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

ORDER MO-2274

Appeal MA-060125-1

Town of LaSalle

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NATURE OF THE APPEAL:

The Town of LaSalle (the Town) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the selection of the successful proponent for a proposed project. The request detailed the types of records which were sought, which included the original submissions from all applicants, further records from and about the short-listed applicants, and records (including e-mails, minutes, etc.) regarding the Town's decision-making process. The request also identified the records, notes and minutes of identified meetings which were sought.

After notifying a number of third parties whose interests may be affected by the disclosure of the records, the Town issued a decision granting access to certain records, and denying access to the remaining records on the basis of the exemptions in sections 14(1) (personal privacy) and 10(1)(a), (b) and (c) (third party information) of the *Act*. In addition, the Town advised that no records responsive to certain parts of the request existed. The Town also provided a fee estimate of $910.61 for the records.

The requester (now the appellant) appealed the Town's decision on the basis that access to the records ought to be granted, and that further responsive records ought to exist. The appellant also took the position that the fees being charged were excessive.

During the mediation stage of the appeal process the following events occurred:

- the Town provided the appellant with an index of responsive records;
- the appellant stated that he was not pursuing access to the information that had been withheld under section 14(1) of the *Act*, and that section is no longer at issue in this appeal;
- the appellant narrowed the scope of his appeal to records relating to the successful proponent (the affected party);
- the affected party consented to the release of certain additional records;
- after a copy of the affected party's consent was provided to the Town, the Town issued a supplementary decision, granting partial access to additional records;
- the Town provided the appellant with a revised fee estimate in the amount of $734.88;
- the appellant identified the specific records to which access was still sought;
- the appellant maintained that records responsive to seven specific items set out in the initial request letter ought to exist;
- the appellant took the position that the Town's revised fee estimate in the amount of $734.88 was excessive.

Mediation did not resolve the remaining issues, which included access to certain records, the adequacy of the Town's search, and the amount of the fee estimate. This file was transferred to the inquiry stage of the process and a Notice of Inquiry, identifying the facts and issues in this appeal, was sent to the Town and the affected party, both of whom provided representations in response. The Notice of Inquiry, along with a copy of the representations of the Town and the affected party, was then sent to the appellant, who also provided representations. Those representations were shared with the Town and the affected party, who were invited to provide reply representations. The Town submitted reply representations, which were shared with the appellant, who provided brief representations in sur-reply.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

The following records remain at issue:

- copies of specified e-mails between the affected party and the Town;
- a copy of a letter from the affected party to the Town, with seven attachments;
- a copy of a power point presentation of the affected party's proposal, and related site plans and drawings;
- the undisclosed portions of the affected party's Original Expression of Interest Package.

DISCUSSION:

FEE ESTIMATE

General principles

Section 45(1) authorizes an institution to charge fees for requests under the *Act*. That section reads:

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

More specific provisions regarding fees are found in sections 6 of Regulation 823 made under the *Act*. That section reads:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD-ROM.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

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

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

Where the fee exceeds $25, an institution must provide the requester with a fee estimate. Section 7 of Regulation 823 states that, where the fee is $100 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the appeal.

A fee estimate of $100 or more must be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[Orders P-81, MO-1699]

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699]. The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614]. This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out above.

The Town's revised fee estimate decision

As set out above, the Town provided a revised fee estimate decision, in which it detailed the costs which form the basis of the fee estimate of $734.88 as follows:

Description	Time	Total (time @ $7.50/15 min)
Time spent searching records	8 hours	$240.00
Time spent reviewing records and any exemptions that apply	10 hours	$300.00
Time spent removing documents to be made available	1 hour	$30.00
Disbursements		
Cost of registered letters (notices to third parties and letter to appellant)		$81.99
Photocopying charges (68 pages @ .20/copy)		$13.60
[Purolator shipping costs]		$13.85
[Purolator shipping costs]		$13.85
Subtotal		$693.29
GST		$41.59
Total		$734.88

Representations

In its representations in response to the questions in the Notice of Inquiry relating to the fees, the Town confirms that it based its fee estimate on the actual work that was done to respond to the request. It states that the requested records are kept and maintained in the administration department and in departmental files. It also states that, in order to locate the requested records, it was necessary to check the central filing system in the administration department and various departmental files. The Town also provides some additional information on the photocopying costs and, in an affidavit provided by the Town and attached to its representations, it also refers to some of the tasks involved in processing the request .

The appellant responds to the Town's fee estimate and representations on fees by stating:

> On the issue of costs, the [Town's evidence] suggests that some of the time being charged was in notifying and dealing with third parties, which does not appear to be collectible. The amount of time seems to be excessive in light of the limited number of records that were located.

In its reply representations, the Town states that it properly charged for the time spent, and that "a great deal of time was required to make a thorough search of each department …".

Analysis and findings

Based on the information before me, including the revised fee estimate as well as the representations of the parties, I make the following findings regarding the fee estimate in this appeal.

Search time

The Town's revised fee estimate identifies that eight hours were spent on searching for records responsive to the request. Although the appellant believes that the time seems to be excessive "in light of the limited number of records that were located," I note that the request for information was quite broad and detailed, setting out three categories of records which were sought and 17 further sub-categories of various types of records. These records included not only proposals and correspondence, but also minutes, notes, e-mails and other records from a variety of different meetings and events. I also note that, notwithstanding the appellant's position that "a limited number of records were located", the records initially at issue in this appeal and provided to this office fill two banker's boxes. In addition, the Town states that the search time of eight hours was based on the actual work done to respond to the request.

In the circumstances, I am satisfied that the search time has been calculated in accordance with the requirements of the *Act*. Accordingly, I find that this aspect of the Town's fee estimate is reasonable, and uphold the Town's fee estimate of $240.00 for the search time associated with responding to this request.

Preparation time

Previous orders have addressed the issue of what types of activities can be included in "preparation time." In Order MO-1380, former Senior Adjudicator David Goodis stated:

> "Preparing the record for disclosure" under subsection 45(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the *Act* (Orders 4, M-376 and P-1536). In my view, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are also not allowable under the *Act*. These activities are part of an institution's general responsibilities under the *Act*, and are not specifically contemplated by the words "preparing a record for disclosure" under section 45(1)(b) (see Order P-1536).
>
> In addition, even though the Township provided a detailed breakdown of the time spent preparing records for disclosure/view, it has not provided any information as to exactly what this involved. … without any additional information from the

> Township with respect to its fee for the preparation of records for disclosure/view, I am unable to determine precisely what the Township is charging the appellant for in this regard.
>
> Based on the above, I do not uphold this portion of the fee estimate …

In Order PO-2574, I stated as follows concerning the claim by a University that "preparation time" for the purpose of section 57(1)(b) of the *Freedom of Information and Protection of Privacy Act* (similar to section 45(1)(b) at issue in this appeal) ought to include removing certain records from files and other actions:

> A number of the specific tasks the University argues ought to be included in the additional preparation costs relate more directly to re-filing and re-storing the University's files after responsive records have been reviewed or copied. For example, the actions of "noting the file to identify removed records to ensure that records are returned intact" and "removing tape from records and putting them back to the files, binders and boxes where they originated" are actions taken to re-store files, and in my view section 57(1)(b) does not make provision for charging a fee for the time taken to re-store files to their original state. Furthermore, time spent "retrieving records from bound files" and "removing staples and paperclips" are, in my view, similar to the types of actions required in photocopying records, and in my view are not time spent "preparing a record for disclosure" for the purpose of section 57(1)(b) of the *Act* (see Order P-184). Finally, with respect to the time spent "bundling copies of records for disclosure", previous orders have confirmed that time spent "packaging records for shipment" is not included in section 57(1)(b) (see Order P-4).

I adopt the approach taken in the Orders set out above.

In this appeal the Town states that two of the items which it has charged for are "time spent reviewing records and any exemptions that apply" and "time spent removing documents to be made available." Order MO-1380 and the other orders referred to clearly state that the time spent reviewing records for release cannot be charged for under the *Act*. Furthermore, time spent "removing documents to be made available" is similar to the types of actions required in photocopying records, and in my view are not time spent "preparing a record for disclosure" for the purpose of section 45(1)(b) of the *Act*. Accordingly, I will not allow the Town to charge the estimated $330.00 for these actions, as these activities do not fall within the ambit of the actions contemplated by the words "prepare a record for disclosure" in section 45(1)(b).

Photocopying

The photocopying charges set out in the Town's decision are calculated at the rate of $0.20 per page, in accordance with item 1 of section 6 of Regulation 823 made under the *Act*. Therefore, I uphold the Town's photocopy charges.

Shipping Costs

The Town has identified that Purolator shipping costs were charged for shipping the records to the appellant, and I uphold these shipping costs. However, the Town has also charged $81.99 for the "cost of registered letters (notices to third parties and letter to appellant)." These costs are not "shipping costs" for the purpose of section 45(1)(d). In my view these activities are part of an institution's general responsibilities under the *Act*, and are not chargeable costs under the *Act*.

GST

Finally, the Town has charged the appellant GST on the search and preparation time and the photocopying and shipping costs, which are not charges authorized by the *Act*. Section 45(1) of the *Act* and Regulation 823 lists the items that can be charged by an institution to respond to a request for access. This list of items does not include GST [Orders M-706, M-679, M-236].

Summary

In conclusion, I am satisfied that the Town's fee estimate for searching, photocopying and certain shipping costs are appropriate, and I uphold the Town's fee estimates for these charges. However, I do not uphold the Town's fee estimates for preparing the records for disclosure, costs for sending notifications, and the GST charges. Accordingly, the Town may charge the appellant $281.30 for processing this request.

THIRD PARTY INFORMATION

As identified above, the Town denied access to the records remaining at issue on the basis of section 10(1) of the *Act*. The Town and the affected party provide representations in support of their position that the records are exempt under sections 10(1)(a), (b) and (c) of the *Act*. Those sections read:

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

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 and MO-1706].

For section 10(1) to apply, the Town and affected 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.

I will now review the record at issue and the representations of the parties to determine if the three-part test under section 10(1) has been established.

Part one: type of information

The Town and the affected party take the position that the records contain commercial, technical and financial information for the purpose of the first part of the three-part test. These terms have been discussed in prior orders as follows:

> *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].

On my review of the records, I am satisfied that much of the information contained in them constitutes commercial information within the meaning of that term in section 10(1) of the *Act*. All of the records at issue, including the e-mails and the power point presentations, relate to the proposal submitted by the affected party, and consequently to the selling of merchandise or services. Some of the information also constitutes financial information for the purposes of that section. Therefore, part one of the section 10(1) test has been met.

Part 2: supplied in confidence

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].

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]

Both the Town and the affected party state that the affected party supplied the information in the Expression of Interest in response to an advertisement by the Town. They also state that the information was supplied by the affected party in confidence. The Town states that the affected

party had an implicit expectation that the information submitted by it would remain confidential. The Town states:

> The expectation was implicit as with all submissions to the Town. The Town receives submissions on various tenders where it has always maintained that the information supplied was done so confidentially …

The affected party states that the undisclosed portions of the affected party's Expression of Interest were supplied in confidence, either implicitly or explicitly. The affected party also states that the other three records (the e-mails between the affected party and the Town, the letter from the affected party to the Town and its attachments, and the power point presentation of the affected party's proposal with related site plans and drawings) would reveal the substance of the information contained in the Expression of Interest, and that they were also supplied to the Town in confidence.

The appellant responds to this position in its representations, and states that the information was not supplied by the affected party "in confidence." The appellant states:

> … the information was not supplied in confidence either implicitly or explicitly. The expression of interest document of the [Town] … instructed bidders to clearly identify on each relevant item or page which areas of the respective submissions were confidential. This implied that whatever was not clearly indicated as confidential was available for public display.

The appellant also provides a copy of the Town's *Expression of Interest – Detailed Package* which sets out the conditions and terms for those wishing to submit an Expression of Interest. The appellant refers to clause K of that package, the first paragraph of which states:

> All information regarding terms, conditions, financial and/or technical aspects of the Submission, which in the Proponent's opinion, is of a proprietary or confidential nature, should be clearly marked "Confidential" at each relevant item or page.

In its reply representations on this point, the Town states:

> Despite the reference to "confidentiality" in the Expression of Interest, the Town has treated all responses it received as confidential to protect the integrity of the process, both in this project and for future projects in the Town …

In its sur-reply representations, the appellant points out that there appears to be an inconsistency between the Town's confidentiality reference set out above, and its actual practice. The appellant also states that the expectation of confidentiality, or lack thereof, arises from the statement in the Town's initial document regarding confidentiality, and not on "any actual practice exhibited after that time."

Findings

As a preliminary note, I wish to emphasize that confidentiality is only one component of the section 10(1) exemption claim, and that establishing the requirements of part two of the test does not mean that the document will be exempt from disclosure, unless both of the other parts of the test have also been established.

I have carefully reviewed the representations of the parties and the records at issue, as well as clause K of the Town's *Expression of Interest – Detailed Package*. Clearly, clause K invites parties to expressly identify records or portions of records which an affected party considers to be "confidential". In addition, I generally accept the appellant's position that any expectation of confidentiality, or lack thereof, arises from the statement in the Town's initial document regarding confidentiality. However, the identification of whether a record or part of a record is supplied in confidence is not determined by whether or not that record is marked "confidential."

Previous orders have established that the provisions of the *Act* apply to information contained in records, notwithstanding the existence of a confidentiality provision. These orders have also concluded that the existence of such an explicit arrangement, though not determinative of the issue, may provide evidence of the confidentiality expectations of the parties. In Order PO-2478 I reviewed previous orders of this office on this issue, and applied them in a situation where an affected party had identified the confidential information in the record at issue, but subsequently argued that an additional portion of the record was supplied in confidence, notwithstanding that it was not expressly identified as confidential. I stated:

> … the confidentiality statement in the record, which identifies clearly those portions of the record that the affected party considered proprietary or confidential, evidences a clear intention on the part of the parties that the listed information was being provided in confidence. It is also clear that this clause is not determinative of whether the information qualifies for exemption under the *Act*, as all three parts of the test must be met; however, the fact that information is referred to in the confidentiality statement is strong evidence of the parties' intentions with respect to whether the information was supplied "in confidence".

I adopt this approach in this appeal. In my view, the fact that portions of the records were not specifically marked "confidential" is not determinative of the issue of whether or not they were supplied in confidence. Furthermore, I note that Clause K only relates to the undisclosed portions of the affected party's Original Expression of Interest Package which remain at issue, and not to the other records at issue. However, based on my finding below regarding the third part of the three-part test, it is not necessary for me to determine exactly which portions of the records were "supplied in confidence."

In this appeal, the records remaining at issue include copies of e-mails, a copy of a letter from the affected party to the Town with seven attachments (attachments A – G), a copy of a power point presentation of the affected party's proposal and related site plans and drawings, and the

undisclosed portions of the affected party's Original Expression of Interest Package (including some Appendices). Based on my review of these records and the representations of the parties, I make the following findings:

- Attachments E and G to the letter from the affected party to the Town were supplied "in confidence" for the purpose of section 10(1). I make this finding on the basis of the specific information contained in these records, both of which include costing or specific financial information relating to the affected party.

- Appendices V, VI and the first five pages of Appendix IV to the affected party's Original Expression of Interest Package, were supplied "in confidence" for the purpose of section 10(1). I make this finding on the basis of the specific information contained in these records. Appendices VI and the first five pages of Appendix IV contain costing and financial information relating to the affected party. Appendix V contains a draft, sample document. I also note that some of these records (particularly some of the letters which form part of these Appendices) are identified as "confidential."

With respect to the other information contained in the records at issue, because of my finding below regarding the third part of the test, it is not necessary for me to determine whether these other portions of the records were "supplied in confidence" for the purpose of section 10(1).

Part 3: harms

General principles

To meet this part of the test, the parties resisting disclosure 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].

Section 10(1)(a)

The Town and the affected party claim that the records are exempt under section 10(1)(a), as their disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

The Town's representations address all of the records at issue, and state:

> … disclosure of the record has the potential of affecting the competitive edge which [the affected party] has developed over the years, insofar as their design philosophies and methodologies are concerned, as well as the financial aspects of [the affected party]. A competitor could gain an unfair advantage should this information be released.
>
> … disclosure could interfere significantly with the contractual or other negotiations of [the affected party] as it has the potential to affect their future business dealings. Should a competitor receive their design philosophies and methodologies or their financial information, they would have an unfair advantage in future submissions.

The affected party's representations focus on three of the records at issue.

With respect to the letter from the affected party with its seven attachments, the affected party states:

> If the above record is disclosed to a third party, the ideas, processes, and detailed procedures outlined in the letter and attachments … could be copied by our competitors in future RFP processes or contract award negotiations which will significantly prejudice our competitive position and place our firm in a competitive disadvantage in future construction projects. The record also reveals information regarding our price, which will significantly prejudice our competitive position if disclosed to a third party. Prices quoted in this record were developed based on specific facts and information given to our firm by the Town.

Concerning the power point presentation of the affected party's proposal, and related site plans and drawings, the affected party states:

> The record reveals detailed information pertaining to our design of [the project]. Site plans and drawings were developed by highly trained professionals using their extensive experience and expertise on similar projects… ; disclosure of this record to a third party could place our organization in a disadvantageous position for future projects and/or competitive bid processes as our drawings could be copied and used by our competitors.

Finally, regarding the undisclosed portions of the affected party's Original Expression of Interest Package, it states:

> If [this record] is disclosed to a third party, our winning strategies, ideas, processes, and detailed procedures outlined in the undisclosed portions of the

> Expression of Interest Package could be copied by our competitors for future Request for Expressions of Interest processes or contract award negotiations which will significantly prejudice our competitive position and place our firm in a competitive disadvantage in future construction projects. The record also reveals information regarding our price, which will significantly prejudice our competitive position if disclosed to a third party. Prices quoted in this record were developed based on specific facts and information given to our firm by the Town. If disclosed to a third party, it will significantly prejudice our competitive position and place our firm in a competitive disadvantage in future construction projects.

In response to the representations of the Town and the affected party, the appellant's brief representations on the possible harms simply state that the records do not qualify for exemption under these sections. The appellant also states that the information in the material was based on criteria provided to all prospective bidders by the Town, and that the information at issue is "not that unique."

Findings

After reviewing the records and the representations of the parties, I am satisfied that the disclosure of some portions of the records could reasonably be expected to result in the harms identified in section 10(1)(a). I find that the affected party has provided me with sufficient evidence to demonstrate that disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party.

Specifically, I find that Attachments E (a cost breakdown) and G (a bank's letter of interest) attached to the letter from the affected party to the Town, as well as Appendices V (draft sample project schedule), VI (affected party's financial references and financial statements) and the first five pages of Appendix IV (declaration letters) of the affected party's Original Expression of Interest Package qualify for exemption under section 10(1)(a).

I make this finding on the basis of the specific, detailed information contained in these attachments and appendices, which include a draft of a specific schedule used by the affected party in carrying out the project (Appendix V), as well as detailed information about the affected party's financial, banking and insurance information (Attachment G, Appendix VI and the first five pages of Appendix IV). Attachment E consists of a breakdown of certain costs for this fixed cost project, and in my view the disclosure of Attachment E could reasonably be expected to prejudice significantly the competitive position of the affected party, as it provides specific information about the affected party's pricing breakdown. Accordingly, I am satisfied that these attachments and appendices qualify for exemption under section 10(1)(a).

However, I am not satisfied that the other records and portions of the records qualify for exemption under section 10(1)(a).

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 records 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 Expression of Interest (which is also described in less detail in the power point presentation, and some of which is reflected in the e-mails, and the letter and attachments), contain information about the manner in which the affected party proposes to meet the requirements of the project. The affected party has made general representations with respect to the concern that disclosure of the proposal would result in the identified harms, and states that the ideas, processes, and detailed procedures outlined in the letter and attachments, as well as the strategies, ideas, processes, and procedures outlined in the undisclosed portions of the Expression of Interest package, could be copied by competitors for future RFP processes or contract award negotiations. The affected party then states that the disclosure of this information could place the affected party in a competitive disadvantage in future construction projects.

The affected party's concerns identified in its representations reflect its concerns that the disclosure of its successful Expression of Interest document, including the form and manner in which the information is set out, will allow others to use the successful Expression of Interest proposal as a "template" to be copied by competitors. 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 adopt the approach I took in Order PO-2478 and apply it to the circumstances of this appeal. On that basis, I am not satisfied that the disclosure of the information contained in the Expression of Interest which remains at issue 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. Furthermore, on my review of the particular information contained in the document, I find that much of it is of a general nature, containing information about the project or the affected party's procedure which is either generally known or general in nature. I have not been provided with sufficiently detailed and convincing evidence to demonstrate that the disclosure of this general information could reasonably be expected to result in the harms set out in section 10(1)(a).

The affected party also states that the disclosure of the site plans and drawings, which the affected party states were developed by highly trained professionals using their extensive experience and expertise on similar projects, could place its organization in a disadvantageous position for future projects and/or competitive bid processes, as the drawings could be copied and used by competitors. In the circumstances, I have not been provided with sufficient evidence to satisfy me that the disclosure of these site plans and drawings, which were prepared specifically for the identified project, could reasonably be expected to result in the harms set out in section 10(1)(a).

Finally, regarding the affected party's concerns that disclosure of the records would reveal confidential pricing information, in my view, my decision to uphold the application of section 10(1)(a) to certain attachments and appendices addresses this concern to some extent. Of the information remaining at issue, only small portions refer to pricing. This information is fairly general in nature, and I am not satisfied that it qualifies for exemption under section 10(1)(a).

In summary, I have found that Attachments E and G to the letter, and Appendices V, VI and the first five pages of Appendix IV, qualify for exemption under section 10(1)(a). Having made this finding, it is not necessary to review the possible application of section 10(1)(b) and/or (c) to these records. Accordingly, I will review the application of section 10(1)(b) and (c) only to the records remaining at issue which I have found do not qualify for exemption under section 10(1)(a).

Section 10(1)(b)

The affected party and the Town take the position that the records are also exempt under section 10(1)(b), as their 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 Town states:

> … the disclosure of the record could result in the Town no longer receiving bids from interested parties in the future should they become aware that their confidential information is available to the competition.
>
> … it is in the public interest that the Town continue to receive bids from all interested parties. The potential harm would result in the possibility that the most qualified candidates may not bid on future projects, derail the Town's procurement process, and jeopardize the Town's ability to negotiate the best agreement for its taxpayers.

The affected party's representations on the applicability of section 10(1)(b) to the records focus on its position that, because the records are a few years old, some of the information may be expired or no longer valid, or may have changed as a result of changed circumstances. It states that the disclosure of these records without the modifications or updates which may have been made would give parties an "inaccurate depiction" of the project or the third party, and may therefore cause confusion or discontent.

I am not persuaded that disclosing the information in the remaining records 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). In my view companies doing business with public institutions, such as the Town, understand that certain information regarding how the institution plans to carry out its obligations will be public.

Regarding the affected party's concern that some of the information in the records is out-of-date, previous orders have addressed concerns of this nature. Commenting on the impact of inaccurate or incomplete information in regard to the harms under sections 17(1)(a) and (c) (the equivalent of section 10(1)(a) and (c) under the *Act*), former Assistant Commissioner Tom Mitchinson stated in Order PO-1803:

> In addition, the appellant and affected persons have indicated that the draft report does not provide 'a comprehensive picture of the situation as the companion document to the Report is not yet complete' and that 'disclosure of the Report to a third party, then, will misinform and mislead the third party'. None of these parties has identified any specific errors, inadequacies or deficiencies contained in the draft, nor are any clear on its face. If the appellant and affected persons are concerned that errors would go unnoticed, they are certainly able to convey this

> information to the requester in order to avoid misinterpretation. Also, the draft report is dated … more than two years ago.

In my view, these comments are similarly relevant to the circumstances of the current appeal. The records themselves were clearly created some time ago, and if the affected party is concerned about changes which have occurred, it can convey this information in order to avoid misinterpretation.

In addition, I do not accept that the prospect of the release of the information contained in the records, which I have found does 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. Therefore, I find that the requirements for section 10(1)(b) have not been met.

Section 10(1)(c)

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

> … the disclosure of the record may result in an undue loss to [the affected party] should their information be supplied to the competition. This would potentially result in the competition determining the strengths and weaknesses of [the affected party] in future bidding.

The affected party states that the disclosure of the records pertaining to the project will reveal the affected party's policies, procedures, designs and details of its strategies to potential clients and potential competitors on future projects, and that this will inevitably lead to undue loss for the affected party.

I have already found that the harm identified in section 10(1)(a) could reasonably be expected to result from the disclosure of certain specific information. In the circumstances of this appeal, I am not satisfied that the remaining information qualifies under section 10(1)(c). In my analysis under section 10(1)(a) I stated that the information remaining at issue includes information about the affected party and its history, experience and qualifications, and also contains information about the project or the affected party's procedure which is either generally known or general in nature, or is specific to this project (such as the specific site plans and drawings) and therefore would not result in the section 10(1)(a) harms. In my view, for the same reasons discussed above, the disclosure of information of this nature could also 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 disclosure of the records will reveal the affected party's policies, procedures, designs and details of its strategies to potential competitors on future projects, I am not satisfied that the disclosure of the information remaining at issue could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. As identified above, in Order PO-2435 Assistant Commissioner Beamish stated:

> 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 Town and affected party regarding their concerns that disclosure of the policies, procedures, designs and details of its strategies to potential clients and potential competitors on future projects is not sufficient, in and of itself, to result in the harms identified in section 10(1)(c) in the circumstances of this appeal.

In summary, I have found that some of the records qualify for exemption under section 10(1)(a). I find that the disclosure of the remaining records or portions of 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).

REASONABLE SEARCH

Introduction

As set out above, the appellant took the position that additional records responsive to seven specific items set out in the initial request letter ought to exist.

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Town has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the Town's decision will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the Act does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate

> responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. In my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

In response to the Notice of Inquiry sent to the Town asking for its representations on this issue, the Town provided an affidavit setting out the searches conducted for responsive records.

The affidavit, sworn by the individual responsible for processing access requests, reviews the steps taken by the affiant in conducting the searches for responsive records. The affidavit sets out the affiant's knowledge of how the request for responsive records was communicated to various departments and Town employees, and which of these individuals or groups of individuals were advised of the request and asked to provide responsive records. The affiant then identifies the individuals or departments which supplied her with records in response, and that no other records were provided to her. In its representations the Town also identifies that various departmental files were also searched.

The Town's representations, including the affidavit, were shared with the appellant, who did not provide representations on this issue.

Finding

As set out above, the issue that I must decide is whether the Town has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Town will be upheld. If I am not satisfied, further searches may be ordered.

The appellant's request for information was fairly detailed, identifying and categorizing the specific information sought. The Town conducted searches for the records and the appellant was provided with partial access to them. As set out above, the Town has provided details about the

searches conducted, and has also provided an affidavit in support of its position. Based on the information provided by the Town about the searches it conducted, and in the absence of representations suggesting that the search was not reasonable, I find that the searches conducted by the Town for responsive records were reasonable, and I dismiss this aspect of the appeal.

ORDER:

1. I uphold the Town's fee estimates for search time, photocopying costs, and certain shipping costs, in the amount of $281.30.

2. I do not uphold the Town's other estimated fees for preparation costs, costs for sending notifications, and the GST charges.

3. I uphold the application of the exemption in section 10(1)(a) to Attachments E and G to the letter, and to Appendices V, VI and the first five pages of Appendix IV.

4. I order the Town to provide the appellant with the remaining records and portions of records by sending him a copy by **March 20, 2008** but not before **March 14, 2008**.

5. I uphold the Town's search for responsive records, and dismiss that aspect of the appeal.

Original signed by: February 14, 2008
Frank DeVries
Adjudicator