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

ORDER PO-2637

Appeal PA-060131-1

Ministry of Transportation

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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a request under the *Act* for records relating to a proposed highway construction project in Bradford (the Project). After discussions with the Ministry, the appellant submitted a revised request. The information sought in the revised request is the following:

- Any responding proposal/bid sent by [a named company] with respect to this [Canadian Environmental Assessment Agency] CEAA project;
- any resulting contract(s) including any subsequent amendments hereto together with draft and final Terms of Reference between MTO [the Ministry] and [the company] and … all invoices submitted by [the named company] relating to this contract and any correspondence, including early termination invoices, specifically relating to the early termination or "putting on hold" of this contract;
- any subsequent correspondence between MTO and [the named company] with respect to the work contracted for including letters and emails dated within the six months proceeding the date of notification to [the named company] that the project was to be put on hold; and
- all draft and final reports, if any, produced pursuant to this contract.

The Ministry located a number of responsive records and, pursuant to section 28 of the *Act*, notified the company named in the request (the affected party) as it might have an interest in the disclosure of the records. The affected party objected to the disclosure of the records. The Ministry subsequently issued a decision letter, granting partial access to the records, denying access to portions of the records, pursuant to section 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. Some of the information in the records was denied on the basis that it is non-responsive to the request. The Ministry also indicated that a fee of $350.00 applied.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant confirmed that he is not appealing the fee, or seeking access to the information the Ministry has identified as non-responsive. He did, however, advise that he is appealing the severances made to the responsive records pursuant to the exemptions at sections 17(1) and 21(1), with the exception of the résumés that are found in one of the records.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Ministry, initially. The Ministry provided representations in response. I also sent a Notice of Inquiry to the affected party. In response, the affected party provided two letters addressed to this office outlining its representations on the appeal. The first letter is dated September 20, 2006 and attaches a letter dated March 17, 2006 addressed to the Ministry's Freedom of Information and Privacy Office. The second letter from the affected party is dated October 3, 2006. For the purposes of this appeal, I will consider all of these documents collectively as the affected party's representations.

I then sent a copy of the Notice of Inquiry to the appellant along with the Ministry's representations in their entirety and the non-confidential portions of the representations submitted by the affected party. The appellant responded with representations.

RECORDS:

The information that remains at issue in this appeal is the following:

- Records 19, 21, 22 – seven monetary figures that reflect fee estimates for components of the proposed work;
- Record 47 – Document C, with the exception of the résumés which are no longer at issue;
- Record 48 – Document D, including the organizational chart, but with the exception of pages 1 to 13, and 21 to 24 which have been disclosed;
- Record 49 – Document E, the Financial Proposal, in its entirety;
- Record 55 – the itemized billing information in charts that make up 11 Monthly Progress Reports.

DISCUSSION:

PERSONAL INFORMATION

The Ministry submits that Record 48 contains the personal information of key personnel and staff designated to work on the Project. It submits that this information is subject to the exemption at section 21(1) because disclosure would result in an unjustified invasion of those individuals' privacy. The portions of Record 48 that I will review to determine whether they contain personal information are the following:

- the information in the text of the record about key personnel involved in the Project, including all information below headings entitled "Staffing," "Key Individuals Responsible for…" or "Assigned Staff" (pages 15, 26, 27, 31, 43, 47, 50, 51, 53, 54, 59, 60, 61, 62, 73, 74, 80, 81, 86, 87, 92, 93, 96, 97, 101, 102, 105, 106, 108, 112, 113, 116, 119, 120, 129, 137, 138, 142, 143, 151, 162, 163, and 167); and

- the information in the Tables in the record that summarize or highlight relevant portions of individuals' résumés (pages 16 and 17, 34, 35 and 36, 43, 44, 45, 46 and 47, 52, 62, 63 and 64, 74, 75, 76, 81 and 82, 87, 93 and 94, 97 and 98, 102, 106, 108 and 109, 114 and 115, 117, 120, 121 and 122, 130, 131, 132 and 133, 163, 164, 165, and 166, 167, 168, 169, 170, and 171).

In order to determine whether section 21(1) of the *Act* applies, it is first necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1). The portion of the definition that is particularly relevant to this appeal is the following:

> "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,

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

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

The Ministry submits that "Record 48 contains information that consists of the employment and educational histories of the personnel involved in the Project, including [extracts from] the résumés of these individuals" which "clearly fall under clause (b) of the definition of 'personal information' in section 2(1) of the *Act*."

The affected party submits that it objects to the release of all the information at issue in Record 48 because:

> A large part of [Record 48] includes the names, qualifications and experience of our key team members. These individuals are not only key team members on this project but are senior key professionals within our organization and people who contribute significantly to the success of our firm and even our ability to stay in business.

The appellant submits that he has already agreed not to pursue the personal résumés that appear in the records but he submits that:

> It appears from the context of the relative documents and the representations of [the Ministry] and the [affected third party] that information of a professional nature relating to the various consultants who will be assigned to this project has also been severed. It is my understanding that information of a professional nature used by a firm of professionals in the pursuit of consulting work does not constitute personal information as defined in the *Freedom of Information and Protection of Privacy Act*.

Having reviewed all of the relevant portions of Record 48, I find that some of the information for which section 21(1) has been claimed qualifies as personal information about an identifiable individual while some of it does not.

In my view, the majority of the information for which section 21(1) has been claimed reveals the past work experience of individuals who are slated to work on the Project. I find that this type of information falls clearly within the scope of paragraph (b) of the definition of "personal information" as "employment history". In Record 48, this type of information is either found in Tables that have been created to summarize or provide highlights of various individuals' résumés or in parts of the textual description of those individuals' experience under the heading "Staffing" or the subheadings "Key Individuals Responsible for…" or "Assigned Staff". Accordingly, I find that all information that reveals anything about an individual's past work experience is properly characterized as personal information.

However, the Ministry has also severed information that, in my view, qualifies as business information and does not reveal anything of a personal nature about that individual. Specifically, I find that the names of the individuals who are designated to work on the Project, their professional designations, their job titles, and any general descriptions of their assigned tasks or responsibilities for components of the Project as well as where they fall in reporting structures, does not qualify as personal information. As the affected party claims that this type information is exempt under section 17(1), I will include it in my analysis of that section, below.

PERSONAL PRIVACY

Where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

In the circumstances, it appears that the only exception that could apply is paragraph (f). Paragraph (f) provides that disclosure of another individual's personal information is not permitted unless disclosure would not result in an unjustified invasion of the privacy of the individual to whom it relates.

As I have found that some of the information at issue in Record 48 qualifies as the personal information of identifiable individuals, I must now determine whether disclosure of that information qualifies as an unjustified invasion of privacy under section 21(1)(f).

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21.

The only presumption that might be relevant in the circumstances of this appeal is that listed at section 21(3)(d), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> relates to employment or education history.

Previous orders have established that information contained in résumés [Orders M-7, M-319, M-1084] and work histories [Order M-1084, MO-1257] falls within the scope of section 21(3)(d). However, a person's name and professional title, without more, has been found not to constitute "employment history" [Order P-216].

In the circumstances of this appeal, all of the information that I have found to qualify as personal information is the type of information that would be found in an individual's résumé or would otherwise reveal information about that individual's employment history. As a result, I find all of the information that I have found to be personal information falls under the presumption at section 21(3)(d) and is therefore exempt from disclosure under section 21(1).

Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. A presumption cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*].

In the circumstances of this appeal, none of the exceptions at section 21(4) apply, nor has the "public interest override" provision at section 23 been claimed. Consequently, I find that the presumption at section 21(3)(d) applies to the information that I have found to qualify as "personal information," and that information qualifies for exemption under section 21(1). Specifically, with the exception of the names of the individuals who are designated to work on the Project, their professional designations, their job titles, as well as any general descriptions of their assigned tasks or responsibilities for components of the Project and where they fall in reporting structures, the information in the following portions should not be disclosed:

- Section 3.2 on pages 15, 16, and 17; Section 4.2.1.3 on pages 31, 33, 34, 35, and 36; Section 4.2.2.3 on pages 43, 44, 45, 46, and 47; Section 4.2.3.3 pages 50, 51 and 52; Section 4.2.4.3 on pages 53 and 54; Section 4.2.5.3, on pages 59, 60, 61, 62, 63, and 64; Section 4.2.6.3 on pages 73, 74, 75, and 76; Section 4.2.7.3 on pages 80, 81, and 82; Section 4.2.8.3 on pages 86 and 87; Section 4.2.9.3 on pages 92, 93, and 94; Section 4.2.10.3 on pages 96, 97, and 98; Section 4.2.11.3 on pages 101 and 102; Section 4.2.12.3 on pages 105 and 106; Section 4.2.13.3 on pages 108 and 109; Section 4.2.14.3 on pages 112, 113, 114 and 115; Section 4.2.15.3 on pages 116 and 117; Section 4.2.16.3

on pages 119, 120, 121, and 122; Section 4.3.1.2 on pages 129, 130, 131, 132, and 133; Section 4.5.1.3. on pages 137, and 138; Section 4.5.2.3 on page 142; Section 4.5.3.2 on page 151; Section 4.5.4.3 on pages 162, and 163; Section 4.5.4.4 on pages 163, 164, 165, and 166; Section 4.5.5.3 on pages 167, 168, 169, 170, and 171.

THIRD PARTY INFORMATION

As identified above, the Ministry denied access to all of the information at issue on the basis of section 17(1) of the *Act*. The affected party also claims that section 17(1) applies to exempt all of the information. Neither party identifies which specific portion of section 17(1) is being claimed. In my view, based on my review of the information and the representations submitted by the parties, only sections 17(1)(a), (b) and (c) are applicable in the current appeal. 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; or

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 party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

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

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders. Those that may be relevant to this appeal have been defined as follows:

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

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

Type of information: representations

The Ministry submits:

> [T]he fees contained in records 19, 21, and 22, the itemized billing information in the charts in record 55 and the tender information in record 49 are commercial and financial information. See in this regard, PO-1818:
>
> > I have no difficulty in finding that the pricing information contained in each of the proposals and the evaluation documentation qualifies as commercial information within the meaning of sections 17(1)(a) and (c). The pricing practices of each of the affected parties which are outlined in each proposal and the evaluation records clearly relate to the selling of the services provided by them.
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> See also Order MO-1312, in which the Adjudicator stated:
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> > Based on my review of the record and the submissions of the affected party, I find that paragraph 2.3 of the "Proposal Requirements" page, which refers specifically to fees, relates to the affected party's pricing practices, thereby qualifying as "financial information" within the meaning of section 10(1) [the municipal equivalent of section 17(1)].

The Ministry also submits:

> With respect to the information exempted under section 17(1) of the *Act* in records 47 and 48, information provided as part of a bid to secure business from a ministry has been recognized in numerous orders as being commercial or technical information within the meaning of the provision. In Order PO-1957, the [former] Assistant Commissioner [Tom Mitchinson] stated the following with respect to this issue:
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> > As the Ministry notes in its representations, Adjudicator [Donald] Hale dealt with a similar issue in Order PO-1818, where he found:

> …the methodologies for meeting the Ministry's needs which are set forth in each proposal by the affected parties also qualifies as commercial information as they describe, often in great detail, precisely how the work is to be performed. In my view, this information is commercially valuable and unique to each of the affected parties. While each proposal is responsive to the same request from the Ministry, they take very different approaches to meeting the requirements of the RFP [Request for Proposal]. The manner in which the work is to be performed is central to each of the proposals. This information distinguishes one proposal from another and, in most cases, is clearly the result of very careful study and preparation. I find that this information may be properly characterized as commercial information for the purposes of sections 17(1)(a) and (c).

> Adjudicator Hale's conclusions are consistent with many past orders of this Office (e.g. Orders PO-1637 and MO-1450), and I too find that the information contained in Group 1 records relates to the buying and selling of services, specifically various collection services offered for sale by the affected parties and considered for purchase by [the Family Responsibility Office], thereby falling within the definition of "commercial information" in section 17(1) of the *Act*.

Further, where the names of the affected party's staff appear in a context where their role in the Project and qualifications are described, this also has been recognized as commercial information. Adjudicator Hale stated the following in Order PO-1818:

> The appellant is also seeking the names and titles of the individual employees or consultants identified by the affected parties in their proposals. This information describes who will actually perform the work on behalf of each firm. In my view, this information may also be characterized as commercial information. The provision of consulting services to government is a highly competitive field. I find that some commercial value exists in the names of the "players" who were identified by the affected parties as having particular areas of expertise in this marketplace.

> In addition to meeting the test for being commercial information, the Ministry submits that much of the information in records 47 and 48 constitutes technical information in that it contains information prepared by professionals in the fields of engineering and environmental planning that describes the work necessary to obtain an environmental approval under the [*Canadian Environmental Assessment Act*].

The affected party submits that the information at issue in this appeal consists of technical, financial, commercial and trade secret information. Specifically it submits that the information related to the staff assigned to various parts of the Project is commercial and trade secret information because there is a shortage of qualified people in this field and disclosure of their staff would allow competitors to target these individuals in an attempt to hire them. It also submits that the records detail its approach to many technical facets of the Project as they describe how it would carry out the Project. It submits that disclosure of the knowledge and experience of its team and its approach to addressing various facets of the Project based on that experience amounts to a technical trade secret. It also submits that although, as the successful bidder, its total fee was disclosed, more detailed information such as how the total fee is broken down between components is considered financial and trade secret information.

The appellant submits that because he has not seen the records it is "difficult, if not impossible, to effectively comment" on whether the records contains information of the types listed in section 17(1). However, the appellant submits:

> This is an environmental assessment study for the purposes of obtaining federal environmental assessment approval. The majority of the work to be undertaken is in the nature of a due diligence review and report. The focus of the report is on the need, justification for the highway and the impacts the proposed highway and any related mitigation will have upon various specified aspects of the environment…
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> …
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> Given that this is a proposal to conduct a "due diligence" study, the information sought likely does not contain any trade secrets, scientific, technical, commercial or labour relations information as those terms are defined by the Privacy Commissioner or the courts…
>
> …
>
> I accept and acknowledge that the severances found in record 55 likely contain financial information…
>
> With respect to [Record] 48, it is not apparent from the un-severed portions of the document that the severed information constitutes financial information. I also

> find it difficult to accept that Record 49, in its entirety, qualifies as financial information which should be severed. In that I am unable to see this record and satisfy myself of the validity of this claim, I have no reasonable alternative but to request that these matters be reviewed by an independent adjudicator.

Type of information: analysis and finding

Records 19 and 20 are letters to the Ministry from the affected party outlining proposed work for the highway construction Project and estimates on the fees for the completion of that work. Both records are identical in content, however Record 19 is unsigned while Record 20 is signed and on company letterhead. The information that has been severed from these records and for which section 17(1) has been claimed are six dollar amounts which represent estimates for the particular components of Project that have been described in the previous paragraph in the letter.

Record 21 is a response from the Ministry to the letter that is Records 19 and 20. As with the other two records, the only information that has been severed from Record 21 is the total amount of the estimates provided by the affected party in the original letter. In my view, the information that is at issue in Records 19, 20 and 21 clearly qualifies as financial and commercial information within the meaning of section 17(1) as it relates to the selling of services by the affected party and the purchase of services by the Ministry, and also, to money and its use or distribution.

The portions of Record 47 that remain at issue contain a number of documents that outlined clarifications about the affected party's proposal sought by the Ministry and subsequently provided by the affected party. I accept that this information forms part of the affected party's bid to secure business. Following Orders PO-1957 and PO-1818, cited above by the Ministry, I find that this information qualifies as commercial information because it sets out the methodologies and approaches for meeting the Ministry's needs as set forth in the proposal. In my view, in keeping with the reasoning expressed by former Assistant Commissioner Mitchinson and Adjudicator Hale, this type of information is commercially valuable and can be characterized as commercial information for the purposes of section 17(1). I also find that some of the information contained in this record qualifies as technical information within the meaning of that section.

The information at issue in Record 48 consists of the bulk of the affected party's proposal. The first page is an organizational chart identifying the individuals responsible for specific aspects of the Project while the remainder details the affected party's proposal. It describes each aspect of the work that is to be done on the Project and the methodologies that will be applied. The information also includes specifics about the key players and senior professionals who will be involved in the Project. These specifics include the key individuals' education and employment experience, any specific expertise that they might have, and the tasks that they will be responsible for.

Having reviewed this information closely, I find that all of it qualifies as commercial information while parts of it qualify as technical information. The information in this record relates to the buying and selling of services and has commercial value to the affected party. Following Orders PO-1818 and PO-1957 I find that this information qualifies as commercial information. This includes the names of the individuals who are proposed to work on the Project because, following Order PO-1818, I find that commercial value exists in the names of the "players" who were identified by the affected party as having particular areas of expertise required to complete the Project. Finally, the record has been prepared by professionals in the fields of both engineering and environmental science and portions of it describe the methodologies, approaches and processes that the affected party intends to use. I find that these portions qualify as technical information. Therefore, I find that Record 48 contains both commercial and technical information within the meaning of section 17(1).

Record 49 is the affected party's Financial Proposal for the construction Project. This record has been withheld in its entirety. This record contains information including the lump sum price of the affected party's tender in response to the RFP and a chart that breaks down that lump sum by listing the categories of work to be done and the proposed dollar amounts for the completion of the work in each particular category. In my view, some of this information qualifies as financial information in that it reveals the affected party's cost account methods and pricing practices. However, I also find that all of this information qualifies as commercial information given that it clearly relates to specifics of the particular services that are being bought and sold. Accordingly, I find that the information at issue in Record 49 qualifies as commercial and financial information within the meaning of part 1 of the section 17(1) test.

The information that remains at issue in Record 55 consists of itemized billing information in charts that make up 11 Monthly Progress Reports. The total amounts listed at the bottom of each report have been disclosed. The information that has been severed is listed in the last three columns of each of the charts and lists monetary amounts for each specific aspect of the project including, the agreed up budget, the billing amount for the period represented by the particular Monthly Progress Report and the total amount billed to the end date covered by the particular Report. In my view, this information clearly relates to the buying and selling of the affected party's services. I am also of the view that this information relates to cost accounting methods and pricing practices. Therefore, I find that the information that remains at issue in Record 55 qualifies as commercial and financial information within the meaning of part 1 of the section 17(1) test.

As I have found that all of the information that remains at issue in this appeal qualifies as at least one of the types of information listed in part 1 of the section 17(1) test, I must now determine whether it has been "supplied in confidence" within the meaning of part 2.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 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].

Supplied: representations

The Ministry takes the position that the information at issue in this appeal has either been supplied to the Ministry by the affected party, or the disclosure of its contents would permit the drawing of an inference with respect to the information supplied to the Ministry by the affected party.

Specifically addressing the information contained in Records 19, 21, 22, and 55 as well as the budgetary information in Record 49, the Ministry submits:

> Financial, fee and budgetary information such as that which appears in records 19, 21, 22, 49 and 55 were held to have been "supplied" in previous orders of the Commissioner's Office. For example, in Order MO-1787, the Adjudicator stated as follows with respect to an estimated budget of the affected party in that case:
>
> > The one exception to this is page 5 of the Request for Proposal, which contains the affected party's estimated budget. Although provided as an attachment to the Request for Proposal, in my view this document does not contain the "terms" of the agreement between the City and the affected party. It contains "estimate" budget information and does not comprise an "essential term" of the agreement between the City and the affected party (see Order MO-1706). Accordingly, I am satisfied that the information on page 5 was supplied to the City by the affected party for the purpose of section 10 of the *Act*.
>
> Similarly, in Order MO-1919, the Adjudicator held that a breakdown of fees contained in a form produced by the institution was "supplied" where it revealed information supplied in response to an RFP:
>
> > The City submits:
> >
> > > The financial/commercial information at issue, specifically the detailed break down of fees

> submitted by the successful proponent, found on Page 3, is information that was supplied to the City in response to the RFP. Although the information on page 3 is not that directly supplied in response to the RFP, (i.e. it appears on a form created by the City) the City submits that disclosure would permit accurate inferences to be drawn about information actually supplied, thereby it qualifies as information "supplied" to the City.

With respect to the billing information contained in Ministry-generated records such as Record 55, see also Order PO-2467, in which the Adjudicator found that a record documenting the number of hours billed in relation to specific dated invoices that were charged to the institution by the affected party was supplied by the affected party, despite the fact that the record was itself created by the institution.

Addressing Records 47, 48 and 49, the Ministry submits:

> [T]his information has been supplied despite its inclusion in the contract between the affected party and the Ministry. It is well settled that the tendering process, while it may contain elements of negotiations, is in essence an alternative to negotiations, based on a competitive model. This has been recognized in two recent decisions of the Supreme Court of Canada. In *M.J.B. Enterprise Ltd. V. Defence* Construction (1951) *Ltd.,* [1999] 1 S.C.R. 619, the Court stated at paragraph 41:
>
> > The rationale for the tendering process, as can be seen from these documents, is to *replace negotiation with competition*. This competition entails certain risks for the appellant. The appellant must expend effort and incur expense in preparing its tender in accordance with strict specifications and may nonetheless not be awarded Contract B. [emphasis added]
>
> This was reiterated by the Court shortly thereafter in *Martel Building Ltd. v. Canada,* [2000] 2 S.C.R. 860, at para. 116:
>
> > To recognize that the Department owed a duty to Martel would be inconsistent with the basic rationale of tendering. As explained in *M.J.B. Enterprises, supra, this rationale seeks to replace negotiations with competition.* In this respect, it is imperative that all bidders be treated on an equal footing, and that no bidder be provided differential treatment on the basis of some previous relationship with the party making the call for tenders. It would

> defeat the purpose of fair competition to allow one bidder to be given some advantage from its previous dealings. The submission of a tender bid requires a great deal of effort and expense. Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder. [emphasis added]

Accordingly, the Ministry submits that, as accepted by the [former] Assistant Commissioner in Order PO-2160, and stated by the Adjudicator in Order P-1611, where information contained in a contract is identical to that submitted in the context of a tender competition, that information is "supplied" for the purpose of s. 17(1). To quote from Order P-1611:

> I have carefully reviewed the records and the representations of [Management Board Secretariat] MBS and the company. I accept that the information contained in the company's proposal which was provided to MBS in the context of a commercial bidding process is one and the same as that incorporated into the agreements. Therefore, I find that the information was supplied to MBS.

Further, it has been held that the purpose of s.17(1) is to protect the "informational assets" of a third party. It is submitted that the information contained in the exempted portions of the various proposal documents consists of the informational assets of the affected party in that they concern the approach and methodology employed by the affected party in completing a Canadian Environmental Assessment Concept Design for the proposed new highway.

Information of this type has been held to be "supplied" in other recent orders of the Commissioner's Office. In Order MO-2072, the Adjudicator held that information on an evaluation that was drawn from bid tenders was supplied. In that order the information related to the proposed terms of a commercial relationship between the affected parties and the institution Board for the provision of information technology (IT) staff resources, including the affected party's pricing practices.

In Order MO-2070, the Adjudicator held that information in proposals supplied for the purpose of demonstrating the suitability of an affected party's product and services for the purposes of putting an alternative voting system in place would not have been known to the institution had it not been supplied to it. In that case, the Adjudicator held that the information contained in the records was "supplied" to the institution. The Ministry submits that the information at issue in this appeal also would not have been known to the Ministry had it not been supplied by the affected party.

> In Order PO-2478, where the request was a proposal in response to an RFP for developing a wind power generating facility, the Adjudicator held that much of the information at issue had been "supplied" within the meaning of section 17(1). This information included:
>
> - Evidence of Progress towards all Approvals and Permits
> - Schedule of Milestones
> - Meteorological Data
> - Scope of Project and Scope of Assessment
> - Environmental Assessment Report
> - Portions of Environmental Assessment documentation
>
> It is submitted that this information is similar in nature to that supplied in this case, and that such information should be considered "supplied" to the Ministry.

The affected party does not specifically address whether it supplied the information to the Ministry as required by part 2 of the section 17(1) but it does clearly state that it prepared the information specifically in response to the RFP issued by the Ministry and submits that the entire proposal, including the information at issue, was provided to the Ministry with an expectation of "full confidentiality." It also submits that the proposal contains information including its original ideas and innovations with respect to its approach to the technical aspects of the Project, as well as staff qualifications; information which is not generally within the Ministry's knowledge and which it considers to be proprietary.

The appellant does not make any specific representations on the "supplied" component of the section 17(1) test.

Supplied: analysis and finding

Having reviewed the records closely, I find that all of the information that remains at issue was "supplied" to the Ministry by the affected party within the meaning of section 17(1).

This Office has previously held that information submitted in the form of proposals should be considered as "supplied" with respect to section 17(1). In Order PO-2300 Adjudicator Bernard Morrow stated:

> 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 of 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).

I adopt the reasoning taken in Order PO-2300 for the purposes of the present appeal.

The Ministry has acknowledged that the proposal was successful and resulted in an agreement being formed, and that some of the information in the proposal has been included in that agreement. However, in the circumstances of this appeal it is not the agreement that is being sought by the appellant but rather it is the proposal itself. Having closely reviewed the specific information that remains at issue, in my view, the information is not a result of negotiation and cannot be characterized as mutually generated.

Following orders MO-1787 and PO-2467, I find that the estimated budget detailed in Records 19, 20 and 21, as well as the information in the financial proposal at Record 49 and the itemized billings in Record 55, which reveal the affected party's fees and pricing practices, were supplied to the Ministry by the affected party.

Additionally, I find that the detailed methodologies proposed by the affected party in both Records 47 and 48 as well as the background and expertise of staff contained in Record 48, was also supplied to the Ministry. In my view, this information was clearly developed or held by the affected party and not within the Ministry's knowledge.

Accordingly, in the circumstances, I am satisfied that all of the information at issue in this appeal was supplied to the Ministry for the purpose of section 17(1) of the *Act*.

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]

In confidence: representations

The Ministry submits:

> The affected party had a reasonable expectation of confidentiality in the submission of its proposals and that these proposals were supplied explicitly in confidence. Proponents were advised as follows on page 8 of the RFP:
>
> > The Ministry will consider all proposals as confidential, subject to the provisions and disclosure requirements of the *Freedom of Information and Protection of Privacy Act*, R.S.O, 1990, c.F.31. The Ministry will, however, have the right to make copies of all proposals received for its internal review process.
>
> The fact that proponents are advised that their proposals are subject to the provisions of the *Act* does not have the effect of removing the expectation of confidentiality on the part of the affected parties, as has been recognized in a number of orders issued by the Commissioner's Office (see Orders PO-1957, PO-1818 and PO-1753). Further, where proposals are prepared for the purpose of obtaining a government contract for services, and the information contained in them is not available to the public from other sources, the Commissioner's Office has held that such information is supplied in confidence (see Order PO-1957).

The affected party makes a number of statements that speak to its expectation of confidentiality with respect to the information that it supplied to the Ministry in response to the RFP. In its letter addressed to the Ministry responding to the notice of the request, it submits:

> I would like to point out that the Consulting Engineer of Ontario (CEO: a not for profit organization representing over 270 consulting engineering firms in Ontario) has recently issued an "Advisory to Members" on this subject [confidentiality of proposals] strongly advocating and providing a rationale for documents, particularly proposals, to be kept in confidence.
>
> …

> It is our strong position, and one that we have always believed to be true regardless of the client, that our entire proposal, including technical and management proposals, the financial proposal and any response to any Ministry clarification questions, have been provided with the expectation of full confidentiality…
>
> We believe the Ministry quite rightly supports our position on confidentiality. For example, it is not easy for us to get detailed debriefings from Ministry staff as to how our proposals compared with other firms after the completion of any given competition. Again, I believe the reason Ministry staff are reticent to give detailed debriefings is that they realize the importance of the confidentiality of proposal contents.
>
> In summary then, we always worked under the assumption that the entire content of our proposals to any client would be kept entirely confidential.

In its letter in response to the Notice of Inquiry, the affected party references the letter quoted above and asked that the rationale for its position on confidentiality set out in that letter be considered. The affected party also adds:

> We believe strongly that the vast majority of information included in both our technical and financial proposals to the [Ministry] is strictly confidential and has been prepared and submitted to the Ministry on the understanding that it is confidential.
>
> …
>
> … [W]e consider our proposals to be fully confidential. These proposals were prepared at fully our cost and we were not reimbursed by [the Ministry]. Consequently, the data belongs to us exclusively and is for use by the Ministry in evaluating our credentials … [We] considered this information to be proprietary and provided in confidence.

The appellant does not make any specific representations on whether the information was supplied "in confidence" to the Ministry, by the affected party.

In confidence: analysis and findings

In the circumstances of this appeal, based on the representations of the Ministry and the affected party, I am satisfied that the information contained in the records at issue was supplied to the Ministry by the affected party with a reasonably-held expectation of confidentiality.

Although previous orders have established that the provisions of the *Act* apply to information contained in records, notwithstanding the existence of a confidentiality provision, the existence

of such an explicit arrangement may provide evidence of the confidentiality expectations of the parties [Order MO-1476]. However, just because the provisions of the *Act* may apply does not necessarily mean that parties should expect that none of the information contained in the proposals that they submit to government institutions will be withheld. 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.

In the current appeal, while none of the records at issue contain specific notations of confidentiality, in my view, the confidentiality statement in the RFP along with the representations of both the affected party and the Ministry evince a clear intention on the part of the parties that information was being provided in confidence.

Although the inclusion of a confidentiality clause or statement is not determinative of whether the information qualifies for exemption under the *Act*, in the circumstances of this appeal I am satisfied that both parties had a reasonably held expectation that the information was to remain in confidence and took steps to ensure that it was not otherwise made public.

Accordingly, I find that all of the information at issue in this appeal was "supplied in confidence" in the context of the Ministry's tender process, thereby satisfying part 2 of the section 17(1) test. I will therefore consider whether this information meets part 3 of the test, relating to harms.

Part 3: harms

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

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

Harms: representations

The Ministry takes the position that the affected party is in the best position to assess the harms that might reasonably be expected to result upon disclosure of all the records for which section 17(1) is claimed. The Ministry submits that it defers to the affected party's view on this point but submits that it is:

> …concerned that the effect of requiring the disclosure of these records will have a negative effect on the affected party and other future proponents for

> government projects, causing them to be less willing to set out their proposals in sufficient detail, for fear of their being disclosed to competitors.

The affected party submits that disclosure of the information at issue in this appeal may reasonably be expected to have harmful consequences. The affected party submits that it is concerned that it does not know the identity of the appellant or his reasons for making the request. It submits that, as a result, it must assume that the release of information has the effect of making the information public which would then be accessible to anyone including various consulting engineering firms who compete with it for work with the Ministry and other clients.

The affected party submits that "a huge amount of effort" is put into the preparation of a response to an RFP and that because it is not paid for the work, the common assumption in the industry is that a proposal belongs to its creator. It submits that in a proposal it must illustrate among other things, the detailed qualifications and experience of its most senior professionals, the technical and managerial approach that it has developed and refined working on similar projects, any innovation plans that they propose to bring to the project, and imaginative pricing strategies. It submits that such information is necessary for the company's proposal to be competitive and increase its likelihood of being successful. The affected party submits:

> It is self evident to us that if this information is made generally available to our competitors then our competitors will soon be able to determine our project pursuit strategies and therefore take action thus impacting our competitive position. We would clearly be significantly harmed in this way. Furthermore, should we or other firms believe that the release of this proposal information, through the assumedly highly confidential [Ministry] RFP process, becomes the norm then it is possible we would either decline to submit proposals for [Ministry] work or would significantly "water down" their content, thus harming the Ministry's ability to secure the necessary consulting engineering expertise to deliver their huge program.

The affected party then addresses the harms that it believes would occur if specific portions of the proposal were released. I have summarized the affected party's position as follows:

- Management plan (Record 48, pages 14 to 21)

> The affected party states that it objects to the disclosure of the names, qualifications and experience of its key team members, who are senior professionals within the organization who contribute significantly to its success and ability to stay in business.
>
> It submits that it is commonly known that the consulting engineering profession is in stress with respect to the availability of resources to address huge government infrastructure programs that are now underway in Ontario and elsewhere. It submits that the lack of qualified individuals

is a subject that is debated in institutions such as the Association of Consulting Engineers of Canada (ACEC) and the Consulting Engineers of Ontario (CEO). The affected party submits:

> The release of the names, qualifications and experience of our key staff individuals would, in our view, significantly increase the likelihood that "recruitment firms" would obtain this knowledge and use it in an attempt to hire these individuals away from our firm and place them with our competitors. We have had experience with such recruiting firms using very unusual or innovative techniques to identify key individuals' names. Proposal data, such as is being requested under this appeal, would be a "gold mine" for such individuals. Similarly, we have to assume, as noted earlier that this data would end up in the possession of our competitors thus also allowing them to target individual staff members within our firm even without the assistance of recruiting firms. We are a consulting engineering business that obtains revenue and therefore stays in business through the act of selling the time of our qualified people. If we lose our good people then we risk going out of business.
>
> Consequently, the release of any information regarding our staff has the potential to significantly harm our firm.

- Planning plan (CEEA) (Record 48, Document D, pages 25 to 171)

The affected party states that the information that makes up this portion of Record 48 is a detailed discussion of its approach to the many technical aspects of the project, which is based on very extensive experience. It submits that the release of this information would be tantamount to providing its competitors with its technical ideas and could therefore significantly harm its ability to compete successfully in the future. The affected party also submits that this is proprietary information because it was not paid to prepare this information and it is likely that they have included certain ideas or innovations that other firms may not have considered. The affected party argues that to release the information could significantly harm its ability to compete and if it was aware that this information would be routinely disclosed it would be reticent to provide the Ministry with innovative ideas on technical approaches in future proposals.

The affected party also points out that this section also includes the names and detailed qualifications of the individuals who will carry out the technical work described in this section. For the reasons outlined above in its submissions on the relevant Management Plan information, the affected party submits that the disclosure of the names and qualifications of its staff members would impact its ability to compete in the industry.

- Quality Control Services Plan (Record 48, Document D, pages 175 to 177)

The affected party submits that all this data is confidential, proprietary information because the implementation of such a plan is a key factor in its overall performance on a project and bears heavily on its financial performance rating which is a significant factor in its ability to compete.

- Absence of Conflict of Interest (Record 48, Document D, pages 188 and 189)

The affected party states that this section includes lists of names of individuals who participated in the preparation of the proposal to demonstrate that there is no conflict of interest in submitting the proposal or with the affected party's other contractual obligations. The affected party submits that disclosure of the information about these individuals would cause them harm and prejudice their competitive interest due to the shortage of qualified staff, as explained above.

Addressing Record 47, the affected party states that it strongly objects to the release of this Financial Proposal because, although it acknowledges that its total fee was made available to other competing firms as is normal Ministry practice, there is other information in the Financial Proposal, "particularly how the fee is broken down between components … and its release most definitely could affect our ability to compete in the future." It states that although its fee is known. The affected party also states, "[i]t is also difficult to image why a third party would want the fee proposal for any reason other than affecting our competitive edge." This argument also applies to the information at issue in Record 55.

As for the Financial Proposal, Record 49, the affected party submits that disclosure of this information to a competing firm would permit them to determine its pricing strategies "not just for the overall Project but for the individual components of the Project and how [it] distributes price between these components as it spelled out in the Financial Proposal." It submits that given that price plays a significant role in the selection of consulting engineering services by clients, disclosure of this information could harm its ability to be competitive.

The appellant points to a comment found on the second last page of Record 47 which was disclosed to him and submits that the comment provided evidence that the affected party's

proposal is quite unique. However, he submits that the work outlined in the proposal represents the completion of work commented under an earlier provincial *Environmental Assessment Act* and that its processes and perhaps even its methodology are no longer appropriate for environmental assessments conducted under the legislation now in force. As a result, the appellant submits that he has difficultly accepting any argument that release of this "obsolete information will reasonably lead to any form of harm to [the affected party]."

The appellant also submits that although the severances found in Record 55 likely contain financial information, he has difficultly accepting that the Project specific information contained in Record 55 could reasonably be expected to lead to any of the harms listed in section 17(1).

Harms: analysis and findings

Having reviewed the information at issue and the representations submitted by the parties, I find that disclosure of some of the information at issue could reasonably be expected to give rise to the harms listed in sections 17(1)(a) and (c), while the disclosure of other portions of the information at issue cannot be reasonably expected to give rise to those harms. However, I am not persuaded by the arguments put forward by the Ministry and the affected party that disclosure of any of the information at issue could reasonably be expected to result in the harm contemplated by section 17(1)(b).

Dealing first with section 17(1)(b), in my view, the arguments put forward by the parties are speculative in nature. They do not contain the requisite "detailed and convincing" evidence to establish that disclosure of the specific information at issue in this appeal could reasonably be expected to result in the companies who generally bid on government projects no longer supplying proposal information to the Ministry. The speculative nature of these arguments is clear from the wording used in the parties' representations. Neither party submits definitively that proponents would no longer supply this type of information in the future. The Ministry submits that proponents will be "less willing" to set out detailed proposals. The affected party submits that if disclosure of certain types of proposal information becomes the norm "it is possible" that it would decline to submit proposals for Ministry work but goes on to state that instead of declining to submit a proposal altogether, it might submit a tender with "watered down" content. In my view, this is not sufficiently detailed and convincing evidence to support that the harm in section 17(1)(b) could reasonably be expected to occur were the specific information at issue disclosed. Moreover, I do not find it credible that the affected party and other competitive consulting firms would cease to bid on the large scale, financially lucrative projects proposed by the Ministry and other government institutions, simply based on the disclosure of the type of information at issue in this appeal.

In the absence of detailed and convincing evidence to the contrary, the argument that future proponents will no longer supply proposal information were the information at issue in this appeal disclosed is, in my view, speculative and it cannot be said that it could be "reasonably expected" to occur. As a result, I find that section 17(1)(b) does not apply.

As for whether the harms in sections 17(1)(a) or (c) apply to the records at issue, I will proceed with my analysis on a record-by-record basis.

Records 19, 20 and 21

None of the parties have made specific representations with respect to whether the harms listed in either sections 17(1)(a) or (c) could occur were the estimate fees in Records 19, 20 and 21 disclosed. As a result, I have not received the requisite detailed and convincing evidence required to establish that disclosure of these amounts could reasonably be expected to result in those harms. Moreover, having reviewed that information, I do not accept that disclosure of the fee estimates could reasonably be expected to result in significant prejudice to the affected party's competitive position or result in an undue loss to the affected party or gain to its competitors.

The amounts detailed in Records 19, 20 and 21 are estimates, and therefore do not necessarily reflect the actual amounts charged or paid for the described work. Additionally, the amounts represent fees for large components of the overall Project. In my view, the fee estimates on these records are general enough that disclosure cannot be reasonably expected to reveal the affected party's pricing practices or their unit pricing for the work that they do.

Accordingly, I find that sections 17(1)(a) and/or (c) do not apply to exempt the information at issue in Records 19, 20 and 21.

Record 47

Based on my review of Record 47 and the representations of the parties, I accept that the disclosure of the clarifications to the proposal sought by the Ministry and the responses provided by the affected party could reasonably be expected to result in prejudice to the affected party's competitive interest and/or result in an undue loss to the affected party or an undue gain to its competitors. In my view, disclosure of this information would reveal some of the methodologies outlined in the proposal as well as further about those methodologies provided in the affected party's clarifications. I accept that in the competitive marketplace within which the affected party works, such information could be used by its competitors in a manner which could reasonably be expected to result in prejudice to the competitive position of the affected party and/or result in undue loss to them and corresponding gain to its competitors. As a result, I find that sections 17(1)(a) and (c) apply to Record 47.

Record 48

Having closely reviewed the information at issue in Record 48, which contains the substance of the affected party's proposal, I find that the information for which section 17(1) has been claimed can be broken down into three types:

(1) information about the key personnel and staff designated to work on the Project;

(2) information about the specific methodologies or processes that the affected party proposes to use to complete the work required; and

(3) general information about the Project and how the affected party proposes to approach it.

Although I have found that some of the information in Record 48 about the key personnel involved in the Project qualifies as personal information and is exempt under section 21(1), I have also found that the record contains information about those individuals that qualifies as their business information. The affected party takes the position that the names, titles, professional designations, as well as general descriptions of an individual's role in the Project and their position in the reporting structure are exempt from disclosure by virtue of section 17(1) of the *Act*. It submits that due to a shortage of qualified individuals in the industry, recruitment firms and competitors would use this information to lure the affected party's employees away and place them in competing firms.

These types of concerns have been addressed in prior orders by this office and have generally not been accepted [Order PO-1818 and PO-1816]. Similarly, in the specific circumstances of this appeal, in my view, I have not been provided with the requisite detailed and convincing evidence to establish that the disclosure of this business information could reasonably be expected to result in significant prejudice to the affected party's competitive position or in an undue loss to the affected party by luring away its employees.

First, the affected party has not demonstrated that the information at issue is its proprietary information and is generally considered to be confidential. In my view, this information is general information about the qualifications and expertise of employees that would be made available to anyone interested in hiring the affected party for a project. It is not reasonable to assume that the names and experience of key players and experts in the field are not known to others in the same industry and it is certainly not reasonable to assume that this type of information is only known to an employee's employer. In fact, on the affected party's own website the names of some of their top level employees, their professional designations, titles, and in some circumstances, references to their specific experience or expertise are cited. Clearly, while a recruitment firm or competitor may use a list of names and positions of specialists on an RFP to recruit candidates it is certainly not the only manner in which to gather contact and background information about the affected party's employees. In my view, contact information about key industry players can also be obtained by internet research, networking, advertising and other such methods.

Secondly, in my view the argument that disclosure of this type of information would result in the affected party losing staff to recruitment firms is speculative at best. The affected party has not provided any evidence to demonstrate that it is definitive that were any of these individuals contacted by a recruitment agency or competitor, as a result of the disclosure of the specific information at issue, they would choose to leave their current position. If the affected party is a competitive employer in the industry, an employee's decision to leave is more complicated than

simply for the reason that he or she has been contacted by a recruitment agency or competitor. In my view, losing staff to competitors is a risk of doing business in a competitive industry.

Accordingly, I find that I have not been provided with the requisite kind of detailed and convincing evidence required to demonstrate that disclosure of the business information of the key personnel involved in the Project could reasonable result in *significant* prejudice to the affected party's competitive position (section 17(1)(a)) or in *undue* harm to the affected party (section 17(1)(b)). This includes the following information:

- The organizational chart; and

- all references to personnel or staff designated to work on the Project, their professional designations, their job titles, as well as any general descriptions of their assigned tasks or responsibilities for components of the Project and where they fall in reporting structures.

Record 48 also contains detailed descriptive information about specific approaches that the affected party has developed to complete different components of the Project. Based on the representations of the affected party, I accept that this type of information is not general in nature but describes specific approaches and methodologies that are unique to the affected party and might not be known or considered by a competitor. This includes information such as work plans, proposed site investigations where the method is sufficiently detailed, descriptions of deliverables where they might reveal a specific approach, and the affected party's quality control plan. I find that the affected party has provided me with sufficient evidence to demonstrate that disclosure of the portions of Record 48 that contain this type of information, which could reasonably be expected to prejudice significantly its competitive position or interfere significantly with the contractual or other negotiations of the affected party (section 17(1)(a)). Additionally, I accept that disclosure of this type of information could reasonably be expected to result in undue harm to the affected party and a correlative undue gain to its competitors (section 17(1)(c)).

Accordingly, I find that sections 17(1)(a) and (c) apply to exempt this type of information from disclosure, which includes the following:

> Section 4.1.2 on pages 25 and 26; Section 4.2.1.1 on pages 27, 28, 29, 30 and 31; Section 4.2.2.1 on pages 36, 37, 38, 39, 40, 41 and 42; Section 4.2.3.1 on pages 47, 48, 49, and 50; Section 4.2.4.1 on pages 52 and 53; Section 4.2.5.1. on pages 54, 55, 56, 57, 58, and 59; Section 4.2.6.1 on pages 65, 66, 67, 68, 69, 70, 71, and 72; Section 4.2.6.4 on page 76; Section 4.2.7.1 on pages 77, 78, 79, and 80; Section 4.2.8.1 on pages 83, 84, 85, and 86; Section 4.2.9.1 at pages 88, 89, 90, and 91; Section 4.2.10.1 on pages 95 and 96; Section 4.2.11.1 on pages 98, 99, and 100; Section 4.2.12.1 on pages 102, 103, 104, and 105; Section 4.2.13.1 on page 107; Section 4.2.14.1 on pages

> 109, 110, 111, and 112; Section 4.2.15.1 on page 115; Section 4.2.16.1 on pages 117 and 118; Section 4.3 on pages 122, 123, 124, 125, 126, 127 and 128; Section 4.5.1.1 on pages 133, 134, 135, and 136; Section 4.5.1.2 on pages 136 and 137; Section 4.5.2.1 on pages 140 and 141; Section 4.5.2.4 on pages 144, 145, 146, 147, and 148; Section 4.5.3.1 on pages 148, 149, 150, and 151; Section 4.5.3.3 on page 152; section 4.5.4.1. on pages 153 , 154, 155, 156, 157, 158, 159, 160, and 161; Section 4.5.5.1 on pages 166; Section 10 on pages 175, 176 and 177.

The remaining information in Record 48 contains general information about the Project and how the affected party intends to complete it. This information includes the affected party's corporate history, experience and qualification, background or overview information about the Project and the work that needs to be done, general deliverables specified in the RFP, general overviews of approaches the affected party intends to take as well as reporting structures. This information appears to be general information about the work to be done by the affected party and, in my view, does not contain the level of detail that would reveal any specific methodologies or processes that are unique to the affected party or might now be known to its competitors. I find that I have not been provided with sufficiently persuasive representations to satisfy me that disclosure of this type of information could reasonably be expected to result in prejudice to the affected party's competitive interests or give rise to an undue loss suffered by the affected party and a correlative gain to its competitors. Accordingly, I find that the remaining portions of Record 48 which have not been identified above, do not qualify for exemption under either section 17(1)(a) or (c) and must be disclosed to the appellant.

Record 49

Record 49, the Financial Proposal, has been withheld in its entirety. As noted above, this record contains information including the lump sum price of the affected party's tender in response to the RFP and a Table that breaks down that lump sum by listing the categories of work to be done and the proposed dollar amounts for the completion of the work in each particular category.

Having reviewed this information as well as the representations of the parties, I find that disclosure of the breakdown of the lump sum amounts listed in Table 1 on page 67 would permit a competitor to determine the affected party's pricing strategies, disclosure of which could reasonably be expected to prejudice the affected party's competitive interest within the meaning of section 17(1)(a) and/or result in an undue loss to the affected party or undue gain to its competitors within the meaning of section 17(1)(c). This consists of all of the monetary figures on pages 67 and 68 with the exception of the "lump sum total" and the "total competitive cost" which appear in the column on the far right of page 68. However, I find that disclosure of the lump sum total and the total competitive cost on page 68, as well as the amount listed as the lump sum price on the third page of the record entitled "Proposal Form" and all of the other information in Record 49 could not reasonably be expected to harm the affected party in the manner contemplated by either section 17(1)(a) or (c).

Accordingly, I find that sections 17(1)(a) and (c) apply to exempt the breakdown of the lump sum amounts listed in Table 1 but that the remaining information is not exempt and must not be disclosed to the appellant.

Record 55

As noted above, the information that remains at issue in Record 55 consists of itemized billing information in Tables that make up 11 Monthly Progress Reports. The total amounts listed at the bottom of each report have been disclosed. The information that has been severed is listed in the last three columns of each Table and consists of the agreed upon total budget for specific aspects of the Projects, the actual billing amount for each aspect of the Project for the period represented by the particular Report and the total amount billed for each aspect of the Project to the end date covered by the particular Report.

In my view, this information is sufficiently detailed that disclosure would reveal to a competitor the affected party's pricing practices. Therefore I find that disclosure of this information could reasonably be expected to significantly prejudice the affected party's competitive position within the meaning of section 17(1)(a) and/or result in a undue loss to the affected party and a correlative undue gain to its competitors within the meaning of section 17(1)(c).

Accordingly, I find that the information that remains at issue in Record 55 is exempt from disclosure under section 17(1)(a) and/or (c).

In summary, I have found that some of the information at issue qualifies for exemption under sections 17(1)(a) and/or (c) while the remaining information could not reasonably be expected to result in any of the harms identified in sections 17(1)(a), (b) or (c). As no other exemption has been claimed, I will order that the information that I have not found to be exempt under section sections 17(1)(a) or (c) be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision not to disclose:

    - Record 47 in its entirety;

    - The portions of Record 48 that reveal the affected party's approaches and methodologies. This information is found in the following portions of Record 48:

        Section 4.1.2 on pages 25 and 26; Section 4.2.1.1 on pages 27, 28, 29, 30 and 31; Section 4.2.2.1 on pages 36, 37, 38, 39, 40, 41 and 42; Section 4.2.3.1 on pages 47, 48, 49, and 50; Section 4.2.4.1 on pages 52 and 53; Section 4.2.5.1. on pages 54, 55, 56, 57, 58, and 59; Section 4.2.6.1 on pages 65, 66, 67, 68, 69, 70, 71, and 72; Section

4.2.6.4 on page 76; Section 4.2.7.1 on pages 77, 78, 79, and 80; Section 4.2.8.1 on pages 83, 84, 85, and 86; Section 4.2.9.1 at pages 88, 89, 90, and 91; Section 4.2.10.1 on pages 95 and 96; Section 4.2.11.1 on pages 98, 99, and 100; Section 4.2.12.1 on pages 102, 103, 104, and 105; Section 4.2.13.1 on page 107; Section 4.2.14.1 on pages 109, 110, 111, and 112; Section 4.2.15.1 on page 115; Section 4.2.16.1 on pages 117 and 118; Section 4.3 on pages 122, 123, 124, 125, 126, 127 and 128; Section 4.5.1.1 on pages 133, 134, 135, and 136; Section 4.5.1.2 on pages 136 and 137; Section 4.5.2.1 on pages 140 and 141; Section 4.5.2.4 on pages 144, 145, 146, 147, and 148; Section 4.5.3.1 on pages 148, 149, 150, and 151; Section 4.5.3.3 on page 152; Section 4.5.4.1. on pages 153 , 154, 155, 156, 157, 158, 159, 160, and 161; Section 4.5.5.1 on pages 166; Section 10 on pages 175, 176 and 177; and,

- the portions of Record 48 that reveal the employment history of key personnel of staff involved in the Project (with the exception of the names of the individuals, their professional designations, their job titles, their position within the reporting structure and general description of their assigned tasks or responsibilities for the components of the Project). This information is found in the following portions of Record 48:

  Section 3.2 on pages 15, 16, and 17; Section 4.2.1.3 on pages 31, 33, 34, 35, and 36; Section 4.2.2.3 on pages 43, 44, 45, 46, and 47; Section 4.2.3.3 pages 50, 51 and 52; Section 4.2.4.3 on pages 53 and 54; Section 4.2.5.3, on pages 59, 60, 61, 62, 63, and 64; Section 4.2.6.3 on pages 73, 74, 75, and 76; Section 4.2.7.3 on pages 80, 81, and 82; Section 4.2.8.3 on pages 86 and 87; Section 4.2.9.3 on pages 92, 93, and 94; Section 4.2.10.3 on pages 96, 97, and 98; Section 4.2.11.3 on pages 101 and 102; Section 4.2.12.3 on pages 105 and 106; Section 4.2.13.3 on pages 108 and 109; Section 4.2.14.3 on pages 112, 113, 114 and 115; Section 4.2.15.3 on pages 116 and 117; Section 4.2.16.3 on pages 119, 120, 121, and 122; Section 4.3.1.2 on pages 129, 130, 131, 132, and 133; Section 4.5.1.3. on pages 137, and 138; Section 4.5.2.3 on page 142; Section 4.5.3.2 on page 151; Section 4.5.4.3 on pages 162, and 163; Section 4.5.4.4 on pages 163, 164, 165, and 166; Section 4.5.5.3 on pages 167, 168, 169, 170, and 171; and

- the monetary amounts that provide a breakdown of the lump sum amounts listed in Table 1 of Record 49; and

- all of the information that is at issue in Record 55.

2. I order the City to disclose the following information to the appellant by sending him a copy by March 3, 2008 but not before February 27, 2008:

    - The fee estimates listed in Records 19, 20 and 21;

    - the remaining portions of Record 48 not identified in provision 1 which includes the business information about key personnel found in Record 48 (names, titles, professional designations, as well as any general description of their designated tasks or responsibilities for components of the Project and where they fall in reporting structures);

    - all of the information in Record 49 with the exception of the breakdown of the lump sum figures (this consists of all the monetary figures in Table 1 with the exception of the amounts described as the "Lump Sum Total" and "Total Competitive Cost" on page 68);

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the portions of the record which are disclosed to the appellant pursuant to provision 2.

January 28, 2008

Catherine Corban
Adjudicator