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

ORDER MO-2435

Appeal MA07-245

Regional Municipality of Durham

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BACKGROUND:

The Regional Municipality of Durham (the Region) issued a Request for Proposals (RFP) for the design, construction and operation of a new "material recovery facility" (MRF). An MRF is a recycling facility that sorts and separates recyclable materials (e.g., cans, bottles and plastic containers), which are then sold to industrial users of these materials.

Two corporations submitted a joint proposal to the Region. The first corporation, which is a construction company, proposed to design and build the facility. The second corporation, which is a recycling company, proposed to design and install all equipment and to operate the facility after it was built. This joint proposal was selected as the winning bid, and the Region signed a contract with each company. The facility, which opened on December 13, 2007, is operated by the recycling company, but the Region maintains ownership of it.

The Region's decision to award the contracts to these two companies generated some controversy. An article in a local newspaper ["$900,000 jump in recycling facility cost," *Metroland News*, November 30, 2007] described the situation in the following way:

> In a controversial decision, Regional Council in July of 2006 awarded the contract to design-build and operate the new MRF to [the recycling company]. The bid had two parts, one contract with [the construction company] for $8 million to build the facility and a second with [the recycling company] for $7 million to furnish it with the equipment needed and to operate the MRF.
>
> Originally three bids were submitted, however the bids by [two other named companies] were reported to have failed the technical portion of the bidding process.
>
> Questions were raised about the fairness of the tendering process and the project was awarded to [the recycling company] after it threatened to sue, [the Region's Commissioner of Works] said.
>
> The total estimated project cost was $16 million …

NATURE OF THE APPEAL:

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

> … a full copy of the proposal submitted by [the recycling company] and the contract entered into by the Region with this corporation in relation to the subject RFP.

The Region located records responsive to the request. It then issued a decision letter that denied the requester access to these records pursuant to the mandatory exemption in section 10(1) (third party information) of the *Act*.

The requester (now the appellant) appealed the Region's decision to this office, which assigned a mediator to assist the parties in resolving the appeal. During mediation, the Region provided the appellant with an index of records, which included a general description of the records, the exemption that it had claimed for each record, and a brief explanation as to why it was denying the appellant access to each record.

In addition, the mediator sent a consent form to both the construction company and the recycling company, which are the affected parties in this appeal. This form asked them whether they would consent to the disclosure of the records at issue, either in whole or in part. Both companies objected to disclosure of any of the records. The construction company also attached a second page to its returned consent form that explained why it objected to the disclosure of the records.

The Region subsequently wrote to both companies and indicated that although "[it] does not release proposals, the request for the contract documents is … different." It asked them to indicate whether they would consent to disclosure of the contracts, either in whole or in part. In response, the recycling company stated that it objected to disclosure of the contracts. The construction company did not respond to the Region's letter. The Region informed the mediator that it was maintaining its decision to deny access to the contracts.

This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the Region and the two companies. I received representations from the Region and the recycling company, but not from the construction company. The only evidence that I have from the construction company with respect to its position on the issues in this appeal is the one-page document that it submitted to the mediator with its consent form.

I then sent the same Notice of Inquiry to the appellant, along with severed copies of the representations submitted by the Region and the recycling company. I withheld portions of these representations from the appellant because they fall within this office's confidentiality criteria for the sharing of representations. The appellant was invited to submit representations on all issues in the Notice of Inquiry and to respond to the other parties' representations. In response, the appellant submitted brief representations to this office.

RECORDS:

The records remaining at issue in this appeal are summarized in the following chart, which is based on my review of these records and the index of records submitted by the Region:

Record Number	Description of record	Region's decision	Exemption claimed
3.0	Design-Build-Operate Proposal for Material Recovery Facility (November 3, 2005) Introductory Letter and Mandatory Requirements	Withheld in full	Section 10(1)
4.0	Design-Build-Operate Proposal for Material Recovery Facility (November 3, 2005) Technical Proposal (Binder 1)	Withheld in full	Section 10(1)
5.0	Design-Build-Operate Proposal for Material Recovery Facility (November 3, 2005) Technical Proposal – Design (Binder 2)	Withheld in full	Section 10(1)
6.0	Design-Build-Operate Proposal for Material Recovery Facility (November 3, 2005) Technical Proposal – Drawings (Binder 3)	Withheld in full	Section 10(1)
7.0	Appendix B – Form of Proposal	Withheld in full	Section 10(1)

8.0	Contract between construction company and the Region (July 21, 2006)	Withheld in full	Section 10(1)
9.0	Contract between recycling company and the Region (July 21, 2006)	Withheld in full	Section 10(1)

DISCUSSION:

THIRD PARTY INFORMATION

The Region and the two affected parties (the construction company and the recycling company) claim that the records at issue are exempt from disclosure under sections 10(1)(a), (b) and (c) of the *Act*, which 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, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Affected

parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

As noted above, the parties resisting disclosure of the records at issue are the Region and the two affected parties. Consequently, the onus of proving that the section 10(1) exemption applies to the records at issue lies with these parties.

For section 10(1) to apply, the Region and the two affected 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

General principles

To satisfy part 1 of the section 10(1) test, the Region and the two companies must prove that the records reveal a trade secret or scientific, technical, commercial, financial or labour relations information.

The records clearly do not reveal any labour relations information. The meaning of the other types of information listed in section 10(1) of the *Act* has been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

> *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].

Summary of the parties' representations

The Region submits that the records at issue reveal a trade secret, technical information, and commercial information.

The recycling company submits that the records at issue reveal a trade secret and technical information. In particular, it asserts that its proposed "design process" for configuring equipment for the recycling facility, which is set out in the records at issue, constitutes a "trade secret":

> … [The company] uses its own engineering staff to design and configure this equipment and provide build specs to various machinery manufacturers for the Machine to be built and delivered. The sequence of operations and exact specifications are not generally known to our competitors. Our success is tied to the material flow designed into this configuration, its power capabilities and the electronic processes used to control and measure it. This is a design process unique to every designer of these facilities. Each bidder's design and approach is generally not known in the trade or to the competition. As a result, our design process has value to us as it is not generally known in the industry …

As noted above, the construction company did not provide representations during the adjudication stage of the appeal process. The only evidence that I have from this company with respect to its position in this appeal is the one-page document that it attached to the consent form

that it submitted to the mediator. In this document, the company submits that the records at issue contain technical, commercial, and financial information.

The appellant's representations do not address whether the records contain the types of information listed in section 10(1).

Analysis and findings

I have carefully reviewed the records at issue and considered the parties' representations. For the following reasons, I find that parts of these records contain technical information, commercial information, and financial information.

The records at issue can be generally divided into two groups: (1) the proposal/bid that the construction company and the recycling company submitted to the Region (Records 3.0 – 7.0); and (2) the contracts that the Region executed with these two companies after the latter parties' proposal was selected as the winning bid (Records 8.0 and 9.0).

I am not persuaded by the recycling company's submission that its "design process" for configuring equipment for the proposed recycling facility, which is set out in the bid documents, meets the definition of a "trade secret." In my view, the company's submissions on this point are vague and not substantiated by sufficient supporting evidence.

As noted above, to prove that this design process is a trade secret, the recycling company must show that it is contained or embodied in a product, device or mechanism which (i) is used in the company's specific trade, (ii) is not generally known in that trade, (iii) has economic value from not being generally known, and (iv) is the subject of efforts by the recycling company, that are reasonable under the circumstances, to maintain its secrecy.

I accept that this design process is used in the recycling company's specific trade. However, the company asserts that "each bidder's design and approach is generally not known in the trade or to the competition" and "has value to us", without providing sufficient evidence to substantiate these claims. In particular, it does not identify the specific parts of the voluminous bid documents where this information is found, nor does it provide sufficiently detailed evidence to explain why this "design approach" is unique, rather than standard in nature.

Moreover, I am not persuaded that this design process has been the subject of efforts by the recycling company to maintain its secrecy. As will be outlined in the next section of this order, section 1.12 of the RFP notifies potential bidders that the information in their bids is subject to the *Act* and could, therefore, be disclosed to the public. It also reminds them to "identify in their proposal material any specific scientific, technical, commercial, proprietary, or similar confidential information, the disclosure of which could cause them injury."

Despite the clear direction in section 1.12 of the RFP, the recycling company did not, at the time the joint bid was submitted to the Region, identify this "design process" as information that

could reasonably be expected to cause the company injury if it was disclosed. In such circumstances, it is difficult to conclude that the recycling company has made efforts to maintain the secrecy of this design process. I find, therefore, that the design process described in the records does not constitute a "trade secret."

There is, however, substantial information in the bid documents which were prepared by engineers, architects and other technical professionals, that describes the proposed construction, operation and maintenance of the recycling facility and accompanying equipment. In my view, this information constitutes "technical information."

In addition, parts of these records contain information relating solely to the buying, selling or exchange of merchandise (e.g., equipment for the recycling facility) and the provision of services to the Region by the two companies. Moreover, the contracts that were executed clearly provide for a commercial relationship between the Region and these two companies. In my view, this information constitutes "commercial information."

Finally, parts of these records contain information relating to the payment of fees by the Region and refer to specific dollar amounts. For example, Record 7.0 contains a pricing schedule for the proposed recycling facility. Similarly, Record 9.0 sets out the "contract price" (i.e., the amount of money that the Region paid the construction company to build the recycling facility). In my view, this information constitutes "financial information."

Given that various parts of the records at issue reveal technical information, commercial information and financial information, I find that the Region and the two companies have satisfied part 1 of the section 10(1) test.

Part 2: supplied in confidence

General principles

To satisfy part 2 of the section 10(1) test, the Region and the two companies must prove that the information in the records at issue was supplied to the Region in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general,

have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. This approach was upheld by the Divisional Court in the *Boeing* case, cited above.

In confidence

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

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

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

Summary of the parties' representations

The Region's representations

Bid documents (Records 3.0 to 7.0)

The Region submits that the two companies "supplied" the information in their joint bid to the Region "in confidence."

With respect to whether the information was "supplied," the Region submits that the two companies provided the information in Records 3.0 to 7.0 to the Region in response to the RFP that had been issued. Consequently, they "supplied" this information to the Region, as contemplated by section 10(1) of the *Act*.

With respect to whether this information was supplied "in confidence," either implicitly or explicitly, the Region cites the confidentiality provision in section 17.1 of its purchasing and tendering by-law (By-law 68-2000, as amended by By-law 59-2003). This provision requires the

Region's employees and officials to keep pricing information confidential, except in specific circumstances. It states:

> No employee, or any appointed or elected official, shall divulge the prices paid by or quoted to the Region for goods, works, and/or services paid by or quoted to the Region for goods, works, and/or services paid by or quoted to the Region for goods, works, and/or services unless Council may otherwise direct, except that the total price in the case of public tenders of the total bid price in the case of quotations may be revealed, as well as any prices included in the public report to Committee or Council.

The Region also cites the notice provision in section 1.12 of the RFP, which alerts proponents to the fact that their bids are subject to the access provisions of the *Act* and asks them to specifically identify any information in their bids that could cause them injury if it were disclosed. This provision states:

> All correspondence, documentation and information provided to staff of the Region by every Proponent, including the submission of proposals shall become the property of the Region, and as such, is subject to the *Municipal Freedom of Information and Protection of Privacy Act*, and may be subject to release pursuant to the *Act*.
>
> Proponents are reminded to identify in their proposal material any specific scientific, technical, commercial, proprietary, or similar confidential information, the disclosure of which could cause them injury. Complete proposals are not to be identified as confidential. It is to be noted that as a public agency Durham Region must release sufficient information to Committees and Council to perform a complete evaluation, at which time it becomes public. [Emphasis in original.]

The Region further states that the two companies submitted a "Letter of Understanding" with their bid documents which prohibits either company from disclosing the contents of their bid to any other party, except the Region and as required by law.

In short, the Region submits that the confidentiality provisions in all of these documents (section 17.1 of its purchasing by-law, section 1.12 of the RFP, and the Letter of Understanding between the two companies) demonstrate that the two companies supplied the information in their joint bid to the Region "in confidence."

Contracts (Records 8.0 and 9.0)

The Region submits that the information in the contracts that were executed between itself and the two companies was not negotiated and "simply directly copied from the Proposal into the contract document." Consequently, it appears to be suggesting that the two companies "supplied" the information in the contracts to the Region, for the purposes of section 10(1).

However, the Region further states that it would be willing to provide the appellant with severed copies of the contracts. In particular, it attached a copy of the contracts to its representations and highlighted information (mainly pricing and equipment information) that it believes should be severed before the contracts are disclosed to the appellant.

The recycling company's representations

Bid documents (Records 3.0 to 7.0)

The recycling company does not specifically address whether it "supplied" the information in the joint bid to the Region, but focuses instead on whether it had an expectation of confidentiality with respect to the information in this joint bid.

It acknowledges the confidentiality provisions in section 17.1 of the Region's purchasing by-law, section 1.12 of the RFP, and the Letter of Understanding between the two companies that was included with their joint bid. It further submits that it did not mark any specific information in its proposal as being confidential, as stipulated in section 1.12 of the RFP, because doing so "would have restricted the Region's ability to evaluate and make decisions …"

Contracts (Records 8.0 and 9.0)

The recycling company did not provide any representations as to whether the information in the contract that it executed with the Region was "supplied in confidence," as required by section 10(1) of the *Act*.

The construction company's representations

As noted above, the construction company did not provide representations during the adjudication stage of the appeal process. The only evidence that I have from this company with respect to its position in this appeal is the one-page document that it attached to the consent form that it submitted to the mediator. In this document, the company submits that the records at issue contain "confidential" information, but does not specifically address whether this information was "supplied" to the Region "in confidence," either implicitly or explicitly.

The appellant's representations

The appellant simply submits that the recycling company has acknowledged in its representations that any material not specifically marked as "confidential" would be released to the public.

Analysis and findings

I have carefully reviewed the records at issue and considered the parties' representations. For the reasons that follow, I find that with the exception of pricing information, the information in the bid documents was not supplied "in confidence," and, therefore, part 2 of the section 10(1) test has not been met with respect to this information. In addition, I find that the information in the contracts was not "supplied" to the Region and, therefore, part 2 of the section 10(1) test has not been met with respect to this information.

Bid documents (Records 3.0 to 7.0)

As noted above, 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]. It is evident from the parties' representations that the two companies submitted their joint bid directly to the Region in response to the RFP that the Region had issued for the design, construction and operation of the new recycling facility. Consequently, I find that the information in the bid documents was "supplied" to the Region for the purposes of part 2 of the section 10(1) test.

However, to satisfy part 2 of this test, the parties resisting disclosure must also show that the information in the bid documents was supplied "in confidence," either implicitly or explicitly. In particular, they 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 two companies included a "Letter of Understanding" with their bid documents which prohibits either company from disclosing the contents of their bid to any other party, except the Region and as required by law. This would appear to be an indication that each company expected the other to keep the information in their joint bid confidential. However, the issue here is whether they supplied the information in their joint bid to the Region in confidence, either implicitly or explicitly, not whether each company expected the other to keep the information confidential.

In my view, the beginning point in determining whether the information in the bid documents was supplied to the Region "in confidence," either implicitly or explicitly, is to examine whether the Region communicated any expectations to the bidding parties with respect to the confidentiality of their bids.

The confidentiality provision in section 17.1 of the Region's purchasing and tendering by-law requires the Region's employees and officials to keep pricing information confidential, except in specific circumstances. Consequently, I find that the two companies had a reasonable expectation of confidentiality that was explicit with respect to pricing information in their bid documents, but only under the confidentiality conditions stipulated in section 17.1.

Section 17.1 does not require that the Region's employees and officials keep other bid information confidential. However, this office has issued numerous orders that have found that another important piece of evidence in determining if the information in a bid was submitted "in confidence" is whether there is a notice provision in the RFP that alerts proponents to the fact that their bids are subject to the access provisions of the *Act* and asks them to specifically identify any information in their bids that could cause them injury if such information was disclosed. [Orders M-511, M-845, MO-1861, PO-2453, MO-2283]

In general, these orders have found if such a notice provision exists in an RFP, a bidder's response to this provision is evidence of its confidentiality expectations with respect to the information in its bid. In particular, if a bidder fails, at the time it submits its bid, to identify specific information that could reasonably be expected to cause the bidder harm if such information was disclosed, this inaction would normally lead to the conclusion that the bidder did not have a reasonable expectation of confidentiality with respect to this information.

For example, in Order MO-2283, Assistant Commissioner Brian Beamish stated the following:

> … The third parties cannot simply ignore the provision of the Request for Expressions of Interest quoted above. It clearly notifies third parties that any material provided by them to the City is subject to the provisions of the *Act* and that, as such, the City could not guarantee its confidentiality. The parties were directed to identify those portions of their submission that should remain confidential. They chose not to follow this direction. I am therefore satisfied that the third parties cannot now claim to have a reasonable expectation that the entire submission was being supplied in confidence.

In the circumstances of the appeal before me, section 1.12 of the RFP notifies potential bidders that the information in their bids is subject to the *Act* and could, therefore, be disclosed to the public. It also reminds them to "identify in their proposal material any specific scientific, technical, commercial, proprietary, or similar confidential information, the disclosure of which could cause them injury." This is clearly a reference to the mandatory exemption in section 10(1) of the *Act*. In addition, it emphasizes that "complete proposals are not to be identified as confidential" and advises potential bidders that "as a public agency Durham Region must release sufficient information to Committees and Council to perform a complete evaluation, at which time it becomes public."

Despite the clear direction in section 1.12 of the RFP, the construction company and the recycling company did not, at the time they submitted their joint bid to the Region, identify any

"specific scientific, technical, commercial, proprietary, or similar confidential information" in their bid materials that could reasonably be expected to cause them harm if it was disclosed. In my view, this evidence shows that these two companies did not have a reasonable expectation of confidentiality at the time they submitted their joint bid to the Region.

I am not persuaded by the recycling company's submission that marking any specific information in its proposal as being confidential, as stipulated in section 1.12 of the RFP "would have restricted the Region's ability to evaluate and make decisions …" The wording of section 1.12 does not in any way suggest that the Region's ability to evaluate a bid would be restricted if a bidder identifies any "specific scientific, technical, commercial, proprietary, or similar confidential information" in its bid materials that could reasonably be expected to cause the bidder harm if it was disclosed. On the contrary, section 1.12 encourages bidders to identify such information.

I find, therefore, that with the exception of pricing information, the two companies did not supply the information in their bid documents to the Region "in confidence," either implicitly or explicitly. Consequently, part 2 of the section 10(1) test not been satisfied with respect to this information. As a result, most of the information in the bid documents does not qualify for exemption under section 10(1) of the *Act* and must be disclosed to the appellant.

Contracts (Records 8.0 and 9.0)

The records at issue include the contracts that the Region executed with the construction company and the recycling company after the latter parties' proposal was selected as the winning bid. Consequently, I will now determine whether the information in these two contracts was supplied to the Region in confidence. I will start by assessing whether the two companies "supplied" the information in the contracts to the Region.

In their representations, the two companies do not specifically address whether the information in their contracts with the Region was "supplied" for the purposes of section 10(1).

However, the Region provided representations on this issue. As noted above, it submits that the information in the contracts that were executed between itself and the two companies was not negotiated and "simply directly copied from the Proposal into the contract document." Consequently, it appears to be suggesting that the two companies "supplied" the information in the contracts to the Region, for the purposes of section 10(1).

However, it then goes on to state that it would be willing to provide the appellant with severed copies of the contracts. In particular, it attached a copy of the contracts to its representations and highlighted information (mainly pricing and equipment information) that it believes should be severed before the contracts are disclosed to the appellant.

However, previous orders of this office have held that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose

of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. This approach was upheld by the Divisional Court in the *Boeing* case, cited above.

Although the Region submits that the information in the contracts was "simply directly copied from the Proposal," this does not mean that the information in the contracts was not subject to any negotiation. In Order PO-2435, Assistant Commissioner Beamish faced a similar argument from the institution and the affected parties in that appeal and addressed it in the following way:

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

I agree with Assistant Commissioner Beamish's reasoning and will apply it in the appeal before me. In my view, if the Region had judged the two companies' joint bid to be too high in terms of price or otherwise unacceptable, it had the option of not selecting that bid and not executing contracts with the two companies. In other words, the Region had the opportunity to accept or reject the bid, which is a form of negotiation. In such circumstances, I find that the information in each contract, including the pricing information, was mutually generated rather than "supplied" by the two companies.

Orders MO-1706 and PO-2371 discuss two exceptions to the general rule that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). These may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit an accurate inference to be made with respect to underlying non-negotiated confidential information supplied by a third party to the institution. The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business or a sample of its products. In my view, none of the information in the contracts falls within the scope of these two exceptions.

In short, I find that the information in the contracts was the product of a mutual negotiation process between the Region and the two companies. It cannot be said that these companies "supplied" the information in these contracts to the Region. Part 2 of the section 10(1) test has, therefore, not been satisfied with respect to this information. As a result, the two contracts

(Records 8.0 and 9.0) do not qualify for exemption under section 10(1) of the *Act* and must be disclosed to the appellant, in their entirety.

Part 3: Harms

General principles

To satisfy part 3 of the section 10(1) test, the Region and the two companies must prove that the prospect of disclosure gives rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

With respect to the quality of evidence required, 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) and (c)

The Region and the two companies have provided similar arguments with respect to the harms contemplated by both sections 10(1)(a) and (c) of the *Act*. Consequently, I will consider the application of these two provisions together.

In order to satisfy the requirements of section 10(1)(a), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in the records 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.

In order to satisfy the requirements of section 10(1)(c), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in the records at issue could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

Summary of the parties' representations

The Region's representations

In its representations, the Region submits that disclosing the information in the two companies' joint bid could "substantially prejudice" its position in future RFPs "if companies bidding for writing proposals cannot provide the majority of their financial and technical information for fear that such information can be gathered by their competitors in an MFIPPA request."

The Region further submits that disclosing the two companies' financial information and "unique" techniques and methodologies could reasonably be expected to harm their competitive position:

> The [two companies] have developed numerous techniques specific to their own operations that are not known to their competitors. The [two companies'] RFP was selected over their competitors partly because of their methodologies and unique abilities. If the [two companies'] 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 [two companies] manage their businesses. The Region submits that this information, in the hands of their competitors or within the public domain, would impair [the two companies'] competitive advantage.

The Region further submits that the two companies "are better able to make a fuller assessment and determination of the extent of the damages."

The recycling company's representations

The recycling company submits that the harms contemplated by both sections 10(1)(a) and (c) of the *Act* could reasonably be expected to occur if the information in the records at issue is disclosed to the appellant.

As noted above, the recycling company submits that its proposed "design process" for configuring equipment at the recycling facility is not generally known to its competitors and "with this information, a competitor could easily duplicate our business and significantly prejudice our competitive position."

In addition, the recycling company makes the following specific submissions with respect to the harms contemplated by section 10(1)(a) of the *Act*:

> … If someone can copy the competition's bid development process, it obviously reduces the advantage the creator of the original has over the copier. If someone is allowed to review the competition's work without having to provide [their] work to review, the party seeing both will have a greater ability to combine or

> modify their product. In both of these circumstances, the originator is subject to prejudice.

The recycling company further submits that disclosing this information could reasonably be expected to result in "undue loss" for itself and "undue gain" for its competitors, as contemplated by section 10(1)(c) of the *Act*. It asserts that if the information in the bid documents is disclosed, it will be required to make additional expenditures to upgrade and re-market its design for projects, which could reasonably be expected to result in an "undue loss" for itself. It further submits that disclosing this information could bolster its competitors' chances of winning future bids, which could reasonably be expected to result in an "undue gain" for them.

The construction company's representations

As noted above, the construction company did not provide representations during the adjudication stage of the appeal process. The only evidence that I have from this company with respect to its position in this appeal is the one-page document that it attached to the consent form that it submitted to the mediator. In this document, the company states the following with respect to whether it could reasonably be expected to suffer harm if the information in the records at issue is disclosed:

> The records requested … constitute important technical, commercial and financial information of a confidential nature, release of which would seriously prejudice [our company] in its work on this project itself (not yet completed) and future projects. Release of these records would significantly interfere in [our company's] negotiations on this project itself and potentially in future projects. Release of the records at any time would give [our] competitors details, technical, commercial and financial, of [our] confidential bidding and pricing strategies, which would give them an unfair advantage over [our company] in bidding future projects. This would cause undue loss to [our company].
>
> ….
>
> … [we] cannot determine whether any parts of the records requested could safely be disclosed without seriously prejudicing [our] interests. [We fear] that release of **any portion** of the records might allow competitors to draw accurate inferences about [our] **confidential information in the balance** of the records. [Emphasis in original.]

The appellant's representations

The appellant submits that the only information that the recycling company has identified as "propriety" is the configuration and order of the pieces of equipment assembled to create the recycling facility.

Analysis and findings

In the previous section of this order, I found that the only information in the records at issue that satisfies part 2 of the section 10(1) test is the pricing information in the bid documents, and only under the confidentiality conditions stipulated in section 17.1 of the Region's purchasing and tendering bylaw. Although the parties' representations on harms refer to other information in the records at issue, I already have found that this information does not qualify for exemption under section 10(1) of the *Act* because it was not supplied in confidence and, therefore, does not meet part 2 of the section 10(1) test. Consequently, it is not necessary to consider whether this information meets part 3 of the test.

Some parts of the bid documents contain pricing information. In particular, Record 7.0 contains a pricing schedule for the proposed recycling facility, including the projected costs of building the facility and supplying and installing equipment.

I have carefully considered the parties' representations and reviewed the pricing information in the bid documents. For the reasons that follow, I find that disclosing this pricing information could not reasonably be expected to "prejudice significantly" the competitive position of the two companies [section 10(1)(a)] or result in an undue loss for them or an undue gain for their competitors [section 10(1)(c)].

First, the Region itself claims that the information in the contracts was "simply directly copied from the Proposal …." In the previous section of this order, I found that the information in the contracts, including pricing information, must be disclosed to the appellant because it does not satisfy part 2 of the section 10(1) test. In such circumstances, I find disclosing any of the same pricing information in the bid documents could not reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c).

Second, even if not all the pricing information in the bid documents is set out in the contracts, the Region submits that the two companies are better able to make "a fuller assessment and determination" of the harms they could reasonably be expected to suffer if the information in the records at issue is disclosed. In my view, this would entail identifying any specific pricing information in the bid documents that could reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c) if it was disclosed.

However, the construction company, which proposed to design and build the recycling facility, makes the general submission that disclosing its "confidential bidding pricing strategies" could reasonably be expected to result in an "undue loss" for itself. It does not identify any specific pricing information in the bid documents that could reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c) if it was disclosed. In addition, the recycling company's representations do not address whether disclosing any specific pricing information in the bid documents could reasonably be expected to lead to the harms contemplated by these two provisions.

In such circumstances, I find that the Region and the two companies have not provided the type of "detailed and convincing" evidence required to establish that disclosing the pricing information in the bid documents could reasonably be expected to lead to the harms contemplated by sections 10(1)(a) or (c) of the *Act*.

Section 10(1)(b)

General principles

In order to satisfy the requirements of section 10(1)(b) of the *Act*, the parties resisting disclosure must provide detailed and convincing evidence to establish that:

- disclosure of the information in the records at issue could reasonably be expected to result in similar information no longer being supplied to the Region, **and**

- it is in the public interest that similar information continue to be so supplied.

Summary of the parties' representations

The Region's representations

The Region refers to Order PO-2483, which cites a passage from the Williams Commission report, which was issued in 1980. This report led to the enactment of freedom of information and protection of privacy legislation in Ontario, both at the provincial and municipal levels. The passage from the report cited in that order, which examines the rationale for a third-party information exemption, states:

> 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.

The Region submits that it is "both reasonable and responsible to keep proposals confidential." It asserts that disclosing the information in the bid proposals could reasonably be expected result in similar information no longer being supplied to the Region.

With respect to whether it is in the public interest that similar information continue to be so supplied, the Region submits the following:

> … there is definitely a strong public interest in ensuring that the Region receives the best prices for products and services supplied to the Region, and that information pertaining to those products and services should be kept confidential to ensure that these suppliers who have a reasonable expectation that the information is kept confidential, continue to provide these products and services.
>
> More concerning is the fact that the taxpayers of the Region who fund a significant portion of the Region's activities would be required to pay for any increase in price if companies choose to stop supplying the Region based on the fact that their proprietary information has become open for all their competitors to request at will.

The recycling company's representations

The recycling company submits that the harm contemplated by section 10(1)(b) of the *Act* could reasonably be expected to occur if the information in the bid documents is disclosed. In particular, it states:

> This information was provided because it was assured in the RFP submission process that it was being done in confidence and protected by the MFIPPA. This was assured by the Region because the detail of the RFP was needed to insure a proper price was being bid and it was the only way they could assure themselves they were receiving value for their dollar. It is in the public's interest that such detail bidding processes are possible so reviewing officials can test the accuracy and validity of bids and eliminate undue loss or gain for all parties. The lack of such assurance would result in such information not being supplied to institutions. It is our opinion that this would have a significant impact on the quality of public bids in the future.

Other parties

Neither the construction company nor the appellant provided any representations as to whether the harm contemplated in section 10(1)(b) of the *Act* could reasonably be expected to occur if the pricing information in the bid documents is disclosed.

Analysis and findings

I have found that disclosing the pricing information in the bid documents could not reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c) of the *Act*. However, as noted above, both the Region and the recycling company claim that that the harm contemplated in section 10(1)(b) could reasonably be expected to occur if this information is disclosed.

In my view, the Region and the recycling company have failed to establish that section 10(1)(b) applies to the pricing information in the bid documents, for the following reasons.

With respect to the Region's procurement and tendering process, it is undeniably in the public interest that any bid information, including pricing information, continue to be supplied to the Region [the second requirement of section 10(1)(b)]. However, I am not persuaded that disclosing the pricing information in the bid documents in this particular appeal could reasonably be expected to result in bidders not supplying similar information to the Region [the first requirement of section 10(1)(b)].

As noted above, the Region itself claims that the information in the contracts was "simply directly copied from the Proposal …." In the previous section of this order, I found that the information in the contracts, including pricing information, must be disclosed to the appellant because it does not satisfy part 2 of the section 10(1) test. In such circumstances, I find disclosing any of the same pricing information in the bid documents could not reasonably be expected to result in the harm contemplated by sections 10(1)(b).

Even if not all the pricing information in the bid documents is set out in the contracts, I am not persuaded that disclosing this information could reasonably be expected to result in bidders not supplying similar information to the Region. The Region paid out more than $16 million to the construction company and the recycling company. In my view, it is simply not plausible that disclosing the pricing information in the bid documents in this particular appeal could reasonably be expected to result in similar information no longer being supplied to the Region, because any bidder that did so would imperil its chances of winning financially lucrative contracts from the Region.

In short, I find that the Region and the two companies have failed to provide the detailed and convincing evidence required to show that the harm contemplated in section 10(1)(b) could reasonably be expected to occur if the pricing information in the bid documents is disclosed.

OTHER MATTERS – PERSONAL PRIVACY

Neither the Region nor the recycling company has claimed that any other exemptions in the *Act* apply to the information in the records at issue. However, page 3 of the Introductory Letter in Record 3.0 summarizes the employment history of several individuals employed by the two companies. In addition, Appendix B of Record 4.0 contains the resumes of several employees of the two companies and various subcontractors. In the one-page document that the construction company submitted to the mediator, it asserts that "portions of the records constitute "personal" information that is exempt from disclosure under the legislation." However, it does not specify where this information is found in the records or identify the specific exemption in the *Act* that might apply.

The *Act* contains both discretionary and mandatory exemptions. The personal privacy exemption in section 14(1) of the *Act* is mandatory. Where a requester seeks the personal information of

another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. Given that section 14(1) is a mandatory exemption, I have an obligation to determine whether it applies to any of the information in the records at issue, even if the parties have not raised it.

Section 14(1) only applies to "personal information." That term is defined in section 2(1) of the *Act*, which states in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the *education* or the medical, psychiatric, psychological, criminal or *employment history of the individual* or information relating to financial transactions in which the individual has been involved.
> (Emphasis added.)

However, sections 2(2.1) and 2(2.2) exclude certain information from the definition of "personal information." These provisions state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

In accordance with section 2(2.1) of the *Act*, I find that the names, titles and contact information of the employees of the two companies and various subcontractors identifies these individuals in a business or professional capacity, and this information does not, therefore, constitute their "personal information." The mandatory exemption in section 14(1) only applies to "personal information." Consequently, those portions of the records that simply contain the names, titles and contact information of the companies' officers and employees, does not qualify for exemption under section 14(1).

However, the information in the above records relating to those individuals contains information relating to their education or employment history. As noted above, the definition of "personal information" in paragraph (b) of section 2(1) includes information relating to the "education" or "employment history of the individual." In short, I find that the information relating to the education or employment history of various individuals on page 3 of the Introductory Letter in Record 3.0 and in the resumes in Appendix B of Record 4.0, qualifies as "personal information."

I will now determine whether this personal information is exempt from disclosure under section 14(1) of the *Act*. Where a requester seeks the personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. In my view, the only possible exception that could apply in the circumstances of this appeal is section 14(1)(f), which allows an institution to disclose personal information to a person other than the individual to whom the information relates if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f). The presumption in section 14(3)(d) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> relates to employment or educational history;

The personal information in the above records relates to the employment and educational history of the employees of the two companies and various subcontractors. Consequently, I find that disclosing this information is presumed to constitute an unjustified invasion of their personal privacy under section 14(3)(d).

Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. I have considered the application of the exceptions contained in section 14(4) and find that the personal information at issue does not fall within the ambit of this section. In addition, there is no evidence before me to suggest that the public interest override in section 16 would apply to this information.

In short, I find that the employment and educational history of the employees of the two companies and various subcontractors qualifies for exemption under section 14(1) of the *Act*, because its disclosure would constitute an unjustified invasion of the personal privacy of those individuals. However, as noted above, those portions of the records that simply contain the names, titles and contact information of these individuals cannot qualify for exemption under section 14(1), because this information is not "personal information."

ORDER:

1. I order the Region to provide the appellant with access to the records at issue, except for the information identified in order provision 2. The Region must provide the appellant with access to the records by **August 10, 2009** but not before **August 5, 2009**, in the manner prescribed in section 23 of the *Act*.

2. I order the Region to withhold the following information, which qualifies for exemption under section 14(1) of the *Act*, from the appellant:

   - The employment history of several individuals employed by the two companies, which is found on page 3 of the Introductory Letter in Record 3.0, except for the names, titles and any business contact information for these individuals.

   - The resumes of the employees of the two companies and various subcontractors, which is found in Appendix B of Record 4.0, except for the names, titles and any business contact information for these individuals.

3. I have provided the Region with a copy of page 3 of the Introductory Letter in Record 3.0 and Appendix B of Record 4.0, and have highlighted in green those portions that qualify for exemption under section 14(1). The Region must not provide the appellant with access to these highlighted portions of the records.

4. I remain seized of any compliance issues that may arise with respect to this order.

Original Signed by: June 30, 2009
Colin Bhattacharjee
Adjudicator