



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2753**

**Appeal PA07-219 and PA07-279**

**Ontario Realty Corporation**



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## **NATURE OF THE APPEAL:**

The Ontario Realty Corporation (the ORC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified Request for Proposal (RFP). Specifically the requester sought access to the following information:

ORC RFP [Specified numbers] – Consulting Services / Decommissioning / Demolition Studies

- 1) Copy of ORC's summary table that identifies for all proponents that submitted a submission response including the proponent's name, the breakdown of the proponent's score for the evaluation criteria...

And the Fixed Fee breakdown for the 3 Project Locations proposed by the proponent...

- 2) A full black and white photocopy of the Successful Proponent's submission documents for both Envelope A and Envelope B.

In response, the ORC identified three responsive records related to the request. Before releasing the documents to the requester, the ORC notified two organizations whose interests may be affected by the outcome of the request (the affected parties) to obtain their views regarding disclosure of the records.

One of the affected parties (the successful proponent) objected to the disclosure of the records on the basis that the records contained confidential third party information. The other affected party did not respond.

After considering the affected party's representations, the ORC issued a final decision that granted partial access to the requester, citing the application of the exemptions in sections 17(1) (third party information), 18 (economic interest) and 21(1) (personal privacy) of the *Act*. Before releasing the records however, the ORC advised the affected party that it had the opportunity to appeal the ORC's decision to this office.

The affected party, now the "third party appellant", appealed the ORC's decision to disclose the records.

This appeal is also linked to a related appeal by the original requester, now the "original requester appellant". That appeal is being processed under the file number PA07-279. The only information at issue in Appeal PA07-279 is the fixed fee breakdown on the Schedule B – Fixed Fee Proposal Form which the ORC declined to disclose to the original requester.

Due to the circumstances of both appeals, I have decided to address my findings on both appeals in this order.

During the mediation process, the original requester appellant agreed to remove the following records from the scope of his request:

- Records withheld under section 21(1) – this refers to any personal information of the successful proponent, such as the Curriculum Vitae of any staff member.
- Financial, Banking and Insurance Information – this refers to banking, financial or insurance information related to the successful proponent; therefore, the record identified by the ORC entitled the Certificate of Liability Insurance and withheld under section 17(1) is no longer at issue.
- Signatures – this refers to the photocopy of any of the signatures in the record relating to the successful proponent.
- Calculation of Hour Rates for Additional Hours – this refers to the portion of Schedule B, entitled the Calculation of Hour Rates for Additional Hours
- Project Experience Response Forms - this refers to the dollar amounts withheld by the ORC on the “Project Experience Response Forms”

As part of the mediation process, the ORC agreed to review its decision with the view to releasing additional portions of its scoring summary records to the original requester appellant. Upon further review, the ORC agreed to release the complete records related to the scoring summary, in particular the record called “Evaluation Summary Sheet”.

Before releasing the additional information, the ORC again notified the affected parties to obtain their views regarding disclosure of these additional scoring information. The ORC advised the affected parties of its decision to grant access to the ORC’s scoring information pertaining to this RFP. The third party appellant (the successful proponent) appealed the ORC’s revised decision to release the scoring information.

As a result, the ORC is no longer relying on section 18 of the *Act* to withhold these records; therefore, the application of section 18 is no longer an issue in this appeal.

The third party appellant maintains that none of the records at issue should be disclosed to the original requester appellant. The original requester appellant continues to appeal the ORC’s decision to withhold the portion of Schedule B, which is the breakdown of the Fixed Fee by individual prices.

As further mediation was not possible, the file was referred to adjudication.

#### PA07-219

At the start of the adjudication process, I sent a Notice of Inquiry to the third party appellant and the other affected party, setting out the facts and issues on appeal. I received representations from the third party appellant only.

I then sent a Notice of Inquiry to the ORC and the original requester appellant, along with a copy of the third party appellant's representations. Portions of the third party appellant's representations were withheld due to my confidentiality concerns. The ORC provided representations in response. The original requester appellant was contacted by this office and indicated that he would not be making representations in this appeal.

PA07-279

At the start of the adjudication process, I sent a Notice of Inquiry to the third party appellant and the ORC, setting out the facts and issues on appeal. I received representations from both parties.

I then sent a Notice of Inquiry to the original requester appellant, along with a copy of the ORC and third party appellant's representations. Portions of the third party appellant's representations were withheld due to my concerns about confidentiality. The original requester appellant was contacted by this office and he indicated that he would not be making representations in this appeal.

**RECORDS:**

As stated above, the only information at issue in Appeal PA07-279 is the fee breakdown in Record 2. In Appeal PA07-219, the third party appellant disputes the ORC's disclosure of all of Record 2, as well as Records 1 and 3.

<b>Record Number</b>	<b>Description of Record</b>	<b>Exemption Claimed</b>
1	ORC's Summary of Total Scores (information relating to third party appellant only)	17(1)
2	Schedule B (Fixed Fee Proposal Form)	17(1)
3	Successful Proposal Submission	17(1)

**DISCUSSION:**

**THIRD PARTY INFORMATION**

The only issue remaining is the application of section 17(1) to the three records. The third party appellant's representations only refer the application of section 17(1) to its submission in response to the RFP, which is described above as the "Successful Proposal Submission" (Record 3). The ORC submits that the fee breakdown information on Record 2 is exempt under section 17(1). I will also consider whether section 17(1) applies to the other information on Record 2 as well as the scoring and fee information on Record 1 since it is a mandatory exemption.

The third party appellant submits that sections 17(1)(a) and (c) apply to exempt disclosure of its submission to the RFP. Sections 17(1)(a) and (c) state:

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;
- (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 third party appellant, in this case, 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 third party appellant submits that his submission to the RFP contains technical, commercial and financial information. These types of information listed in section 17(1) have been discussed in prior orders, as follows:

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or

electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

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

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

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

The third party appellant submits:

The RFP submission contains .. the format developed for successful competition on ORC projects. This includes how we execute our services, how our office is structured to carry out such services; our staffing profiles; experience of staff; and how work is broken up to provide services required at the most competitive costs.

The information in the RFP falls into 3 of the 4 categories identified on page 6 of the notice of inquiry: Technical, Commercial and Financial.

The body of the RFP identifies the technical procedures we have developed for executing ORC projects. We have developed this on our own and it is private from any other Firm.

The body of the RFP identifies the commercial and management procedures we have developed for ensuring cost effective execution of ORC projects.

The ORC submits that Record 1 does not contain third party information as it solely relates to scoring given to the third party appellant by the ORC to aid in a comparison of each proponent's submissions.

The ORC submits that the fee breakdown on Record 2 contains financial and commercial information. It states:

Record 2 is the successful proponent's /Appellant's Schedule B – Fixed Fee Proposal Form. This is an ORC form that was completed and submitted by the successful proponent/Appellant indicating the proponent's fee to provide consulting services in the delivery of decommissioning / demolition studies relating to three (3) specific Government-owned sites...

The ORC states that the balance of the information on Record 2 is not third party information as it "constitutes part of the template that was developed by the ORC".

In regard to Record 3, the ORC submits that the information for which it claimed section 17(1) is no longer at issue as the original requester appellant has removed those sections of the third party appellant's successful submission from the scope of this appeal. In regard to the rest of the information in Record 3, the ORC submits that this information is general business information.

As stated above, the original requester appellant did not make representations.

### **Analysis and findings**

From my review of Record 1, I find that the pricing information listed next to the headings "Fixed Fee", "Sum of Hourly Rates" and "Total Fee for Evaluation" qualifies as commercial and financial information for the purposes of the section 17(1) exemption. As the ORC states, these figures represent the third party appellant's fee for providing the service required by the ORC's RFP. I agree with the ORC's submission that the rest of Record 1 does not contain any of the types of information protected under section 17(1). Specifically, I find that the scores and headings contained in Record 1 do not qualify under part 1 of the test for section 17(1).

Record 2 is titled, Schedule B – Fixed Fee Proposal Form. From my review of this record, I find that the pricing information provided under the section relating to the breakdown of the fixed fee represents financial and commercial information for the purposes of section 17(1). This information is the third party appellant's fee for providing its services to the ORC, broken down by task. The rest of the information on Record 2 does not contain any of the types of information protected under section 17(1) and does not meet the test under part 1.

Record 3 is the third party appellant's submission to the RFP which it argues contains technical, commercial and financial information. Technical information is defined above as information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. 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. From my review of this record and the third party appellant's representations, I note that the third party appellant is a firm of architects that also provides project management services. The third party appellant argues that disclosure of the information in Record 3 would reveal the technical procedures which it created for executing the ORC project. I do not agree. I am unable to find that the descriptions of the project team, the proposed methodology and schedule or the staff contribution matrix to be technical information.

To be clear, I am not saying that information relating to project management cannot ever be considered technical information; however, in this particular circumstance, I find that the information in Record 3 is not technical information for the purposes of section 17(1). Record 3 includes a description of how the third party appellant intends to provide the service required by the RFP and is more properly characterized as commercial information for the purposes of section 17(1) since it addresses the provision of a service by the third party appellant.

In summary, I have found that the dollar amount information on Records 1 and 2, and all of Record 3 contain financial and commercial information for the purposes of section 17(1). As there are no additional exemptions claimed for these records, the information I have found in Records 1 and 2 that do not meet the test under part 1 for section 17(1) should be disclosed to the original requester appellant.

## **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].

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, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be “supplied” [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not “supplied” would not apply, which may be described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where “disclosure of the information in a contract would permit accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution”. The “immutability” exception applies to information that is



immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

In Order PO-2435, Assistant Commissioner Brian Beamish adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be “supplied”. In that order, Assistant Commissioner Beamish rejected the Ministry’s position that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish observed that the government’s option of accepting or rejecting a consultant’s bid is a “form of negotiation”:

The Ministry’s position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant’s bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

It is also important to note that the per diem does not represent a fixed underlying cost, but rather it is the amount being charged by the contracting party for providing a particular individual’s services.

I adopt the approach taken by Assistant Commissioner Beamish in Order PO-2435 for the purposes of this appeal.

### **In confidence**

In order to satisfy the “in confidence” component of part two, the third party appellant who is resisting disclosure must establish that the supplier of the information 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]

## **Representations**

The third party appellant submits that the information it provided to the ORC in response to the RFP was supplied in confidence. It states:

It is our belief and understanding that RFP information is provided to ORC in confidence for the sole use of ORC in awarding Architectural commissions. We have no record of ORC advising us that our proprietary information was subject to scrutiny by our competitors.

In the past, ORC has provided a debriefing on unsuccessful submissions. We have never been provided with details of competitor's bids. What has been provided was an assessment of our own submission to identify areas where there were shortcomings or improvements could be made.

Accordingly, we have always expected the confidentiality of our submissions would be maintained.

The ORC submits that while the third party appellant supplied the information at issue in response to the RFP, it did so with the knowledge that the ORC is subject to the *Act*. The ORC states:

Section 14 of the RFP [Request for Proposal] provides general terms and conditions governing the RFP and bidding process. The part titled "*Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31 (*FIPPA*)" contains the following relevant wording:

*FIPPA*, as amended, applies to information provided to ORC by a proponent. A proponent should identify any information in its submission or any accompanying documentation supplied in

confidence for which confidentiality is to be maintained by ORC. The confidentiality of such information will be maintained by ORC, except as otherwise required by law or by a court or tribunal.

...

ORC respectfully submits that the above sections in the RFP were intentionally included to alert proponents to the fact that the proposals would be subject to the access provisions of *FIPPA*.

...

ORC understands that the [third party] Appellant regards the information at issue as confidential .. ORC further understands that the [third party] Appellant expects ORC to treat their information confidentially. In fact, ORC regularly and consistently treats submissions as confidential by requiring that they be delivered sealed, kept in a locked office and opened in a private setting;

Regarding the Fixed Fee breakdown on Record 2, the ORC submits the following:

In the case at bar, the record at issue did not form part of an agreement. Schedule B is not a negotiated agreement; it is a Fixed Fee Proposal Form showing a total fixed fee price submitted by proponents for work to be performed in exchange for payment...The Fixed Fee Proposal Forms were supplied to the ORC within the meaning of part two of the test. The ability to merely accept or reject an offer is not a negotiation in the sense that the Court found in *Boeing*. This analysis is consistent with a plain language definition of "negotiation".

"Negotiation" is defined in the Merriam Webster dictionary as "the action or process of negotiating or being negotiated." Further, "negotiating" is "the arranging for or bringing about through conference, discussion, and compromise. It is respectfully requested that the ordinary and plain meaning of the word "negotiation" be accepted in this case. Furthermore, it is respectfully submitted that the ordinary and plain meaning does not apply to the successful proponent's fixed fee breakdown shown in the record at issue in this case. In the case at bar, the information withheld that is contained in Schedule B was not brought by conference, discussion or compromise with ORC. Rather the fee breakdown which is unique to each proponent was generated by each of them separately and was directly provided to ORC in the form of a completed Schedule B. The proprietary information at issue originated with each proponent separately and is based on each proponent's own business practices and pricing strategies. The Schedule B was submitted to ORC by each proponent, evaluated pursuant to the evaluation criteria outlined in the RFP and a successful bidder was chosen. The mere acceptance of a bid precludes negotiation, as no compromise was in fact

made. Therefore, it is respectfully submitted, that this proprietary information contained in the Fixed Fee Proposal Form is supplied to ORC.

The Fixed Fee Proposal Form, Schedule B, which forms part of the successful proponent's submission, includes the following statement: "I/We understand that the Fixed Fee stated above will be the Contract Price. The Fixed Fee is the sum of the prices identified below...". The "prices identified below" represent the breakdown information that is at issue in the present appeal. With the inclusion of this statement in the Schedule B to the RFP, ORC respectfully submits that this is further evidence as to the non-negotiated nature of the information.

The ORC further submits that this office held in Order PO-2300 that information submitted in the form of proposals should be considered as "supplied" with respect to section 17(1).

### **Analysis and findings**

In the circumstances of this appeal, and based on the representations of the ORC and the third party appellant, as well as the confidentiality clause in the RFP, I accept the position of the ORC and the third party appellant that Record 3, the third party appellant's submission, was supplied to the ORC with a reasonably-held expectation of confidentiality. I make this finding notwithstanding the awareness by the third party appellant that the record would be subject to the access provisions of the *Act* (see Order PO-1688). My finding on the supplied aspect of Record 3 is consistent with prior orders of this office, including Order PO-2300 referred to by the ORC, which have held that information in proposal documents which were not the product of negotiation, may be considered to have been supplied for the purposes of section 17(1).

Regarding Record 1, the Evaluation Summary Sheet, I find that the scoring information was not supplied by the third party appellant. The scoring information was determined by the ORC and does not meet the "supplied" requirement for section 17(1). The fee information next to the headings "Fixed Fee", "Sum of Hourly Rates" and "Total Fee for Evaluation" on the scoring sheet was also not supplied by the third party appellant for the reasons set out below.

Record 2 is the "Schedule B Fixed Fee Proposal Form" and details the pricing information prepared by the third party appellant in response to the RFP issued by the ORC and contains the third party appellant's fee for the completion of the whole assignment as well as a fee breakdown for the three tasks which comprise the assignment. As the third party appellant was the successful bidder in the RFP process, the fee and the fee breakdown outlined by the third party appellant presumably formed the basis of the contract for service between the third party appellant and the ORC. In fact, Record 2 states, "We understand that the Fixed Fee stated above will be the contract Price."

Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, I find that by accepting the third party appellant's RFP submission including the fee and fee breakdown, the information in Record 2 became "negotiated" information. The ORC accepted the third party

appellant's fee in response to the RFP and as such that fixed fee became an essential term of the contract between the ORC and the third party appellant.

Furthermore, having reviewed the representations and the records at issue, I do not find that any of the record at issue is "immutable" or that disclosure of the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party appellant to the ORC. I have also not been provided with any evidence to show that the pricing information reflects the third party appellant's underlying costs.

Based on my review of the representations submitted by the parties and Record 2 itself, I find that the information contained in Record 2 consists of agreed upon essential terms that are, in my view, the product of a negotiation process. Therefore, in the circumstances of this appeal, I find that the fee and fee breakdown information was not "supplied" by the third party appellant, as that term is used in section 17(1).

In conclusion, the only information which I have found to be "supplied in confidence" for the purposes of section 17(1) is the information in the third party appellant's RFP submission, which is Record 3.

### **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].

The third party appellant argues that sections 17(1)(a) and (c) apply.

### **Representations**

The third party appellant submits that its competitive position would be prejudiced significantly if the information at issue was disclosed. In addition, the third party appellant argues that disclosure of the information at issue would result in an undue gain to its competitors and undue loss to its organization. The third party appellant states:

Information on the RFP submission will permit competing firms to "reverse engineer" our fee structure and bidding procedures. On future RFP calls where

the applicant is competing against us they will have the opportunity to adapt our proprietary information from this RFP to compete against us, with the unfair advantage of understanding our fee structures to undercut our bids.

The release of our documents will provide our competitor with the names and telephone numbers of our clients.

The release of our documents will provide our competitor with the private information on our volume of work and dollar values of construction and consulting fees we earn.

The release of our documents will provide our competitor with our roster of sub-consultants with whom we share confidential information and who have provided us with client, staff, project information, and fee structures they consider to be proprietary.

...

The RFP format, organization, and data therein, are core informational assets of our company. It is the culmination of .. years of research and development of our documents to compete for public sector commissions.

...

The body of the RFP identifies the commercial and management procedures we have developed for ensuring cost effective execution of ORC projects. Our investment in developing these procedures has given us a competitive advantage in competing for ORC work. We have developed this on our own and it is private from any other Firm.

The inclusion of fee breakdowns by use of a contribution matrix and hour rates provides a roadmap to our project estimating, cost accounting, pricing practices and projected profits. The release of any of this information to a competitor would provide that individual with an unfair advantage on any submissions we both responded to.

The ORC submits that disclosure of Record 3 would not result in any of the harms in section 17(1) and cites Order PO-2618 where similar information was at issue.

## **Analysis and findings**

### ***Section 17(1)(a): prejudice to competitive position***

I have carefully reviewed Record 3 as well as the representations of the parties. Based on my review, I am satisfied that the disclosure of portions of Record 3 could reasonably be expected to result in the harms identified in section 17(1)(a). I find that I have been provided with sufficient evidence to demonstrate that disclosure of certain portions of Record 3 could reasonably be expected to prejudice significantly the competitive position of the third party appellant. Specifically, I find that the following parts of Record 3 qualify for exemption under section 17(1)(a):

- Staff Contribution Matrix
- Proposed Methodology and Project Schedule

The specific detail contained in these portions of the third party appellant's proposal submission identify the methodology proposed by the third party appellant to provide the services required by the ORC. I find that disclosure of these portions of Record 3 combined with the fee breakdown information in Record 2 could reasonably be expected to prejudice significantly the competitive position of the third party appellant as it would be possible to "reverse engineer" the third party appellant's fee structure and its approach to providing the service required by the ORC. Accordingly, I am satisfied that the disclosure of these portions of Record 3 could reasonably be expected to give rise to the harms contemplated by section 17(1)(a). As a result, I find that this information qualifies for exemption under that section.

However, I am not satisfied that the other sections of Record 3, specifically the following sections qualify for exemption under section 17(1)(a):

- Proposal Compliance Form
- Tax Compliance Declaration
- Engineers' PEO Letters of Good Standing
- Team Organization and Reporting Structure
- Project Team Organization Description
- Qualifications of Prime Contact and Back-up Team Member
- Appendix II – Proponent's Project Experience Response Forms
- Appendix III – Proposed Comparable Project

In my view, the remaining portions of the record do not contain information which, if disclosed could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization. I find that I have not been provided with sufficiently persuasive representations which satisfy me that the information contained in these portions of the record qualify for exemption under section 17(1)(a).

The third party appellant submits that if disclosure is ordered, a competitor will be able to obtain the names and telephone numbers of its clients, as well as its sub-consultants. The third party appellant states that a competitor will gain access to its roster of sub-consultants with whom it shares confidential information and who have provided staff, project information and fee structures. However, from my review of Record 3, I am unable to find that it contains the confidential information of the third party appellant's sub-consultants. Instead, Record 3 contains a general description of the sub-consultants and the services they will be providing in response to the RFP. I am unable to find that disclosure of this information will significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. Further, the third party appellant has not provided me with evidence to suggest that the names and contact information of its clients and sub-consultants is more than general or public information. Further, I have not been provided with sufficient evidence to support the position that disclosure of the team organization or the reporting structure could reasonably be expected to result in the harms set out in section 17(1)(a).

I also find there is no basis to the third party appellant's argument that release of the records will provide competitors with the private information of the volume of their work and dollar values of construction and consulting fees earned. The original requester appellant has removed the dollar amounts from the Project Experience Forms. The third party appellant has not provided me with evidence to suggest that disclosure of the information on the Project Experience Response Forms, absent pricing information, could significantly prejudice its competitive position.

The third party appellant is also concerned that disclosure of its RFP format in the way it proposes to meet the requirements of the RFP will result in the identified harm in section 17(1)(a). Adjudicator Frank DeVries in Order MO-2151 made the following finding in an appeal with similar records at issue:

The other information contained in the proposal ...contains information about the manner in which the affected party proposes to meet the requirements of the RFP. The affected party has made general representations with respect to the concern that disclosure of the proposal would result in the identified harms. The affected party also identifies its concern that the disclosure of the form and structure of the proposal will allow others to use their successful proposal as a "template". I recently reviewed a similar argument in Order PO-2478. In that case the arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry, and in which the exemption in section 17(1)(a) and (c) of the *Freedom of Information and Protection of Privacy Act*, (which is similar to section 10(1)(a) and (c) of the *Act*) was raised. After reviewing the argument, I stated:

In general, I do not accept the position of the Ministry and affected party concerning the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the



disclosure of the “form and structure” of bid would result in the identified harms under sections 17(1) (a) and (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent Order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms.

In Order PO-2435, Assistant Commissioner Beamish made the following statement:

The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

I accept the position taken by the Assistant Commissioner. In my view the arguments put forward by the Ministry and affected party regarding their concerns that disclosure of the “form and structure” of the bid, or its general format or layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in either section 17(1)(a) or (c).

I find that the disclosure of the general information contained in the proposal which discloses only the “form and structure” of the proposal would not reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I do not have sufficiently detailed and convincing evidence to demonstrate that disclosure of this general information could reasonably be expected to result in the harms set out in section 17(1)(a). Therefore, I find that these portions of the records are not exempt under that section.

***Section 17(1)(c): undue loss or gain***

The third party appellant also claims that the records are exempt under section 17(1)(c), as disclosure could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. The third party appellant submits:

We consider the complete RFP submission document to be proprietary commercial and professional information which if released will significantly prejudice our competitive position. The release of our RFP to a competitor will further provide the recipient with an undue gain of the work we have invested in the development of our RFP submission procedures.

For the similar reasons set out above in my finding under section 17(1)(a), I am unable to find that the third party appellant has established that disclosure of the sections of Record 3, which I have found not exempt under section 17(1)(a), could reasonably result in undue loss. The remaining sections of Record 3 contain general information about the third party appellant, its clients and its sub-consultants. The third party appellant has not provided me with sufficiently detailed and convincing evidence that disclosure of this general information, including the form and structure of the third party appellant's successful proposal, could reasonably be expected to result in undue loss to itself. Accordingly, I find that section 17(1)(c) does not apply to the sections of Record 3 which I have found not exempt under section 17(1)(a).

**ORDER:**

1. I order the ORC to provide the original requester appellant with the records or portions of records which I have found do not qualify for exemption under section 17(1)(a) or (c) by sending him a copy of those records by **February 24, 2009** but not before **February 17, 2009**. Specifically, the ORC is to provide the original requester appellant with all of Records 1 and 2 and the following parts of Record 3:
  - Proposal Compliance Form
  - Tax Compliance Declaration
  - Engineers' PEO Letters of Good Standing
  - Team Organization and Reporting Structure
  - Project Team Organization Description
  - Qualifications of Prime Contact and Back-up Team Member
  - Appendix II – Proponent's Project Experience Response Forms
  - Appendix III – Proposed Comparable Project
2. I uphold the application of the exemption in section 17(1)(a) to the remaining portions of Record 3, namely the parts titled "Staff Contribution Matrix" and "Proposed Methodology and Project Schedule".
3. I reserve the right to require the ORC to provide me with a copy of the records or portions of the records which are disclosed to the initial requester appellant pursuant to Provision 1, upon request.

Original signed By: \_\_\_\_\_

Stephanie Haly  
Adjudicator

January 20, 2009 \_\_\_\_\_