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

ORDER PO-2724

Appeal PA07-238

Ministry of Energy

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BACKGROUND OF APPEAL:

The Smart Metering Initiative is the Government of Ontario's program to create a conservation culture based upon the province-wide deployment of smart meters. Smart meters track how much electricity is used at a specific location and when it is used. Unlike a conventional meter, a smart-meter can record a customer's total electricity consumption on an hourly basis and transmit that information to a computer database. The Government's target is to furnish all homes and small businesses with smart meters by 2010.

The Ministry of Energy (the Ministry) has entered into an arrangement with the Independent Electricity System Operator (the IESO) where the IESO will act as the Smart Meter Entity, responsible for the establishment and implementation of Ontario's central meter data repository (MDM/R).

The MDM/R is a centralized computer database that will receive electronic readings from smart meters. The MDM/R will process these meter readings to produce consumption data and transmit that data to local distribution companies for billing.

The IESO ran a competitive procurement process for the development and operation of Ontario's MDM/R and selected a third party vendor (the third party). The IESO subsequently entered into a MDM/R Agreement with the third party and a copy of the agreement and related documentation was provided to the Ministry.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the Government of Ontario's smart meter initiative. After clarifying the request, the Ministry confirmed that the request was for the latest estimates of a number of specific costs, as well as all final documents relating to the cost of smart metering hardware and MDM/R systems for an identified period of time, including the agreement for the central data repository.

The Ministry issued a fee estimate decision, as well as a time extension decision. In addition, the Ministry notified the requester that disclosure of the requested records may affect the interests of the IESO and third party and these parties were given the opportunity to make representations concerning the disclosure of the records in accordance with section 28 of the *Act*.

The Ministry subsequently issued an access decision to the appellant granting full access to a number of records and partial access to the agreement. The Ministry claims that the withheld information is exempt under the mandatory exemption at section 17(1) (third party information) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision to deny access to portions of the agreement to this office. Mediation did not resolve this appeal and it was transferred to the adjudication stage of the appeals process.

This office commenced its inquiry by sending a Notice of Inquiry to the Ministry, IESO and the third party. The Ministry, IESO and third party provided representations in response, taking the position that the agreement contained a confidentiality clause that specifically barred disclosure of certain portions of the agreement. They argued that these portions of the agreement qualified for exemption under section 17(1) of the *Act*. The confidentiality provision in the agreement states:

> Except for Article 18 and Article 19, Sections 12.3, 15.2 and 21.2 and Schedules 1.1.109, 9.3, 10.4.2, 10.6.3, 11.2.1, 12.6.2.4, 13.2 and 15.2.4 and the agreed portions of Appendix A of Schedule 8.2.2 which will be deemed to be the Confidential Information of both Parties, the terms and conditions of this Agreement will not be considered Confidential Information by either party and may be publicly disclosed at any time by either Party.

The Ministry also raised the possible application of the discretionary exemption at section 14(1)(i) (security of a system established for the protection of items) with respect to Schedule 11.2.1. This Schedule is identified as the "Vendor Security Policies" in a portion of the agreement disclosed to the appellant. In its representations, the IESO raised the possible application of sections 18(1)(a) and (c) (economic and other interests) of the *Act* to the records at issue. The Ministry did not raise the possible application of section 18(1) (economic and other interests) of the *Act* but requested that "the Commission carefully consider the arguments raised by the IESO in respect of section 18 in order to preserve their right to assert and argue economic interests at this time".

The non-confidential portions of the representations of the Ministry, IESO and the third party were provided to the appellant. The appellant, in turn, made representations in response. The appellant's representations indicate that Section 21.2 and Schedules 13.2, 1.1.109 and 10.4.2 should be released as they are not exempt under the *Act*. The appellant did not make any representations regarding the other withheld portions of the agreement. I subsequently wrote to the appellant to confirm that he no longer sought access to those portions of the agreement. The appellant confirmed in writing that his arguments relate only to Section 21.2 and Schedules 13.2, 1.1.109 and 10.4.2.

As a result, the other withheld portions of the agreement, including the "Vendor Security Policies" attached as Schedule 11.2.1 of the Agreement, are no longer in dispute. Accordingly, I will not address the Ministry's claim that section 14(1)(i) applies to the "Vendor Security Policies" attached as a schedule to the agreement.

RECORDS:

The Meter Data Management and Repository Development, Hosting and Support Agreement (MDM/R Agreement), dated December 5, 2006 is a 97-page agreement between the IESO and third party. Attached to the agreement are various Schedules. Together the agreement and schedules total over 600 pages. Most of the agreement and its attachments were provided to the appellant.

The appellant seeks access to the following withheld portions:

- Section 21.2 of the agreement; and
- Schedule 1.1.109;
- Schedule 10.4.2; and
- Schedule 13.2.

The titles and headings of the provisions in the agreement and the attached schedules are identified in either the Table of Contents or Interpretation portions of the agreement. Both the Table of Contents and Interpretation sections of the agreement were disclosed to the appellant.

Section 21.2 is a contractual provision set out in the agreement under the heading "No Payment for Unperformed Services". The provision consists of one paragraph.

Schedule 1.1.109 is an eleven-page document entitled "Project Plan". Nine pages of this record comprises a spread sheet which identifies a number of tasks to be completed by the third party and the proposed start and finish times for each task. The remaining two pages summarize the information contained in the spread sheet.

Schedule 10.4.2 is a two-page document entitled "Incentive Payment Criteria and Calculation Methodology for Engagement Manager". The document does not set out the Engagement Manager's salary but does set out the criteria for the Engagement Manager eligibility for incentive payments.

Schedule 13.2 is an eighteen-page document entitled "Fees". The first seven pages set out contractual provisions. This section does not contain any specific fee amounts but does refer to calculation formulas and percentages. The remaining eleven pages is an exhibit attached to the document entitled "Fees". The attachment is referred to as "Exhibit A". Exhibit A contains calculation formulas but also includes specific rate and fee amounts relating to the project.

In my view, the information at issue falls under two broad categories:

1. Information relating to the project plan (Schedule 1.1.109); and

2. Information regarding fees and other payments related to the project (Section 21.2, Schedules 10.4.2 and 13.2).

I will refer to these categories later in this order.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry claims that the information at issue qualifies for exemption under sections 17(1)(a), (b) and (c) of the *Act*. These sections read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)].

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third 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.

Part 1: type of information

The Ministry submits that the withheld portions of the Agreement contain commercial, technical and financial information. The IESO and third party submitted representations in support of the Ministry's position. However, I note that their representations regarding the categorization of the information as technical information relate to the "Vendor Security Policies", which is no longer at issue. Commercial and financial information have been defined in prior orders, as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The Ministry and the affected parties take the position that the information at issue contain commercial information related to the delivery of merchandise and services by the third party to the IESO. They also submit that the records contain financial information consisting of information about the payments the IESO is to make to the third party. Their representations state that the information at issue relates to:

1. the charges to be paid to the third party under the agreement, including specific unit rates and fees, in section 21.2 and Schedule 13.2 entitled "Fees";

2. the project plan for the development of the MDM/R in Schedule 1.1.109; and

3. the criteria and calculation methodology for incentive payments under the agreement in Schedule 10.4.2;

The appellant did not provide representations specifically addressing the issue of whether the information at issue qualifies as commercial or financial information for the purposes of section 17(1) of the *Act*.

I have reviewed the records, along with the representations of the parties, and am satisfied that the information at issue qualifies as commercial and financial information within the meaning of section 17(1). In particular, the withheld portions of the agreement relate to the services the third party is to provide to the IESO and the fees and other payments the IESO agrees to pay the third party. Accordingly, I find that this information meets the requirements of part 1 of the test.

I will now go on to determine whether the Ministry and the affected parties have satisfied part 2 of the test.

Part 2: supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

In 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

1. communicated to the institution on the basis that it was confidential and that it was to be kept confidential

2. 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

3. not otherwise disclosed or available from sources to which the public has access

4. prepared for a purpose that would not entail disclosure [Order PO-2043]

The Ministry, IESO and third party rely on the confidentiality clause contained in the agreement in support of their position that the information at issue was supplied in confidence.

As previously noted, the agreement is between the IESO and third party. The Ministry advises in its representations that it was involved in the contract negotiations to ensure that the agreement met the Government of Ontario's smart metering initiative policy expectations. The IESO representations state:

> The Ministry was involved with negotiations between the IESO and [third party] and understood that the MDM/R Agreement contained confidential information of the parties that was not to be released. Further, the intent of the IESO and [third party] to keep these records confidential is clearly and unambiguously set in … the Agreement

The Ministry submits that the withheld information "was not the subject of further synthesis or manipulation". The Ministry also states that the information was:

- communicated to [the Ministry and the IESO by the third party] 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;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure (provided that the confidentiality portions of the MDM/R are given full weight).

The appellant did not provide representations specifically addressing the issue of whether the information at issue was supplied in confidence to the Ministry.

Analysis and Decision

The parties resisting disclosure submit that the information at issue was provided to the Ministry "in confidence" and make reference to the confidentiality clause contained in the agreement. The Ministry also submits that the information at issue has been consistently treated in a confidential manner. Having regard to the parties' submissions, I am satisfied that the portions of the agreement identified in the confidentiality provisions were provided by the third party to the Ministry "in confidence". This finding, however, is not sufficient to meet part 2 of the test. The test requires a finding that the information at issue was also "supplied" to the Ministry.

Order PO-2018, cited above, states that 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. In that order, former Adjudicator Sherry Liang stated:

> Because the information in a contract is typically the product of a negotiation process between two parties, the content of the contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the *Act*. Records of this nature have been the subject of a number of past orders of this office. In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party.
>
> The fact, however, that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 17(1). The terms of a contract have been found not to meet

> the criterion of having been "supplied" by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).

The representations of the Ministry, IESO and third party, in support of their position that the information at issue was "supplied" to the Ministry, focus on the "Vendor Securities Policies" found at Schedule 11.2.1 which is no longer at issue in this appeal. The only other evidence before me supporting their position is the Ministry's submission that the withheld information "was not the subject of further synthesis". However, given my decision under the third part of the three-part test under section 17(1) below, it is not necessary for me to determine whether or not this information meets part 2 of the test.

Part 3: harms

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

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

Section 17(1)(b): similar information no longer supplied

The third party submits that if the information contained in the "Vendor Securities Policies", attached as a schedule to the agreement, is disclosed it would not provide updated versions to the IESO or the Ministry with the same level of detail in the future. The appellant, however, no longer seeks access to this record. The third party did not provide further representations regarding the application of section 17(1)(b) of the *Act* to the records. However, the Ministry and IESO submit that all of the information at issue qualifies for exemption under section 17(1)(b) of the *Act*.

The Ministry states that disclosure of the withheld information would "cause the IESO's third parties' contractors, such as [the third party] to cease providing such information to the IESO". The IESO states that "[i]f third party contractors know that valuable confidential proprietary information will not remain confidential, then they will cease to provide such information to the IESO and the Ministry."

Having regard to the representations of the parties resisting disclosure, I am not persuaded that disclosure of information relating to the project plan and fees related to the project could reasonably be expected to result in similar information no longer being supplied to the Ministry or IESO in the future. In my view, the Ministry and IESO have not provided me with sufficiently cogent evidence to support such a finding.

As I have found that section 17(1)(b) of the *Act* does not apply to the information at issue, I will go on to consider whether this information qualifies for exemption under sections 17(1)(a) and 17(1)(c) of the *Act*.

Sections 17(1)(a) and (c): Prejudice to Competitive Position and Undue Loss or Gain

The Ministry, IESO and third party submit that disclosure of the information at issue could reasonably result in the harms contemplated in sections 17(1)(a) and (c) of the *Act*.

The third party states:

> Disclosing [the third party's] Supplied Information about … pricing and approach to contract issues to a competitor … would put [the third party] at significant competitive disadvantage. This is true for both Requests for Proposals issued by IESO for follow-[up] smart meter work and for Requests for Proposals issued by other customers for smart metering systems… With this confidential [third party] Supplied Information the competitor would have an obvious advantage in structuring its bids for these Requests for Proposals and planning its negotiation strategy for any related negotiations in order to win against [the third party].

With respect to the fee and payment information contained in Schedule 13.2 the third party submits that disclosure would reveal information about how it fees are calculated and adjusted. The third party also submits that the information at issue reveals its actual fees and hourly rates and disclosure would allow:

> … the competitor to backward engineer [the third party's] costs. If a competitor understands [the third party's] pricing methodology and costs, a competitor will know how to underbid [the third party] by just enough to beat [the third party]. This would significantly prejudice [the third party's] competitive position in Requests for Proposals issued by IESO for follow-[up] work, as well as in all other customer's Request for Proposals … for smart metering systems.

The third party also argues that disclosure of the fee and payment information contained in Schedule 13.2 could reasonably interfere significantly with other negotiations (section 17(1)(a)). In support of its position, the third party provided confidential representations listing smart metering projects it has submitted or intends to submit Request for Proposals. The remaining non-confidential portions of the third party's representations relate to portions of the agreement no longer in dispute.

The Ministry submits that disclosure of the information at issue would enable competitors to "…be in a position to reap unwarranted benefits by being placed in a position to undermine [the third party's] bargaining position". In support of this position, the Ministry's representations state:

> These harms are exacerbated by the fact that, as the Ministry is given to understand, in the near term there are only a finite number of projects to build and market these kinds of systems. The costs associated with bidding upon, developing and building these kinds of systems are significant, meaning that the harm of disclosure of [the third party's] approach to this project would be

> potentially significant with respect to its ability to compete for those projects that do exist…

The Ministry also states the following regarding the costs associated with the MDM/R:

> A competitive procurement process was undertaken by the IESO to procure the best value MDM/R solution for the province. Technically, the [third party] solution was considered by the IESO to be very sound and to meet all the requirements of the MDM/R specifications.
>
> The MDM/R Agreement allows for IESO to benchmark the costs of services against other such services offered in the marketplace to ensure that the IESO, and eventually all rate-payers, receive optimal value for money. Within the MDM/R Agreement, the vendor can also identify cost reduction opportunities which it can share with the IESO, which is intended to benefit all Ontario consumers. Therefore, pressure is brought to bear on costs with a view to driving them down, given that the MDM/R Agreement provides economic incentives for [the third party], as vendor, for actively work toward identifying and capitalizing upon efficiencies in the project, for the benefit of both parties and rate-payers. There is also a further protection for Ontario ratepayers as the MDM/R Agreement places an upper limit on [the third party's] profit.

The IESO's representations state:

> In this case, it is reasonable to expect that the release of the withheld portions of the MDM/R Agreement will cause the harm identified in paragraph 17(1)(a) by significantly prejudicing the competitive positions of [the third party] and the IESO. The records will reveal the position taken by [the third party] in the negotiation of the MDM/R Agreement to its competitors and potential customers. These are a limited number of companies with the required expertise and experience in the energy field to bid on projects of this type. The release of these records would compromise [the third party's] competitive position in any future competitive bid processes run by the IESO or the Ministry, including any bid process for the continued operation of the MDM/R after the expiry of the current MDM/R Agreement. This in turn will undermine the confidence that [the third party] and other bidders in future IESO procurement processes and may hamper the IESO's ability to attract qualified bidders for projects of this nature.
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> …
>
> The release of these records would also result in undue loss to [the third party] and IESO, which is the harm identified in paragraph 17(1)(c). As stated above, the release of this information would compromise [the third party] competitiveness in future bid processes and provide an advantage to [the third party's] competitors in such processes. Undermining the effectiveness of future

> IESO procurement processes could also result in higher project costs for the IESO and therefore cause an undue loss to the IESO.

The appellant takes the position that the evidence of the Ministry, IESO and third party amounts to speculation, stating that:

> It is the position of the appellant that insufficient evidence has been presented to make this case and that the assertion of commercial harm ultimately confuses the outcome of financial negotiations with IESO as (presumably) detailed in the contract, with various bargaining positions that [the third party] may or may not have taken in the process of coming to an agreement with the IESO. In other words, the financial schedules in question may reveal what [the third party] was ultimately willing to accept in terms of financial compensation for this particular project within the unique context of the 650 page IESO contract but they may not shed any light on what their initial bargaining positions were, what they might accept if other aspects of the contract were different, or what they might accept on a different project, in a different jurisdiction, and in a different context. [The third party] claims in its submission to the inquiry that the release of this information "would allow the competitor to understand [the third party's] approach to pricing. It would allow the competitor to backward engineer [the third party's] costs". It is our argument that there are many, many variables contributing to the overall cost structure of such a project, all of which can be adjusted according to the specifics of the project and in anticipation of competitors likely approach.

Decision and Analysis

I will first consider whether the exemptions at sections 17(1)(a) and (c) of the *Act* apply to information contained in the project plan. I will then go on to consider the application of sections 17(1)(a) and (c) to the "fee and payment" information.

a) Information relating to the project plan (Schedule 1.1.109)

The parties resisting disclosure argue that disclosure of the project plan could reasonably be expected to significantly prejudice the third party's competitive position (section 17(1)(a)) and/or result in an undue loss or gain (section 17(1)(c)).

Schedule 1.1.109 is an eleven-page document, which includes a nine-page spread sheet and two-page summary. The spread sheet identifies each of the component tasks involved in the project by its name and number, along with its related preceeding task number. The proposed start and finish date of each task is identified on the spreadsheet.

Having regard to the parties' representations and the record itself, I am not satisfied that disclosure of the information contained in the project plan could reasonably be expected to significantly prejudice the third party's competitive position or result in an undue loss or gain. I carefully reviewed the project plan and note that the tasks are organized under headings which

identify specific deliverables. The deliverables appear to describe in broad terms the major steps required to implement the project. The tasks described under the headings for the deliverables are the smaller steps that the parties agree should take place to complete the identified deliverables. The tasks and deliverables are described only in general terms. For example, they identify a need to develop certain plans or tools or indicate whether certain approvals need to be obtained within a specified time period.

In order for the parties resisting disclosure to establish that disclosure of the information contained in the project plan could reasonably be expected to significantly prejudice the third party's competitive position or result in an undue loss or gain, they would have to establish that the disclosure of this information could reasonably result in the harms contemplated in sections 17(1)(a) and (c) of the *Act*.

In my view, disclosure of the mere identification of the steps and tasks the parties agree should take place to keep the project moving forward could not reasonably result in the harms contemplated under sections 17(1)(a) and (c) of the *Act*. In making my decision, I took into account that the information contained in the project plan does not describe how the third party is to meet specific tasks and does not indicate whether the tasks were completed or were completed ahead or behind schedule. Rather, the project plan indicates that the proposed timelines may require amendment as the project proceeds.

I also find that the representations in support of non-disclosure are not sufficiently detailed and convincing. For instance, the representations of the third party suggest that disclosure of this information would reveal its methodology, negotiation tactics, approach to contract issues and how it structures its bids. However, I was not provided with sufficiently detailed evidence connecting the speculated harm with the information contained in the project plan. As a result, I am not satisfied that disclosure of the information contained in Schedule 1.1.109 could reasonably be expected to result in the harms contemplated in sections 17(1) and (c) of the *Act*. Accordingly, even if I was persuaded that this information meets the "supplied in confidence" test in part two of the three-part test, it would not meet part three of the test.

b) Information regarding fees and other payments (Section 21.2, Schedules 10.4.2 and 13.2)

The parties resisting disclosure submit that disclosure of the fee and payment information at issue could reasonably be expected to result in the harms contemplated under sections 17(1)(a) and (c) of the *Act*. They argue that disclosure of the fees and payments the third party is to receive would allow its competitors to "backward engineer" the third party's costs relating to the project. As a result, competitors would gain a competitive advantage and the third party would unfairly lose its competitive edge. The third party also argues that disclosure of this information would significantly interfere with its contractual or other negotiations.

The appellant argues that the Ministry, IESO and the third party have failed to demonstrate detailed and convincing evidence in support of their positions. In Order PO-2435, Assistant Commissioner Brian Beamish stated that pricing information paid by a government institution to a contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a) and (c) of the *Act*. The fee and payment information contained in the schedules at issue

in this appeal include the third party's employees hourly rates along with information identifying percentages representing the third party's profit ceiling.

In Order PO-2435, the Assistant Commissioner found that the Ministry of Health and Smart Systems for Health Agency failed to provide "detailed and convincing" evidence in support of its position that disclosure of the per diem rates and contract ceiling relating to individual consultants could reasonably be expected to attract the harms in section 17(1)(a) and (c) of the *Act*. In that decision, the Assistant Commissioner stated:

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:
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> > …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to

> provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP, there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

> While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a),(b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

The Assistant Commissioner's approach taken in Order PO-2435 has been applied in several recent orders of this office. I also adopt this reasoning for the purposes of this appeal. Like the Assistant Commissioner, I concede that disclosure of specific pricing information paid by a government institution to a contractor, may in some rare cases, result in the harms set out in section 17(1)(a) and (c) of the *Act*. However, based on my review of the representations of the parties along with the records, I am not satisfied that the facts of this appeal lend itself to one of those "rare and limited circumstances".

In my view, the parties resisting disclosure failed to provide me with the type of "detailed and convincing" evidence required to demonstrate that disclosure of the fee and payment information at issue could reasonably be expected to significantly prejudice the third party's competitive position or result in an undue loss or gain. As stated in Order PO-2435, the need for public accountability in the expenditure of public funds dictates the need for "detailed and convincing" evidence. Not only did the parties fail to identify a competitor, they failed to provide evidence establishing how disclosure of the withheld fee and payment information could reasonably be expected to result in the harms contemplated in sections 17(1)(a) and (c) of the *Act*. The parties resisting disclosure also failed to explain how disclosure could reasonably be expected to attract the contemplated harms, given the price protections and incentive payments built into the agreement. I note that the agreement provides economic incentives for the third party to drive costs down in addition to setting an upper limit on the third party's profit. Accordingly, the information at issue relating to the fees and payments to be paid to the third party does not necessarily reflect the actual amount the IESO will pay the third party in exchange for its services.

In any event, even if the fee and payment information contained in the agreement represent fixed or actual payments reflecting the overall costs of the project, the evidence provided to me by the Ministry, IESO and third party lacks the degree of detail required to support their arguments.

For example, I was not provided with evidence demonstrating how a disclosure of withheld information contained in Section 21.2 and Schedules 10.4.2 and 13.2 would enable a competitor to "backward engineer" the third party's costs. Instead, I was provided with representations that made general claims but failed to connect the information at issue and the third party's actual costs. Though I accept that there are a "limited number of companies with the required expertise and experience in the energy field" and future smart-metering project work is limited, these facts alone are not sufficient to establish an evidentiary connection that the information at issue could reasonably result in an "obvious advantage" to the third party's competitors. In this regard, I adopt the Assistant Commissioner's reasoning in Order PO-2435 and find that the possibility that the third party may be subject to a more competitive bidding process for follow-up work or future related projects does not, in and of itself, significantly prejudice its competitive position or result in undue loss. Similarly, I find that disclosure of the fee and payment information contained in Schedule 13.2 could not reasonably be expected to significantly interfere with the third party's contractual or other negotiations relating to future smart metering initiatives. In my view, the third party's evidence that it has or intends to submit bids for future projects is not sufficient to demonstrate that disclosure could reasonably lead to this result.

Further, I find the portions of the records that set out how fees are to be calculated or the type of payments the third party could expect if the IESO delays, defers or terminates the project does not disclose financial information relating to the third party which, if disclosed, could reasonably be expected to result in the harms contemplated in sections 17(1)(a) and (c) of the *Act*. Again, the proposed fees and charges identified in the record merely set out the parties' acknowledgement that the third party is entitled to compensation should the IESO delay, defer or terminate the project. Similarly, Section 21.2 of the agreement sets out the parties' agreement regarding payment obligations relating to "unperformed services". In my view, the arrangements the parties have made regarding payments for non-performance do not represent the third party's pricing strategy which resulted in them being selected as the vendor for the development of the MDM/R.

I am also not satisfied that the portions of Section 21.2, Schedules 10.4.2 and 13.2 which contain contractual language and percentages and do not identify specific amounts of monies to be paid to the third party in exchange for its services qualify for exemption under sections 17(1)(a) or (c) of the *Act*. In my view, disclosure of the percentages identified in Schedule 13.2 to be used to calculate service credits to be paid to the third party or calculate the "upper limit" of the third party's profit do not attract the harms contemplated in sections 17(1)(a) and (c) of the *Act*.

With respect to the portions of Schedule 13.2 which specify the amount of fees, payments and hourly rates the third party may receive in exchange for its services, I am not persuaded that disclosure of this information could reasonably be expected to result in significantly prejudicing the third party's competitive position or result in an undue gain or loss. In making my decision, I note that the fee and payments identified in Schedule 13.2 relate to the completion of deliverables that represent the major stages of the project. Schedule 13.2 does not identify specific fee, payment or pricing information relating to the numerous individual tasks that represent each deliverable. With respect to the hourly rates, I note that this information refers to hourly rate the third party may charge the IESO for additional work if requested by the IESO.

Having regard to the above, I find that the parties resisting disclosure failed to provide me with sufficient evidence demonstrating how disclosure of this information would provide a competitor the means to "backward engineer" the third party's costs and result in the harms contemplated in sections 17(1)(a) and (c) taking into consideration, in the appellant's words, the "… many variables contributing to the overall costs structure of such a project". Accordingly, I find that none of the information at issue qualifies for exemption under sections 17(1)(a) and (c) of the *Act*.

The IESO claims that sections 18(1)(a) and (c) of the *Act* (economic and other interest) applies to the withheld information. Accordingly, I must consider whether these exemptions apply to the information I found not exempt under sections 17(1)(a), (b) and (c) of the *Act*.

ECONOMIC AND OTHER INTERESTS

As previously stated, the IESO raised the possible application of the discretionary exemptions at 18(1)(a) and (c) of the *Act* to the withheld portions of the Agreement. At the time, the IESO was not aware that the appellant had narrowed the scope of the appeal. In its representations, the IESO requests:

> If the Adjudicator determined that the mandatory exemption in section 17(1) does not apply to the records, then the records should be exempted from disclosure on the basis of the discretionary exemptions contained in paragraphs 18(1)(a) and (c) of the *Act*

The raising of the discretionary exemptions at sections 18(1)(a) and (c) of the *Act* raise a number of issues. First, there is a question as to whether the IESO, as an affected party who is also an institution under the *Act*, has the ability to raise a discretionary exemption. Second, there is a question of whether the IESO should be permitted to raise the possible application of sections 18(1)(a) and (c) taking into consideration that it failed to do so within the 35-day policy established by this office to provide institutions with a limited time frame to raise new discretionary exemptions.

Before I consider the issues surrounding the IESO's ability to raise the discretionary exemptions at sections 18(1)(a) and (c), I will first consider the applicability of these sections to the information remaining at issue. Sections 18(1)(a) and (c) of the *Act* read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information

2. belongs to the Government of Ontario or an institution, and

3. has monetary value or potential monetary value.

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 following is the IESO's entire representations on the applicability of sections 18(1)(a) and (c) of the *Act*:

> With respect to the first element, the records contain commercial and financial information as detailed above.
>
> In regards to the second and third elements, the Adjudicator in PO-1763 stated that a record satisfies paragraph 18(1)(a) if the institution has a substantial interest in protecting the information from misappropriation by another party:
>
> > For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. Int. Corona Resources Ltd.* (1989), 61 D.L.R. 4th 14 (S.C.C.), and the cases discussed therein). [Emphasis in Original]

> In this case, the Ministry's interest in protecting the confidentiality of the records mirrors that of the IESO outlined above. Disclosure of these records would compromise the effectiveness of any future procurement processes conducted by the IESO (many of which are of interest to the Ministry) or by the Ministry directly. These records have a monetary value to the Ministry that derives from their content not being generally known and this is reflected in the decision to explicitly identify these records as confidential information under section 16.1.5 of the MDM/R Agreement. It follows that disclosure would affect the economic interests and competitive position of the Ministry in any future procurement process and therefore these records are also deserving of protection under paragraph 18(1)(c).

As previously stated, the Ministry's representations simply state that "it requests that the Commission carefully consider the arguments raised by the IESO in respect of section 18 in order to preserve their right to assert and argue economic interests at this time.'

Decision and Analysis

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

The section 18(1)(c) exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

The IESO's argument is two-fold:

1. that the withheld portions of the agreement have monetary value because they were identified in the confidentiality provision and are not "generally known"; and

2. that "disclosure would affect" the economic interests and competitive position of the Ministry and IESO as the effectiveness of any future procurement processes would be compromised

Further support of IESO's position is found in its representations regarding the application of the section 17(1) (third party information exemption). In this regard, the IESO submits that disclosure would undermine the confidence of bidders in future IESO procurement processes which would ultimately result in undermining the effectiveness of future IESO procurement processes and result in higher project costs for the IESO.

Having regard to the IESO's representations and the records themselves, I am not satisfied that disclosure of the remaining information at issue could reasonably be expected to attract the harms contemplated by sections 18(1)(a) and (c) of the *Act*.

Section 18(1)(a): information that belongs to government

Though I accept that the information at issue contains financial or commercial information, I am not satisfied that the IESO has provided "detailed and convincing" evidence establishing that this information "belongs to" the Government of Ontario or Ministry and has monetary value.

The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others [Order PO-1805 and Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.)]

To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information [Order M-654].

The IESO argues that the confidential treatment of the information at issue demonstrates that the information has an inherent monetary value. For section 18(1)(a) of the *Act* to apply to this information, the IESO would have to provide "detailed and convincing" evidence that the information "belongs to" the Ministry and has intrinsic monetary value. In my view, the existence of a confidentiality provision which establishes that the information is not "generally known" is not sufficient on its own to establish that the information qualifies for exemption under section 18(1)(a) of the *Act*. What is required is corroborating evidence that the information at issue is the result of the expenditure of money or the application of skill and effort to develop the information. The IESO did not provide representations establishing that the information at issue is the result of the Ministry's or its own expenditure of money, skills or effort. As a result, I find that the discretionary exemption at section 18(1)(a) of the *Act* has no application to the information at issue.

Section 18(1)(c): prejudice to economic interests

The section 18(1)(c) exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

The IESO argues that disclosure of the information at issue could reasonably be expected to prejudice the Ministry's economic interests or competitive position under section 18(1)(c) of the *Act*. To meet this test, "detailed and convincing" evidence must be provided to establish a "reasonable expectation of harm".

In support of its position, the IESO states that "…disclosure would affect the economic interests and competitive position of the Ministry in any future procurement process". It also argues that disclosure of the information at issue would undermine the confidence of bidders have in future procurement projects. As a result, the IESO submits it would be forced to incur higher project costs.

In my view, the IESO's evidence is too remote and speculative to meet the "detailed and convincing" standard required under section 18(1)(c) of the *Act*. Essentially, the IESO's position is that disclosure of the information at issue would cripple the confidence of its bidders who, in turn, will demand more money. The IESO, however, did not provide evidence supporting its position, such as examples in the energy industry where bidders lacking confidence in the procurement process gained an advantage and were able to raise their project costs and successfully out-bid their competition.

Having regard to the above, I find that the discretionary exemption at section 18(1)(c) of the *Act* has no application to the information at issue. As the discretionary exemptions at sections 18(1)(a) and (c) of the *Act* have no application to this appeal, it is not necessary for me to make a determination as to whether the IESO, as an affected party, should be allowed to claim these

exemptions and if so, whether the IESO should be allowed to claim the exemptions taking into consideration this office's 35-day policy for the raising of new discretionary exemptions.

As no other exemptions have been claimed to withhold the records at issue, I will order the Ministry to disclose these records to the appellant.

ORDER:

1. I order the Ministry to disclose Section 21.2, Schedules 1.1.109, 10.4.2 and 13.2 in their entirety to the appellant by **November 18, 2008** but not before **November 13, 2008**.

2. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the Ministry pursuant to order provisions 1.

Original Signed by: October 10, 2008
Jennifer James
Adjudicator