



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2817**

## **Appeal PA07-439**

### **Ontario Realty Corporation**



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## **NATURE OF THE APPEAL:**

The Ontario Realty Corporation (ORC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to a specific Request for Qualifications (RFQ). The request specifically stated:

We are requesting the following information regarding RFQ # [specific file number]:

- copies of all proposals submitted (winning and competitive proposals), including financials
- copies of all evaluation notes and records
- copies of any minutes or notes taken during the evaluation process

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

Two of the affected parties, who were the successful proponents, objected to the disclosure of the records on the basis that the records contain confidential third party and personal information.

After considering the affected parties' representations, the ORC issued a final decision that granted partial disclosure to the requester. The ORC's decision granted access to two records in their entirety. In regard to Record 3 (the Qualification Submissions), the ORC granted partial access, stating in its decision:

Portions of Record 3 containing the following information have been severed pursuant to subsection 17(1) (third party information) of FIPPA:

- Annual values of construction work;
- Banking information;
- Tax compliance information;
- Insurance information;
- Project Management methodology; and
- Fee values and reference information of similar assignments.

Further, portions of Record 3 which include personal information in resumes and detail the employment references of individual employees have been severed pursuant to section 21(1) (personal privacy) of FIPPA.

Before releasing the record the ORC advised the affected parties that they had the opportunity to appeal the ORC's decision to this office.

Two affected parties, now the appellants, appealed the ORC's decision to this office and two files were opened. This order disposes of one of the appeals.

During mediation, the mediator confirmed with the appellant's representative that he was not appealing the ORC's decision to disclose Records 1 and 2. Consequently, the ORC's Final Evaluation Summary and the ORC's Individual Evaluated Information Score Sheet are not at issue.

The mediator also confirmed the specific portions of Record 3 that are actually at issue. This is set out in further detail in the Records section of this order.

The mediator also confirmed with the initial requester that he is not seeking access to the names of company personnel, their home address, their email addresses or home or work telephone numbers. However, the original requester continues to seek access to the job titles and list of job functions.

The remaining issues were not resolved at mediation and the file was moved to adjudication, where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry by sending a Notice of Inquiry to the appellant, setting out the facts and issues on appeal. The appellant provided representations.

I then sent a Notice of Inquiry to the ORC and the original requester. I provided the ORC and the original requester with a copy of the non-confidential portions of the appellant's representations. I received representations from the ORC only.

I then provided the appellant with an opportunity to reply to the ORC's representations. The appellant did not make reply representations.

## **RECORDS:**

The record at issue is appellant's RFQ submission (Record 3), excluding those pages withheld from the original requester by the ORC in its initial decision. Specifically, the following pages of the appellant's submission remain at issue:

- Page 396: names, titles, email addresses and phone numbers
- Page 397: Names
- Page 406: Organizational Chart
- Page 408: Information under headings b) and c)
- Page 411: Client Service Manager and Lead Project Manager information
- Pages 446 - 447: Other Support Resources
- Page 456: Proponent's Proposed Supportive Tool Sets and Technology Capability
- Page 457: Quality Assurance Procedures

- Pages 459 – 461: Information listed under the headings – Client’s Name, Proponent’s Staff on This Assignment and Role of Key Staff
- Page 467: Proponent’s Proposed Supportive Tool Sets and Technology Capability
- Page 468: Information listed under Appendices B, C, D and E
- Pages 470 – 472: Information listed under the following headings – Client’s Name, Proponent’s Staff on this Assignment and Role of Key Staff
- Page 473: Quality Assurance Procedures
- Pages 475 – 489: Information on these pages
- Pages 491 – 492: Information on these pages
- Pages 494 – 498: Information on these pages

## **DISCUSSION:**

### **PERSONAL INFORMATION**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature,

and replies to that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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

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

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The appellant submits that the records at issue contain the employment and educational history of identifiable individuals such that the record contains personal information within the meaning of paragraph (b) of the definition of that term in section 2(1) of the *Act*.

The ORC submitted that the records do not contain personal information within the meaning of section 2 of the *Act*. It submits:

Section 2(3) which speaks about business identity information, goes on to state that personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. Such information is not considered by the IPC to be personal by its very nature.

Notwithstanding the above paragraph, ORC also confirms that the requester no longer seeks the names of the company personnel, their home addresses, their email addresses or home or work telephone numbers. The remaining information about education or employment history of company personnel standing alone without personal identifiers cannot be interpreted as personal information. To the contrary, information limited to position titles and job functions are purely of a business nature.

...

ORC recognizes that certain types of information could be considered personal but only when linked to other information that allows for the identification of an individual. However, that is not the case here with respect to the information that is being sought. The information that the Appellant describes as “personal” is in fact, business information of a corporate nature that has been compiled and organized to comprise the Appellant’s corporate submission. This submission reveals information about the company to facilitate participation in a corporate procurement context in order to establish a corporate contractual relationship. For the above reasons, ORC respectfully submits that especially in the absence of names, addresses and telephone numbers, it is not reasonable to expect that an individual may be identified if the information at issue is disclosed.

### **Finding**

Based on my review of the record, I find that, once the names, home addresses, email address and telephone numbers are removed, the record does not contain personal information as that term is defined in section 2(1) of the *Act*. As stated by the ORC, section 2(3) of the *Act*, specifies that an individual’s name in combination with his or her title, contact information or designation in a business, professional or official capacity, is not personal information for the purposes of the *Act*. Accordingly, I find that the professional title information in the records on pages 396, 397, 406, 408, 459 – 461, and 470 – 472, do not constitute personal information for the purposes of the *Act*.

Further, I find that the job descriptions in the records also do not constitute personal information for the purposes of the *Act*. The job descriptions contain generalized information of the various job functions. I find that the information in the job descriptions does not contain information relating to the employment history of an identifiable individual. In particular, I find that the information on pages 411 and 408 to not be personal information for the purposes of this *Act*. Finally, the appellant argues that more specific qualification type information in the record is personal information. Specifically, I refer to the information on the right hand margin of page 446 and all of page 447. These pages contain the names of various individuals and their credentials including current and past employment and educational history. I find that this information is personal information within the meaning of paragraph (b) of the definition of that term in section 2(1) of the *Act*.

As stated above, the original requester has confirmed that he does not want the names of the various individuals in the record.

Previous orders have established that, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

I have reviewed the information on pages 446 (in part) and 447 of the record, which are detailed accounts of the education and employment history of the named individuals. Even if the names of the individuals are severed from the records, the record contains sufficiently detailed information about the individuals such that, in my view, it is reasonable to expect that each of the individuals may be identified. Accordingly, I am satisfied that the information contained on pages 446 (in part) and 447 qualifies as the personal information of individuals other than the appellant.

In summary, I find that only pages 446 (in part) and 447 of the record contain personal information for the purposes of section 2(1) of the *Act*.

The appellant has also claimed that section 17(1) also applies to the information at issue, and I will review the application of section 17(1) to pages: 396, 397, 406, 408, 411, 446 (remaining information), 459 – 461 and, 470 – 472.

## **PERSONAL PRIVACY**

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

In the circumstances, it appears that the only exception that could apply is paragraph (f). Paragraph (f) provides that disclosure of another individual's personal information is not

permitted unless disclosure would not result in an unjustified invasion of the privacy of the individual to whom it relates.

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

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

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. The only presumption that might be relevant in the circumstances of this appeal is that listed at section 21(3)(d), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

relates to employment or education history.

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

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

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

In the circumstances of this appeal, none of the exceptions at section 21(4) apply, nor has the "public interest override" provision at section 23 been claimed. Consequently, I find that the presumption at section 21(3)(d) applies to the information that I have found to qualify as "personal information," and that information qualifies for exemption under section 21(1). Accordingly, the employment history information on pages 446 (in part) and 447 qualifies for exemption under section 21(1).

### THIRD PARTY INFORMATION

The appellant submits that sections 17(1)(a), (b) and (c) apply to exempt information in the record in addition to the information already withheld by the ORC. These sections 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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the appellant 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 types of information listed in section 17(1) have been discussed in prior orders:

*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].

*Labour relations information* has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]

the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario*

I adopt these definitions for the purposes of this appeal.

The appellant submits that the record contains commercial, technical and labour relations information. He states that the record contains commercial information because:

The Record was prepared by professionals, who are experts in structuring proposals, and it contains our ideas, processes and procedures for performing the services required pursuant to the project management services at the Ontario Realty Corporation. In essence, the Record represents a detailed description of our business. The Record discloses the approach we take to compete in the very competitive project management market, including the specialized proposal drafting techniques we utilize in order to prepare professional proposals and processes and procedures used in the actual construction of the project. The ideas, processes and procedures found in the Record and the structure of the Record itself are the result of our experience, expertise and the investment of a significant amount of our time, money and effort.

The appellant submits that the record also contains technical and labour relations information:

The Record contains confidential information concerning our corporate structure (page 13), a list of our staff assigned to this project, the resumes of team members, our sample project plan (Appendix B), our sample master schedule (Appendix C), our sample risk register (Appendix E), our sample cost tracking log (Appendix D), and our references. All of these documents disclose the particular approach we adopt in planning and managing projects, all in an extremely high level of detail.

And finally the appellant submits that the record contains labour relations information because it contains confidential information about the names, duties and qualifications of the appellant's employees.

The ORC submits that the remaining information (after its severance) does not contain the types of information protected in section 17. The ORC states:

...the balance of information contained in the submission is comprised of general third party proposal and company information such as the third party's history and description, project experience and qualifications, information about past comparable projects as well as general introductory information including a cover letter and table of contents. As such, the information at issue appears to be general in nature and does not appear to reveal information that is unique to the successful proponent.

...

Furthermore, ORC respectfully submits that the information remaining at issue does not fit within the definitions for commercial, technical or labour relations types of information as interpreted by the IPC and contemplated by section 17(1). ORC respectfully requests the IPC follow Adjudicator DeVries' reasoning in MO-2164 where he did not consider information consisting of job duties and qualifications of individual employees to be labour relations information since it does not relate to labour disputes, labour negotiations or other similar information. Further, ORC submits that the information at issue cannot be considered technical information as it does not fall under the general categories of applied sciences or mechanical arts or describe the construction, operation or maintenance of a structure, process, equipment or thing. ORC respectfully suggests that the Appellant has not demonstrated how the information remaining at issue falls within those information category definitions.

### **Finding**

Based on my review of the information in the record and the representations of the parties, I find that the record at issue contains only commercial information within the meaning of section 17(1). This information relates to the appellant's submission to provide project management services regarding the project for the ORC [Order MO-2197].

I find that there is no labour relations information in the record at issue. The names, duties and qualifications of the appellant's employees does not qualify as "labour relations" information for the purposes of section 17(1) [Orders MO-2151, MO-2164]. Additionally, I find that this information cannot be characterized as commercial, financial, trade secret or technical information for the purposes of section 17(1). As all three parts of the test must be met for section 17(1), and this information is not personal information, these pages of the record should be disclosed to the appellant.

Further, the information described by the appellant as technical information does not, on my review, qualify as "technical information" under section 17(1). The approach taken by the appellant to complete the project relates to the commercial aspect of its proposal rather than information prepared by a professional describing the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010]. Accordingly, I find the information characterized by the appellant as "technical" information is commercial information for the purposes of section 17(1).

In summary, I find that the following pages of record do not qualify for exemption under section 17(1): 396, 397, 406, 408, 411, 446 (in part), 459-461, and 470-472.

The rest of the information qualifies as "commercial information" and part 1 of the test has been met for this information.

## **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].

The appellant submits that the record at issue was supplied by it to the ORC in response to an RFQ concerning the project management services required by the ORC. The appellant states that nothing in the record is a result of negotiations between itself and the ORC.

The ORC made no submissions on this issue.

Based on my review of the information, I find that the information was supplied by the appellant to the ORC in response to the ORC’s RFQ.

### **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]

On the issue of confidentiality, the appellant submits that it has treated the record as confidential and has not revealed it to anyone outside the ORC or their organization. The appellant states:

The Record is not available to the public...We have been led to believe that the Record would not be public because the very nature of the RFQ process is that the proposals received are sealed and confidential, lest competitors steal ideas from each other for winning the right to tender services...

The fact that the competition is now over in no way lessens the confidential nature of the Record for all the reasons discussed above...

The ORC made no submissions on this issue.

Based on my review of the information at issue and the representations of the appellant, I find that the appellant had a reasonable expectation that its record would remain confidential when it supplied the information to the ORC.

Accordingly, I find that all of the information at issue in this appeal was “supplied in confidence” in the context of the ORC’s RFQ process, thereby satisfying part 2 of the section 17(1) 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].

The appellant argues that sections 17(1)(a), (b) and, (c) apply.

I will now deal with each item of the test in part 3 separately.

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

The appellant submits that disclosure of the commercial information in the record could reasonably be expected to prejudice significantly its competitive position. The appellant states:

If disclosed to a third party, the ideas, processes and procedures outlined in the Record could be copied by our competitors in future RFQ processes, which will significantly prejudice our competitive position by eliminating the competitive advantage that our proposal structures, and our processes and procedures for completing construction projects, have given us. As mentioned above, the project management industry is extremely competitive. It is more than merely price that distinguishes us from our competitors, but also our proposal format and other information related to providing the services that is revealed in those proposals. It is inevitable that the Record will be used as a template by others because it was the winning proposal.

...

We have invested considerable time, money and resources into the development, cultivation and acquisition of the various methods, procedures, forms, corporate structures, employee mix, manpower estimates, risk registers, working relationships, support resources, service delivery methods, project plans, master schedules, and cost tracking logs that we use to provide project management services. Clearly, to disclose these extremely confidential, technical documents, methods and procedures to our competitors would prejudice our technical position in an extremely unfair manner.

The appellant submits that it regularly competes against the same firms for similar management projects and in the past it has prevented disclosure of its winning proposals (Order MO-2164).

The ORC submits that the appellant has not proven the actual and resulting harm that exists if the information is disclosed. It states:

ORC acknowledges the current competitive climate in the real estate industry and particularly in the area of project management; however, ORC remains unclear as [to] how disclosure of the information remaining at issue or the form and structure of the Appellant's proposal would result in prejudice.

**Finding**

Based on my review of the record, I find that only portions of the record contain commercial information which if disclosed could reasonably be expected to prejudice significantly the competitive position of the appellant. In particular, I find that the information on page 457 (Quality Assurance Procedures); page 468 (duplicate information to page 457); and appendices

A (Quality Assurance Procedures), B (Sample Project Plan), C (Sample Master Schedule), D (Sample Cost Control Log) and E (Sample Risk Register) all contain information that qualifies for exemption under section 17(1)(a).

These pages of the record contain detailed information about the appellant's approach to managing the project and the way it intends to provide its particular services to the ORC. The appendices, in particular, contain samples of the actual documents that the appellant will be providing to the ORC. I find that disclosure of these records could reasonably be expected to prejudice significantly the competitive position of the affected party. I note that Adjudicator Frank Devries withheld similar information in Order MO-2164, referred to earlier by the appellant.

On the other hand, I also find that portions of the record do not qualify for exemption under section 17(1)(a). In particular, I am referring to the information remaining at issue on page 446 (Qualifications as a Principal), page 456 (Qualifications as a Principal) and 467 (duplicate of page 456). I adopt the reasoning taken by Adjudicator Devries in Order MO-2164 in which he found that some of the information at issue appeared to be general, public information about work done by the affected party and the manner in which the affected party was prepared to meet the requirements of the proposed project. Regarding this "commercial" information, Adjudicator Devries stated the following:

In two recent order (PO-2478 and MO-2151), I reviewed similar arguments. In PO-2478 the arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry. In that case, the exemptions in sections 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*) were 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 adopted this same approach in Order MO-2151, and I will also apply it to the circumstances of this appeal. On that basis, I am not satisfied that the disclosure of general information contained in the proposal which discloses the “form and structure” of the proposal 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. Furthermore, on my review of the particular information contained in the proposal, I find that much of it is of a general nature, while the more specific information is contained in the appendices (two of which I have found qualify for exemption under section 10(1)(a)). I have not been provided with sufficiently detailed and convincing evidence to demonstrate that the disclosure of this general information could reasonably be expected to result in the harms set out in section 10(1)(a). Therefore, I conclude that these portions of the record are not exempt under that section.

The pages of record, referred to above, contain the appellant’s history and qualifications as well as information that I would consider general business information. I do not accept the appellant’s argument that disclosure of this general information which sets out the “form and structure” of the appellant’s proposal could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

In summary, I have found that pages 446 (in part), 256 and 457 do not qualify for exemption under section 17(1)(a) and I will proceed to consider their possible exemption under sections 17(1)(b) and (c).

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

The appellant submits that if the record is made public, it will result in fewer responses to ORC’s requests for qualification being made by “quality firms”. The appellant states:

Firms like us will be reluctant to respond to the ORC’s future requests for qualifications and to do business with the ORC because the disadvantages of

disclosure (i.e. prejudice to competitive position and undue gain) will far outweigh the benefits. It is in the public interest that as many firms as possible respond to every ORC RFQ, so that the firm that offers the best combination of price and quality may be selected for the project.

The ORC submits that while it values its business relationships, as a government agency subject to the *Act*, it has a legislated responsibility to operate in an open and transparent manner while remaining accountable for the expenditure of public funds. The ORC further submits that it has attempted to balance between the appellant's right to confidentiality in the proprietary portions of its proposal with its responsibilities under the *Act*.

### **Finding and analysis**

Based on my review of the record remaining at issue and the representations of the appellant, I find that section 17(1)(b) does not apply. I am not persuaded that disclosure of the information that I have found not exempt under section 17(1)(a) would result in similar information no longer being supplied to the ORC within the meaning of section 17(1)(b) of the *Act*. As stated above, the information that remains at issue is general business information. This is the type of information that organizations who want to do business with the ORC would expect to provide in a proposal. The appellant has provided me with nothing more than speculation as to how disclosure of this information would result in similar information no longer being supplied to the ORC.

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

Finally, the appellant submits that disclosure of the information would result in undue loss or gain to a person, group, committee or financial institution or agency. The appellant states:

We have incurred the expense and invested the enormous amount of time required to plan and prepare winning proposals and develop the project management procedures contained in the Record. If the Record is disclosed, then our competitors would have a gain to which they are not entitled because they could simply copy the format of our qualification submission and the procedures contained in the Record.

...

The detail contained in those documents, and with which the procedures and methods are described clearly has taken us a long time and a lot of money to create. We are not in the business of training other firms on how to plan and manage projects and the disclosure of the above described information to them does just that.

...

Finding and recruiting and retaining key employees of the calibre that we have and that are needed to produce winning proposals and manage successful projects is a time consuming and costly enterprise. If the Record is disclosed, our competitors will not have any expenses related to the search for these types of employees, as they will be listed for them in the Record. Consequently, our competitors will be able to use the money they saved in the search for these employees, on salaries for them. Please note that recruitment costs are significant. In some cases, job recruitment firms charge fees up to 30% of an employee's salary for the first year. Our competitor's ability to offer inflated salaries to our employees because of the money they save on job search is an undue gain...

The ORC did not make representations on this issue.

### **Finding**

I do not find that section 17(1)(c) applies to exempt the information remaining at issue from disclosure. I have found that information about the certain aspects of the proposal and specific samples of documents qualifies for exemption under section 17(1)(a). The information remaining at issue consists of generalized description of the appellant's qualifications, business and employees. I find this information not exempt under section 17(1)(c) for the same reasons I found it not exempt under section 17(1)(a). The appellant has not provided me with detailed and convincing evidence that disclosure of the "form and structure" of its proposal could reasonably result in undue loss to itself or undue gain to a competitor.

In conclusion, with respect to section 17(1), I find that part 3 of the test, as outlined in paragraph (a), operates to exempt certain records or portions of records from disclosure. With respect to the remaining records or portions of records (pages 446 (in part), 456, 467), I have not been provided with sufficiently "detailed and convincing" evidence to establish a "reasonable expectation of harm" as contemplated by paragraphs (a), (b) or (c) of section 17(1). As all three parts of the test under section 17(1) must be met, the remaining information contained in the records or portions of records do not qualify for exemption under section 17(1).

### **ORDER:**

1. I order the ORC withhold the following pages of information in the Record: pages 446 (in part), 447 (employment history information); page 457 (Quality Assurance Procedures); page 468 (duplicate information to page 457); and appendices A (Quality Assurance Procedures), B (Sample Project Plan), C (Sample Master Schedule), D (Sample Cost Control Log) and E (Sample Risk Register). For greater certainty, I have highlighted the portions of page 446 that should be withheld on the copy of that page sent to the ORC along with this order.

2. I uphold the ORC's decision to disclose pages 396, 397, 406, 408, 411, 446 (in part), 456, 467, 459-461, and 470-472. For greater certainty, the portions of page 446 that are *not* highlighted on the copy of that page sent to the ORC along with this order are to be disclosed.
3. I order the ORC to disclose the records referred to in Order Provision 2 by sending a copy to the original requester no later than **October 2, 2009** but not earlier than **September 26, 2009**.
4. In order to verify compliance with this order, I reserve the right to require the ORC to provide me with a copy of the portions of the record which are disclosed to the original requester pursuant to Provision 2.

Original signed by: \_\_\_\_\_

Stephanie Haly  
Adjudicator

\_\_\_\_\_ August 26, 2009