



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2618

Appeal PA-050232-1

Ontario Realty Corporation



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NATURE OF THE APPEAL:

The Ontario Realty Corporation (the ORC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

A copy of all tenders/proposals submitted to the [ORC] in respect of the request for Process Management Consulting Services for [an identified project].

The ORC responded to the request by denying access to the records on the basis of section 17(1) (third party information) and section 21(1) (invasion of privacy).

The requester, now the appellant, appealed the decision to deny access.

During mediation, the ORC advised that the program to which the request relates had, since the time that this appeal was opened, been transferred from the ORC to the Ministry of Public Infrastructure and Renewal (the Ministry). The ORC advised that, in light of the transfer, although the ORC remained the institution in this appeal, the Ministry became an interested party in this appeal for the purpose of section 50(3) of the *Act*.

Also during mediation, the requester advised that he was not pursuing access to the personal information of identifiable individuals. Accordingly, section 21(1) is no longer an issue in this appeal.

Mediation did not resolve the remaining issues in this appeal, and it was transferred to the inquiry stage of the process.

In the Mediator's Report sent to the parties at the conclusion of mediation, the mediator identified the issue of custody and control as a possible issue in this appeal, due to the fact that the program area to which the request relates had been physically moved to the Ministry. The ORC responded to the Mediator's Report by indicating that, in its view, custody or control was not an issue, and that the ORC is properly the institution. The ORC also subsequently confirmed that it retained a copy of the records at issue in this appeal. None of the other parties who were advised of this potential issue chose to address it and, in the circumstances, I am satisfied that custody or control of the records is not an issue in this appeal.

I sent a Notice of Inquiry to the ORC, the Ministry and four corporate affected parties, initially. The ORC, the Ministry, and three affected parties (the successful proponent and two unsuccessful proponents) provided representations in response to the Notice of Inquiry. I then sent the Notice of Inquiry, along with a copy of the representations of the Ministry, the ORC, and one of the affected parties (the successful proponent), to the appellant. I also received representations from the appellant.

RECORDS:

The records at issue in this appeal are portions of the four responses to a Request for Proposal for Process Management Consulting Services for an identified project (the project).

As identified above, the appellant confirmed that he is not pursuing access to the personal information of identifiable individuals. Portions of each of the four records at issue include the resumes and work histories of identified individuals, and the ORC has indicated that the following portions of the records contain the personal information of identifiable individuals:

- Record 1: Sections 1 and 2 (pages 13 - 20), and Appendix 1 (pages 34 -54)
- Record 2: Section 2 (pages 4 - 7) and Appendix A
- Record 3: Sections 1 and 2 (pages 3 - 10) and Appendix 1
- Record 4: Sections A and B (pages 3 - 10) and Addendum VI

On my review of the Records, I note that pages 8 - 11 of Record 2 also contain the personal information of identifiable individuals (including resumes and/or work histories). This information is similar to that identified by the ORC, above, and it is also not at issue in this appeal.

Furthermore, the successful proponent has indicated in its representations that it consents to the disclosure of the introductory material on pages 1-4 of Record 1, as well as Appendix 2 of Record 1 (pages 55-86, which are Global Accommodation Credentials). As a result, those portions of Record 1 are no longer at issue in this appeal, and I will order that they be disclosed.

Accordingly, the portions of the Records remaining at issue in this appeal are:

- Record 1: pages 5 - 12 (Tax, insurance and reference information)
pages 21 - 22 (Proposed comparable projects/assignments)
pages 23 - 29 (Organization and Methodology)
pages 30 - 33 (Value-Added Services)
- Record 2: pages i - iv (Introductory pages, cover letter and table of contents)
page 2 (General proposal information)
page 3 (General Firm Information)
page 8 (the top portion, which consists of general information about the proponent's team members' experience)
pages 12 - 13 (Proposed comparable projects/assignments)
pages 14 - 20 (Organization and Methodology)
pages 21 - 24 (Value-Added Services)
Appendices B - E (including form of offer, tax, insurance and reference information)
Appendix D (Financial Submission Information)

Record 3: pages i - vii (Introductory pages, cover letter and table of contents)
pages 1 - 2 (Glossary of terms and general compliance checklist)
pages 11 - 12 (Proposed comparable projects/assignments)
pages 13 - 17 (Organization and Methodology)
pages 18 - 19 (Value-Added Services)
Appendices 2 - 5 (including form of offer, tax, insurance and reference information)

Record 4: pages i - ii (Cover pages and information)
pages iii - iv (Process management allocation schedule)
pages v - viii (Introductory pages, cover letter and table of contents)
page 2 (General information)
pages 11 -12 (Proposed comparable projects)
pages 13 - 20 (Organization and Methodology)
pages 21 - 24 (not numbered – additional information and chart)
Addendum I - Resource Allocation Schedule
Addendum II, III, IV and V (including form of offer, tax, insurance and reference information)

DISCUSSION:

THIRD PARTY INFORMATION

As identified above, the ORC denied access to the responsive records on the basis of section 17(1) of the *Act*. Three of the affected parties provided representations in support of their position that the records are exempt under sections 17(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 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

I will now review the records at issue and the representations of the parties to determine if the three-part test under section 17(1) has been established.

Part one: type of information

The ORC, the Ministry and two of the affected parties take the position that the records contain “commercial” and “financial” information for the purpose of the first part of the three-part test. The two affected parties also argue that the records contain “trade secrets”. These terms have been defined in prior orders as follows:

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

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

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].

I adopt the definitions of these terms as set out in the prior orders.

Representations

The Ministry states as follows in support of its view that the records contain commercial and financial information:

The information relates to proposals for a contract to provide process management consulting services in the delivery of a ... project. The records at issue include the prices or costs of the provision of such services. ... the proponents that submitted proposals are offering an exchange of services in providing consulting services to the ORC, and now [the Ministry], to implement a project. The records contain information relating to the buying or exchanging of services in that they describe the services or aspects of the services that are to be provided and the bid price. Similarly, the methodologies for meeting the ... Ministry's needs, which are set forth in each proposal by the proponents also qualify as commercial information, as they describe, in detail, precisely how the work is to be performed. This information is commercially valuable and unique to each of the proponents. While each proposal is responsive to the same request, they take different approaches to meeting the requirements of the [Request for Proposal (the RFP)]. The manner in which the work is to be performed is central to each of the proposals. ... The information contained in the proposals can be distinguished from one proposal to another. [The Ministry] therefore submits that the proposals should be considered "commercial" information as contemplated in subsection 17(1) of [the Act].

It is clear from the nature of the records at issue that the information contained therein refers to the unique pricing practices of the respective individual proponents. Moreover, the proponents within their pricing practices [indicate] their overhead and operating costs in their tenders, in order to allow for a just evaluation and to ensure that the ORC, and now [the Ministry], understood as to how the proponents reached the specific bidding price. [The Ministry] therefore

submits that the proposals should also be considered as “financial” information, as contemplated under the first part of the three-part test established under section 17 of [the *Act*].

The ORC’s representations are similar to those of the Ministry.

One of the affected parties also supports the position that the records contain financial information. It states:

The contents of these documents constitute financial information because they clearly indicate our firm’s pricing conventions, including our hourly rates based on the resource allocation strategy contemplated by our firm for this project.

Two of the affected parties also take the position that the records contain “trade secrets”. One of the affected party’s representations state:

Trade secret information is contained throughout the Evaluated Criteria section of the Proposal where confidential references are made to client-specific challenges [the affected party] has faced on past projects and their impact on [the affected party’s] current work practices. This section of the Proposal also identifies detailed work methodology applied to assignments similar to that of the Project. This content is proprietary intellectual property because it reflects our unique approaches and ideas to address the challenges of assignments such as the Project. [The affected party] has developed unique methodologies which differentiate us from other firms Such trade secrets, and their descriptions contained in the Proposal, were central to successful tender on this Project and will continue to be pivotal in our ability to compete successfully on project tenders in the future.

The affected party also provides examples of what it considers to be “trade secrets” contained in the record submitted by it. The other affected party, in its confidential representations, also takes the position that the records contain trade secrets.

The appellant acknowledges that the records may contain financial information, but argues that they do not contain “trade secrets”.

Findings

On my review of the records and the representations of the parties, I am satisfied that much of the information contained in them constitutes commercial information for the purposes of section 17(1) of the *Act*, as it contains information that relates to the buying, selling or exchange of merchandise or services. I also find that portions of the records contain financial information for the purpose of that section, as portions contain information relating to pricing practices, and overhead and operating costs.

However, based on the definition of “trade secrets” set out above, I am not satisfied that the records contain such information for the purpose of section 17(1). On my review of the records, I am not satisfied that they contain methods, techniques, or processes not generally known in that trade or business. Although some of the information contained in the records may reveal distinctive processes that have been used by the affected parties, in my view this information does not qualify as a “trade secret” as, in my view, these processes would generally be known in the trade or business in which the affected parties are involved.

Part 2: supplied in confidence

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706]. 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 party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, 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 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]

Supplied

Representations

The ORC and the Ministry submit that the information contained in the records was supplied to the ORC. They acknowledge that previous orders have established that the negotiated terms of an agreement are not “supplied” for the purpose of section 17(1), and refer to the Divisional Court decision in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.), in which the approach by this office to this issue was upheld. They state, however, that the circumstances in this appeal are different. In the Ministry’s representations (which are similar to those of the ORC) the Ministry begins by referring to the three unsuccessful bids, and states:

In the present case, the records at issue did not necessarily form part of an agreement. There were four tenders, three of which were unsuccessful. Therefore, those three bids cannot qualify as negotiated agreements since no agreement was actually reached. Therefore, it is respectfully submitted that the unsuccessful tenders were supplied to the ORC within the meaning of part two of the test. The ORC rejected the bids.

The Ministry goes on to state:

Recently, in Order PO-2435, the IPC held that just because Service Level Agreements, formed with a ministry, may substantially reflect the terms of the RFP, it does not necessarily follow that they were “supplied” by the third parties within the meaning of section 17(1). It is respectfully submitted that the present case may be differentiated [as] only one Service Level Agreement was actually formed with the successful proponent. The three unsuccessful tenders did not form the winning bid, no Service Level Agreement was reached, and therefore [these] should not fall into the same category as Order PO-2435. Moreover, it is not the Service Level Agreement that is being sought by the appellant in this case. Rather, it is all the tenders/proposals submitted by both the successful proponent and unsuccessful proponents. While the name of the successful proponent, the proposed price and reasons for non-acceptance of the unsuccessful proponent would be provided to an unsuccessful proponent upon request, pursuant to a Management Board Directive, the tender itself is not a public document.

The IPC has previously held that information submitted in the form of proposals should be considered as “supplied” with respect to subsection 17(1).

In my view, it is clear that the information contained in the two proposal documents was supplied by the affected party to the Ministry in response to the Ministry's solicitation of proposals from prospective developers of a long-term care facility. The information was not the product of any negotiation and remains in

the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution (see Orders MO-1368 and MO-1504). (Order PO-2300)

It is therefore respectfully submitted that the records at issue, the tenders, were “supplied” within the meaning of subsection 17(1).

The ORC also states:

The IPC has recently held that service level agreements which reflect the terms of the RFP are not necessarily considered to have been supplied within the meaning of section 17(1) [Order PO-2435]. Under the current circumstances, only one Proposal resulted in a contract being formed.

The affected parties (both the successful and the unsuccessful proponents) also submit that the information contained in the records was supplied by them to the ORC.

Findings

On my review of the representations of the parties and the records at issue, I am satisfied that they were supplied to the ORC.

With respect to the three unsuccessful proposals, I accept the position of the ORC and the Ministry that these three bids cannot qualify as negotiated agreements, since no agreement was actually reached, and that these unsuccessful tenders were supplied to the ORC within the meaning of part two of the test.

Concerning the successful proposal, I am also satisfied that this record was supplied to the ORC by the proponent. The Ministry identifies that, in this appeal, it is not the agreement that is being sought by the appellant, rather, it is the proposals submitted by the proponents that are sought. The ORC’s representations state that the successful proposal resulted in a contract being formed and, in the portion of the successful proponent’s tender which it has consented to disclose to the appellant, there is reference to the finalization and execution of a further agreement. Accordingly, in the circumstances, I am satisfied that the successful proposal was supplied to the ORC for the purpose of section 17(1) of the *Act*.

In confidence

Representations

The affected parties state that the records were supplied to the ORC in confidence, in response to the RFP. The successful proponent states:

It is industry practice, and [the proponent's] expectation in all circumstances, that information supplied to prospective clients which deals with our methodology, value-added innovations, and details of specific work steps will be held in strict commercial confidence and not disseminated to others.

[The successful proponent] supplied the Proposal in confidence based on the following reasonable and objective grounds:

- the Proposal, including the Written Submission, the Financial Submission, and the Resource Allocation document, were clearly marked "Private and Confidential" on the cover of all documents supplied;
- [the affected party] limited [the] production of hard copies of the Proposal for supply to the ORC, and retained the final electronic version in [its] secure database servers;
- the Proposal was prepared and supplied under the reasonable expectation that general industry practice for such documents be upheld, including Proposal confidentiality by the Institution and the [affected party].

The ORC and the Ministry also take the position that the proposals were supplied in confidence. The ORC states:

The Proposals were submitted to the ORC in response to the RFP. Section 6 of the RFP provides general terms and conditions governing the RFP and bidding process. Subsection 6.10, entitled "Confidentiality", includes the following:

Any proprietary or confidential information shall be identified as such and the desired treatment specified and that information has been supplied in confidence, either implicitly or explicitly.

The treatment of such information, however, shall be subject to the provisions of the aforementioned *Freedom of Information and Protection of Privacy Act* (Ontario).

While section 6.10 of the RFP alerted the parties to the fact that the Proposals would be subject to the access provisions of [the Act], this did not have the effect of removing the expectation of confidentiality on the part of ORC or the affected parties.

The ORC also identifies that the proposals included a specific consent "to the disclosure, on a confidential basis, of this submission by the ORC retained for purpose of evaluation or participating in the evaluation of this submission." The ORC then states:

The ORC and the proponents have, and had at the time of the submission of the Proposals, a reasonably-held expectation that the information provided would be treated by the ORC in a confidential fashion. ... As such, at the time of their submission, the Proposals were sealed and delivered to a designated official at the ORC and the Proposals were kept in a locked office. When the Proposals were opened, they were opened in a private setting, and were always kept in a locked area. It is therefore submitted that the treatment of the information contained in the Proposals is consistent with an expectation of continuing confidentiality on the part of the proponents ...

The combination of section 6.10 of the RFP and the consent to the disclosure “on a confidential basis” of the information provided in the Proposals ... had the effect of identifying all information as being confidential. This is an explicit communication to the ORC, and now [the Ministry], by the proponents that the Proposals were confidential and that they were to be kept confidential.

... The proponents treated the Proposals in a manner consistent with and indicative of a concern for the protection of the privacy and confidential nature of the Proposals. The Proposals were prepared for a purpose that would not entail disclosure. Therefore, [the ORC] maintains that the Proposals were submitted with an expectation of continuing confidentiality.

The appellant takes the position that the affected parties did not have a reasonable expectation of confidentiality. He states that, unlike private tenders, parties who seek to do business with the government must be prepared to submit to a higher and more transparent level of disclosure. The appellant refers to the need for the public to scrutinize government contracts, and argues that parties doing business with government must assume that their tenders and proposals will not be maintained in confidence. The appellant also states:

The ordinary citizen must be entitled to disclosure of any government tender documentation in order to be satisfied that government projects are being awarded without taint of nepotism or scandal.

Findings

In the circumstances of this appeal, and based on the representations of the parties, as well as the confidentiality clauses in the RFP, I accept the position of the ORC and the affected parties that the records were supplied to the ORC with a reasonably-held expectation of confidentiality. I make this finding notwithstanding the awareness by the parties that the records were subject to the provisions of the *Act* (see Order PO-1688). Although I agree with the appellant’s general statement that parties who seek to do business with the government must be prepared to submit to a higher and more transparent level of disclosure, in my view this does not mean that parties ought to have no expectations of confidentiality for any of their proposals. Section 17(1) of the *Act* clearly provides that certain third party information may be denied to requesters if the requirements of section 17(1) are met, and that is the issue that is being reviewed in this appeal.

Finally, the appellant refers to the public's interest in reviewing government tenders, to allow the public to be satisfied that government projects are being awarded "without taint of nepotism or scandal". In making this argument, the appellant indirectly raises the "public interest override" found in section 23 of the *Act*, which states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In this appeal, the appellant's references to the public's interest in all tenders submitted to government are general in nature. There is no suggestion that the public has a specific interest in the records at issue, nor that the general concerns identified by the appellant about government tenders has any direct relationship to the records at issue in this appeal. The appellant's arguments regarding the public's interest in government tenders generally seems to be made in support of the appellant's view that the affected parties ought not to have had an expectation of confidentiality when submitting their tenders. As set out above, I do not accept this argument, and find that the affected parties did supply the tenders to the ORC with a reasonably-held expectation of confidentiality.

Part 3: harms

General principles

To meet this part of the test, the party 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 17(1)(a)

The affected party who is the successful proponent claims that its record is exempt under section 17(1)(a), as its 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. It states:

The "Evaluated Criteria" section of the Proposal contains detailed work methodologies that, if disclosed, could be used to circumvent our success on future competitive tenders. For example, pages 26-29 contain specific techniques and processes used by our firm on assignments similar to that of the Project. These techniques and processes described contributed to our successful tender on the Project Disclosure of this information will provide the appellant the opportunity to discern our market strategy and/or duplicate our methodologies, resulting in the deterioration of our firm's competitive advantage in client solution excellence.

A second example of reasonable expectation of harm can be found in the financial information as contained in the Financial Submission and Resource Allocations document ...

The ORC also submits that the disclosure of the information in the records would result in the harms under section 17(1)(a). It states:

The proponents have developed numerous techniques specific to their own operations that are not known to their competitors. The proponents' clients select them over their competitors partly because of their creative methodologies and unique abilities. If the proponents' processes and techniques are copied by competitors, the result will be a loss of revenue. Moreover, the release of financial information would provide insight into how the proponents manage their businesses and principal shareholders. ORC submits that this information, in the hands of their competitors or within the public domain, would impair the proponents' competitive advantage.

In addition, the release of this information would significantly prejudice the proponents' competitive position, negotiations and commercial interests, given the competitive climate in the consulting services industry. The disclosure of methodologies outlined in the Proposals, including the description as to how the work will be done, could reasonably be expected to result in prejudice to the competitive position of the proponents. Competitors could make use of the creative and unique methodologies outlined in the Proposals and tailor their own Proposals to those of the successful proponent. The information in the records, if disclosed, will give competitors a "significant competitive advantage in seeking future consulting work" and the proponents' ability to pursue such work would be "substantially impaired" [Orders PO-1818, MO-1609].

The Ministry's representations closely mirror those of the ORC regarding the application of the harm in section 17(1)(a). In addition, the other affected parties also provide submissions in support of their position that the disclosure of the records will result in harm for the purpose of section 17(1)(a). The focus of their submissions is particularly the methodologies referenced in the records, as well as the pricing information. Some of these representations also refer to the

possible section 17(1)(a) harms resulting from the disclosure of information relating to the proponents' clients and past projects.

The appellant disputes the position that any undue harm, prejudice or loss of competitive position would result from the disclosure of the records.

Findings

I have carefully reviewed the portions of the four records remaining at issue, as well as the representations of the parties. Based on my review, I am satisfied that the disclosure of portions of the records, as well as a number of the appendices and/or addendums attached to the proposals, could reasonably be expected to result in the harms identified in section 17(1)(a). I find that I have been provided 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 parties.

Specifically, I find that the portions of the proposals which contain the information detailing the methodologies (including information relating to the value-added services), the financial and pricing information, the banking, insurance, and reference information, and the information containing sample schedules and reports, qualify for exemption under section 17(1)(a).

I make this finding on the basis of the specific detail contained in those portions of the proposals that identify the methodologies proposed by the affected parties. In my view, the unique information contained in those portions of the proposals disclose particular approaches to the project taken by the affected parties. I also find that the disclosure of the specific information contained in the other portions of the proposals identified above, which includes the financial and pricing information, the banking, insurance, and reference information, and the information containing sample schedules and reports used or proposed by the affected parties, and the manner in which this information is recorded, could reasonably be expected to prejudice significantly the competitive position of the affected parties, as it provides details of this type of confidential information, including some specific templates of documents. Accordingly, I am satisfied that those portions of the records qualify for exemption under section 17(1)(a).

Accordingly, I find that the following portions of the records, which contain the types of information referred to in the above paragraph, qualify for exemption under section 17(1)(a):

Record 1: pages 5 - 12 and 23 - 33

Record 2: pages 14 - 24 and Appendices B - E, and the second Appendix D

Record 3: pages 13 - 19 and Appendices 2 - 5

Record 4: pages iii - iv, 13 - 24 and Addendum I, II, III, IV and V

However, I am not satisfied that the other portions of the records remaining at issue qualify for exemption under section 17(1)(a).

In my view, the remaining portions of the records 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 17(1)(a). Some of the information is general in nature, relating to the corporate affected parties' histories, experience and qualifications. Other information describes projects that these affected parties have worked on in the past, or consists of only general or introductory information about the company or the proposal. Much of this information appears to be of a public nature, or is general in nature, and I have not been provided with sufficient evidence to support the position that the disclosure of this information could reasonably be expected to result in the harms set out in section 17(1)(a). Therefore, I conclude that these portions of the records are not exempt under that section.

Accordingly, I find that the following portions of the records, which contain the types of information referred to in the above paragraph, do not qualify for exemption under section 17(1)(a):

Record 1: pages 21 - 22

Record 2: pages i - iv, 2, 3, 12 - 13, and the top portion of page 8

Record 3: pages i - vii, 1 - 2 and 11 - 12

Record 4: pages i - ii, v - viii, 2, and 11 - 12

Section 17(1)(b)

The affected parties, the ORC and Ministry take the position that the records are also exempt under section 17(1)(b), as disclosure of them could reasonably be expected to result in similar information no longer being supplied to the ORC, where it is in the public interest that similar information continue to be so supplied. The successful proponent states that disclosure of the proposal would result in being reluctant to provide similar information to an institution in the future.

The ORC's representations (which are similar to those of the Ministry) state:

As cited in Order PO-2043, when commenting on the purpose of s. 17(1) of the [the *Act*], the [Williams Commission Report] stated that:

...the accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure

might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information. [Order PO-2043].

ORC maintains that it is both reasonable and responsible to keep the Proposals confidential. The disclosure of the Proposals could reasonably be expected to result in similar information no longer being supplied to ORC or similar institutions. If the information supplied in the Proposals is disclosed, it is reasonable to expect that consultants will become hesitant to submit proposals to ORC fearing that the proposals would be made available to the public. Consultants would therefore not submit proposals to ORC with respect to future RFP processes [Order MO-1609]. Hence, notwithstanding the transparent nature of governmental organizations, such as ORC, in circumstances such as these, it is more responsible to keep proprietary information confidential.

ORC contends that it is in the public interest to keep proposals responding to RFPs confidential, in order to ensure that they be continually supplied to ORC and other institutions. ...

It is in the public interest to encourage participation in ORC's and [the Ministry's] RFP processes and to ensure that such procurement processes are conducted in an equitable manner.

I am not persuaded that disclosing the information which I have found does not qualify for exemption under section 17(1)(a) could reasonably be expected to result in similar information no longer being supplied to the ORC [or the Ministry] in the future, as contemplated by section 17(1)(b). As stated above, I have found that certain information contained in the records, which could prejudice the competitive position of the affected parties, qualifies for exemption under section 17(1)(a). With respect to the remaining information contained in the records, which includes general information about the affected parties' histories, experience and qualifications, information about projects these affected parties have worked on in the past, and general or introductory information about the company or the proposals, I reject the contention that the prospect of the release of this type of information 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 institutions. Accordingly, I find that the requirements for section 17(1)(b) have not been met.

Section 17(1)(c)

The ORC and the Ministry claim that the records are exempt under section 17(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 ORC's representations (which are similar to the Ministry's) state:

The disclosure of the information contained in the Proposals can reasonably be expected to result in undue loss to the proponents and ORC. The proponents' methods, service commitment and other valuable commercial information would be open to imitation by competitors.

For example, if pricing information were to be made available to the proponents' competitors, it is reasonably likely that they would make use of this information in an attempt to undercut the proponents' pricing in future competitions, thereby resulting in undue loss to the proponents [Order PO-1818].

It is ORC's position that should the Proposals from the successful and unsuccessful proponents be released, there would be both undue loss and undue gain. The proponents would experience undue loss in that their competitors would be able to view their submissions and use the information pertaining to skills, technique and form of response as a basis for their own future submissions. The Appellant would experience undue gain by obtaining the ability to use the Proposals to its advantage in preparing future proposals.

Fundamentally, disclosure of the Proposals would significantly undermine the entire purpose of confidentiality within an RFP process, whereby industry competitors are asked to submit information on a confidential basis, if that information was then later made available to competitors and used against the responding parties to their detriment for future RFPs [Order MO-1504].

In the circumstances of this appeal, I am not satisfied that the information which I have found does not qualify under section 17(1)(a) qualifies under section 17(1)(c). As identified above, I have found that certain specific information contained in the proposals is exempt under section 17(1)(a). The remaining information includes general information about the affected parties' histories, experience and qualifications, information about projects these affected parties have worked on in the past, and general or introductory information about the company or the proposals. 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.

In regards to the ORC's position that, fundamentally, disclosure of the proposals would significantly undermine the entire purpose of confidentiality within an RFP process, I do not accept this argument. The ORC's representations on this are general in nature. Section 17(1) of the *Act* requires that each part of the three-part test contained in this section must be met in order for a record to qualify for exemption under that section. This includes the third part of the test, which is that the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 17(1) will result. The party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". It is not sufficient to posit that because the records were provided in confidence, harm will, therefore, necessarily follow from disclosure.

In addition, the ORC seems to identify a concern that competitors will use the proposals as templates for future proposals. In addressing this argument, I adopt the approach I took in Orders PO-2478 and MO-2151, in which I found that the disclosure of general information contained in proposals which discloses the “form and structure” of the proposals could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. Accordingly, I find that the requirements for section 17(1)(c) have not been met for the portions of the records remaining at issue.

In summary, I have found that some portions of the proposals and certain appendices and addendums qualify for exemption under section 17(1)(a). I find that the disclosure of the remaining portions of the records will not result in the harms identified in sections 17(1)(a), (b) or (c). As all three parts of the test under section 17(1) must be met, the remaining information contained in the records does not qualify for exemption under section 17(1) of the *Act*.

ORDER:

1. I order the ORC to provide the appellant with the portions of the records which I have found do not qualify for exemption under section 17(1)(a)(b) or (c) by sending him a copy of those records by **November 26, 2007** but not before **November 20, 2007**. Specifically, the portions of the records which are to be disclosed are:

Record 1: pages 1 - 4, 21 - 22 and 55 - 86

Record 2: pages i - iv, 2, 3, 12 - 13, and the top portion of page 8

Record 3: pages i - vii, 1 - 2 and 11 - 12

Record 4: pages i - ii, v - viii, 2, and 11 - 12

For greater certainty, I have included a copy of the pages of the records which are to be disclosed, as well as a highlighted copy of page 8 of Record 2, along with the copy of this Order sent to the ORC. To be clear, I have highlighted the portion of page 8 of Record 2 which is **not** to be disclosed.

2. I uphold the application of the exemption in section 17(1)(a) to the remaining portions of the records at issue.
3. I reserve the right to require the ORC to provide me with a copy of the portions of the records which are disclosed to the appellant pursuant to Provision 1, upon request.

Original Signed by: _____

Frank DeVries
Adjudicator

_____ October 19, 2007