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

ORDER MO-2489

Appeal MA08-33

United Counties of Leeds and Grenville

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

Background

Broadband high-speed Internet is vital to opening up a world of growth opportunities in rural Ontario. It connects rural families, businesses and professionals with opportunities in commerce, health, education, social development and community enrichment.

As set out in the Rural Connection Broadband Program webpage at www.Ontario.ca/rural, in the summer of 2007, the Government of Ontario offered a one-year broadband building program that helped 18 communities install broadband infrastructure. That one-year program was so successful that in March 2008, it announced the 4-year Rural Connections Broadband Program. Its aim was to continue addressing the broadband gaps in rural, southern Ontario in partnership with municipalities and with involvement from the telecommunications sector. Since the summer of 2007 the Government of Ontario has committed over $27.4 million to 47 municipal broadband projects.

The Rural Connections Broadband Program is led by the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA).

The Request

The OMAFRA received a request under the *Freedom of Information and Protection of Privacy Act* for access to a proposal submitted by the successful proponent (the affected party) in response to a Request for Proposal (RFP) for broadband service throughout the United Counties of Leeds and Grenville (the United Counties).

After it received the request, OMAFRA considered the United Counties to have a greater interest in the requested record and transferred the request to the United Counties.

The United Counties identified a record responsive to the request and, after extending the time to respond to the request under section 20(1) and notifying the affected party, who objected to disclosure, relied on the mandatory exemption at section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to deny access to it, in full.

The requester (now the appellant) appealed the decision denying access.

The matter did not resolve at mediation and it was moved to the adjudication stage of the appeal process.

I commenced the adjudication by sending a Notice of Inquiry setting out the facts and issues in the appeal to the United Counties and the affected party, initially. Only the affected party provided representations in response to the Notice. A Notice of Constitutional Question (NCQ) accompanied the affected party's representations. In the NCQ, the affected party took the position that information about identifiable individuals that appear in the records, other than their name, title and business address is "personal information" in accordance with the Federal

Personal Information Protection and Electronic Documents Act (*PIPEDA*). The affected party also asserted that, unlike the approach taken by this office, there is no basis under *PIPEDA* for a finding that other types of information associated with an individual in a professional, official or business capacity may not qualify as that individual's personal information. The affected party asserted that if there was any conflict between the two statutes (*PIPEDA* and the *Act*) regarding information in the records that is associated with an individual in their professional, official or business capacity, *PIPEDA* would prevail because it is a Federal statute.

The appellant subsequently advised this office that it was not seeking access to any information in the record that qualifies as "personal information," such as employment and educational history, and as a result, that type of information and the issues raised in the NCQ were no longer at issue in the appeal. A Notice of Inquiry, accompanied by the non-confidential representations of the affected party, was then sent to the appellant who provided representations in response. In his representations, the appellant further advised that he is not seeking access to:

- the affected party's financial statements;
- information on its potential subcontractors; or,
- any details of its construction costs. I interpret this to include details of the affected party's construction costs for the existing network and/or for building out the network proposed in its bid.

As a result, this information is also not at issue in the appeal, and along with any information that qualifies as "personal information," will be severed from any portion of the records that may be disclosed as a result of this order.

I determined that the appellant's representations raised issues to which the United Counties and the affected party should be given an opportunity to reply. Accordingly, I sent a copy of the non-confidential representations of the appellant to the United Counties and the affected party, inviting their reply representations. Only the affected party provided reply submissions.

In the course of preparing my decision in this appeal, I determined that it was necessary to seek representations from the United Counties on whether all, or part of, the bid at issue in this appeal was subject to a public opening. I also requested that the United Counties provide me with a copy of any finalized agreement between the United Counties and the affected party. The United Counties provided a copy of the finalized agreement, as well as its representations on whether all, or part of, the bid at issue in this appeal was subject to a public opening. The United Counties responded that the first portion of the bid was opened publicly. I determined that the appellant and the affected party should be given an opportunity to respond to the United Counties' position regarding public opening. Both the appellant and the affected party provided responding representations. In its representations, the affected party agreed that there was a public opening of the bid, but that it was extremely limited in scope. I then sent the representations of the affected party and the appellant on this issue to the United Counties for reply. The United Counties provided further reply representations. This is addressed in more detail below.

RECORDS:

At issue in this appeal is a bid from the affected party responding to the RFP, set out in two portions identified by the affected party as Binder #1 and Binder #2.

DISCUSSION:

PRELIMINARY MATTER

As set out in the background portion of this order, the appellant is not seeking access to:

- any information that qualifies as "personal information", such as employment and educational history. I interpret this not to apply to an employee's name, title, business address or telephone number that may appear in the records. This is because sections 2.1 and 2.2 of the *Act* (and for that matter the definition of personal information in *PIPEDA*) provide that this type of information is not included in the definition of "personal information";

- the affected party's financial statements;

- information on its potential subcontractors; and,

- any details of the affected party's construction costs for the existing network and/or for building out the network.

As a result, this information will be severed from any portion of the records that may be ordered disclosed to the appellant. I have reviewed the records and in my view the information highlighted in blue on a copy of the pages of the records provided to the United Counties with this order qualifies as the type of information to which the appellant no longer seeks access and ought not to be disclosed.

THIRD PARTY INFORMATION

As identified above, the United Counties denied access to the affected party's bid on the basis of section 10(1) of the *Act*. Accompanying the affected party's representations was an "annotated" version of the two portions of its bid with discreet information highlighted in yellow. The affected party submitted that, except for Appendix B to Binder #1, the entirety of its bid should be withheld under sections 10(1)(a), (b) and (c) of the *Act*. In the alternative, it argues that, at a minimum, the highlighted information in the "annotated" version of the two portions should be withheld under those sections.

Sections 10(1)(a), (b) and (c) of the *Act* read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in

> confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

Part 1: Type of Information

The affected party initially submitted that its bid contains commercial, financial and technical information. In the course of the exchange of representations, the affected party also took the position that the records at issue contain "trade secrets." The meaning of this type of information has 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].

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].

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

I have reviewed the records at issue and the submissions of the parties and I find that they contain information that meets the definitions of technical, financial and/or commercial information, reproduced above. However, I am not satisfied that the template of the affected party's bid, nor the examples of information that the affected party argues qualifies as a "trade secret," satisfies the definition of a "trade secret" as contemplated by section 10(1).

Accordingly, as I have determined that the records contain information that meets the definitions of technical, financial and/or commercial information, I find that part one of the section 10(1) test has been satisfied with respect to that information.

Part 2: supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

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

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences 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 is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above)].

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

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

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

The appellant's representations do not address the "supplied" test in detail, and focus on the "in confidence" portion of the test.

I will address the "in confidence" component of part two of the section 10(1) test, first.

In Confidence

The Representations of the United Counties

The United Counties initially provided no representations in response to the Notice of Inquiry. In the course of preparing my decision in this appeal, however, I determined that it was necessary to seek representations from the United Counties on whether all, or part of, the bid at issue in this appeal was subject to a public opening. It provided the following information in response to my question:

> The "part A" of the RFP in question was opened publically on October 5, 2007. [named individual], [the United Counties] MIS Manager and [named individual], [the United Counties] CAO Support were in attendance. No vendors were present at the opening.
>
> Part A of the RFP was opened as required by the Ministry of Agriculture, Food and Rural Affairs. Part B which contained the proprietary information was opened after the vendor was chosen based on Part A of the RFP. [Named individual] and former Counties CAO [named individual] were in attendance to open the Part B envelopes.

I then sent a letter to the appellant and the affected party including the information provided by the United Counties inviting their representations in response. Both the appellant and the affected party provided responding submissions.

The Appellant's Representations

The appellant submits that the provisions of the RFP support its assertion that the proposal was not supplied in confidence and furthermore, a great deal of the information at issue is publicly available from the affected party's website.

The appellant points to section 3.7 of the RFP, submitting that it provides that the form of response to the RFP must consist of two envelopes: one that details the non-financial aspects of the proposal and the other the financial aspects of the proposal. Section 3.7 of the RFP reads:

> 3.7 Form of Response
>
> Your response must conform to the following: ENVELOPE #1
>
> Understanding of the Scope of Work - articulate your understanding of this project in terms of community, the County's broadband requirements and the RURAL CONNECTIONS program.

> Solution Overview - provide an overview of how your company would approach the project, work with the United Counties of Leeds & Grenville Project Team, and help implement our vision. Identify staff expertise, project management methodology and client(s) currently operating similar solutions. Explain how this project fits into your company's objectives and strategic direction.
>
> Description of Proposed Broadband Services - include detailed plotting of proposed services on maps.
>
> Vendor/Company Profile - include complete contact coordinates for the company(s) and the specific individual to be contacted for this proposal.
>
> Project Management and Project Plan
>
> Vendor Qualifications and References - provide detailed profiles and references for the company(s), project managers and developer(s) and other personnel (as determined necessary) for this project. The reliability of the Proponents' claims must be demonstrated by their track record and client references from communities currently served by the vendor.
>
> Timeline - Provide a comprehensive timetable and demonstrate that your team will be able to complete the project in an efficient and timely manner.
>
> Bidder's Declaration Form (Appendix "D")
>
> Bidder's Information Form (Appendix "E")
>
> Your response must conform to the following: ENVELOPE #2
>
> Pricing - provide rates and costs for all services and costs deemed necessary for this project, including sustainability information and partnership proposition.
>
> Sustainability - provide financial information to establish projections as to the market penetration and sustainability from revenues generated from the client base within the newly serviced areas.
>
> Private Sector Matching Funding - It is expected that proponents submitting a proposal will include an analysis of their financial contribution to the project, and, any County/local municipally owned vertical real estate or other physical assets that the proponent may utilize in the project's implementation.

The appellant further asserts that all attendees at a meeting for prospective bidders were told by the United Counties that the contents of the first envelope would be made public and that any confidential information should be placed in the second envelope. The appellant submits that at this meeting the United Counties also advised that it could not guarantee that any information in the second envelope would remain confidential. In further support of its position, the appellant

refers to an email from the United Counties responding to a request for clarification regarding whether OMAFRA would be treating the proposals confidentially. The email sets out that OMAFRA would, "respect the confidentiality of information and if [there is] any information that is highly confidential, then it should be labelled as such. The government is of course subject to all freedom of information rules."

In response to the information provided by the United Counties regarding the public opening of "part A," the appellant submits that since the RFP refers to Envelope #1 and Envelope #2 rather than Part A or Part B, it assumes that in the excerpt reproduced above, the reference to Part A and B really means Envelope #1 and Envelope #2, respectively. The appellant also comments that "it could be seen as prejudicial to the position of the appellant, for [the writer] to characterize information included in Envelope #2 (part B) as proprietary. The status of the information included in Envelope #1 and Envelope #2 has yet to be determined by the Adjudicator."

The appellant submits that, in addition to section 3.7, other provisions of the RFP support its position that the proposal was not provided "in confidence."

The appellant submits that section 3.3 of the RFP indicates that the bid was to conform to a specified format and be submitted in two portions, one to be opened publicly. Section 3.3 reads:

> Submission Requirements
>
> 1. The proposal, excluding costs, shall be submitted in one (1) envelope, containing eight (8) hard copies of the proposal as well as one electronic copy of the file in Word or Adobe Acrobat format by 3 p.m. on the closing date October 5, 2007.
>
> 2. Envelope number two will include the project costs as outlined in Appendix "A" Infrastructure Implementation Cost Template and Appendix "B" Operation and Maintenance Cost Template. This envelope will only be opened if the respondents proposal is selected for further consideration by the steering committee.
>
> 3. Envelopes shall be sealed and clearly marked as to contents and identity of proponent,
> …
> 9. There will be a public opening of the proposal.

The appellant also points to section 3.5 of the RFP entitled "RFP Timetable," which refers to a "Public Opening Council Chambers."

The appellant concludes its submissions by stating:

- since the successful proponent did not object to the public opening condition of the RFP, one can infer that the successful proponent accepted this essential condition;

- all interested bidders knew or should have known that there was absolutely no possibility of a "reasonable expectation" of confidentiality with regard to the contents of Envelope #1 and that they also knew or should have known that there was no unequivocal assurance that the confidentiality of the contents of Envelope #2 was guaranteed;

- the United Counties' confirmation of the public opening of all proposals, as well as the specific references to a public opening in the RFP, support and reinforce the appellant's position that the successful proponent had no reasonable expectation that any, and certainly not all, of the contents of its proposal would remain confidential;

- as the contents of the Envelope #1 have already been the subject of a public opening, at a minimum, that portion should be immediately released.

The appellant also provides a list of information generally available on the internet, or the affected party's website, in an effort to demonstrate that much of what the affected party alleges is confidential is, in fact, available from public sources.

The Representations of the Affected Party

The affected party submits that the proposal was submitted both explicitly and implicitly in confidence. In particular, it submits that:

- it placed a broad confidentiality notice on the cover page of each of Binder #1 and #2 and an abbreviated confidentiality notice referring back to the first page on each of the pages that followed;

- the bid was consistently treated in a manner that indicated a concern for its protection from disclosure, prior to being supplied to the United Counties;

- the bid was prepared to respond to a request for proposals, which, relying on Orders MO-2151 and PO-2618, does not entail disclosure to any party other than the United Counties.

With respect to whether all, or a portion of, its bid was to be made public, the affected party initially relied on section 3.6(7) of the RFP which provides that:

> The United Counties of Leeds & Grenville will consider all proposals to be confidential, and will not release proposals to any persons, other than the United

> Counties of Leeds and Grenville project staff, advisors and Provincial support member without first obtaining permission.

In its representations provided in response to the appellant's initial submissions, the affected party stated that "there is no indication in the RFP document of bid material information being segregated into two different envelopes, one of which would be public and one of which may or may not be public as claimed by the appellant." The affected party submitted that it understood that the bid document was opened only to confirm its contents.

In response to the information provided by the United Counties, the affected party took the position that the public opening referred to by the United Counties was extremely limited in scope and was not intended to disclose all the information contained in a bid. The affected party submits that the public opening involved, at most, the disclosure of the bidder's name and bid amount, with all other information remaining subject to an expectation of confidentiality. The affected party bases its position on the bid opening practices in other locales, as well as Orders MO-1364, PO-1794 and PO-1816.

The affected party explains that:

> [It] fully expected that the public opening would disclose the fact that [the affected party] was responding to [the United Counties] RFP. However, [the affected party] did not expect disclosure and, through its confidentiality notices on the document itself, made it clear that the contents of that proposal would not and should not be disclosed at that time or at a later time.
>
> The purpose of the public opening, as [the affected party] understood it from the context in which the opening took place, was to establish the bidders' identities, not to disclose all information contained in a given proposal. [The affected party] thus did not expect the opening to involve any disclosure to the public of the proposal's technical and commercial details.
>
> The broadband sector has, over the past several years, seen numerous public funding programs to stimulate the roll-out of high speed services. It is now a well-established industry practice, in this sector, that "public openings" only disclose the bidders' names, and are <u>not</u>, in any way, tantamount to a public viewing. The "public opening" confirms that a bid has been received on time, that the bid does not, for example, contain additional materials or inducements, and that the disclosure at these openings is so limited, industry representatives do not attend. For example, the City of Kawartha Lakes in 2007 held a similar "public opening" of the responses it had received from a near-identical rural broadband RFP [reference deleted]. As is typical, [the affected party] did not attend, and [the affected party] understands that no other industry representatives attended the public opening. This pattern has been repeated often over the past two years over numerous public openings.
>
> In any event, in the present case, the public opening itself could not possibly have disclosed any proposal's details, even if any member of the public had been

> present. Part A of [the affected party's] response consists of many pages of detailed technical and other information compiled as a part of the RFP process.
>
> The public opening was scheduled for and occurred, [the affected party] understands, on October 5, 2007 at 4:00 pm. That limited time frame would not have provided enough time for anyone to read (or read out, or review in detail) even [the affected party's] proposal alone, and certainly not every proposal submitted. One hour before the close of regular business hours at the end of the day (and there is no indication that the "opening" would continue beyond the close of business) would also not even have been enough time for every bidder to photocopy every other bidder's proposals. In short, [the affected party] was aware that it would have been neither practical nor reasonable for the public opening to disclose the proposals' contents in any significant detail.
>
> Further, the "public opening" in this case did not actually occur in front of the public. As mentioned above, [the affected party] understands that only [the United Counties] employees were present at the opening. No other bidders or any members of the public attended. The RFP document did not invite bidders to attend nor, to [the affected party's] knowledge, did any bidders or other members of the public actually attend or request to attend.
>
> It does not appear that any notice of the proposals' opening was given to the public. [The affected party] is not aware that any such notice was given. [The affected party], in its own right, did not attend and was not aware that a public "event" was expected to take place. For example, the "News and Events" section of [the United Counties'] website [reference omitted] contains several press releases regarding its Broadband RFP, but none indicated a public opening to which the public would be invited - or otherwise providing public notice of a public opening. Further, the opening is not listed as a meeting anywhere on the [the United Counties] website's extensive list of council and committee meetings. It appears that the only indication given of the "public opening" is that contained in the RFP itself. [The affected party] had no expectation, given this lack of notice of any public event, and the lack of attendance of any outside persons, including bidders, at the event, that the "public opening" would consist of any more than an identification of the bids received by the County and a public disclosure of the bidders.
>
> Finally, [the affected party] repeatedly asserted that the information in the proposal was submitted in confidence and that any future disclosure would be opposed. These assertions, made on the proposal's cover and on each page's footer, demonstrate that [the affected party] did in fact expect its business and technical information to be kept confidential. The County never objected to these claims for confidentiality and did not advise [the affected party] that the public opening of the bid was inconsistent with [the affected party's] claim. [Emphasis in original]

The affected party refers to Order PO-1794, where records relating to a company's publicly opened bid were found not to have been submitted in confidence to the Ministry of Natural

Resources, even though the public opening had only revealed the bidders' names and total prices. It submits:

> It is clear, however, from that decision that the public opening of the bid documents was not, on its own, the determining factor. In that instance, the Adjudicator also examined Ministry procedures, past practice, and the fact that the information at issue was not of a proprietary nature. The Adjudicator found that
>
> > "There [was] nothing in [that] record, which relates in any specific way to pricing, delivery charge variations, bid break downs, or would be considered confidential information which would enable a competitor to gain an advantage over the [appellant] by adjusting their bid and underbidding in future business contracts." [Footnote omitted]
>
> That case, in which the information at issue was simply not sensitive enough to give rise to an implicit expectation of confidentiality, is thus very different from the present proceeding. [The affected party's] commercial information is highly sensitive, inherently giving rise to an expectation of confidentiality because of its potential to enable a competitor to compete unfairly for future rural broadband projects. …

The affected party also distinguishes Order MO-1364, where tender information subject to a public opening was found not to have been submitted with a reasonable expectation of confidentiality. It states:

> However, unlike in the current situation, the information at issue in Order MO-1364 was directly related to the information that had otherwise been disclosed: the total amount of the contract had already been disclosed, and the additional information sought consisted of the complete tender amount on which the contract price was based. The confidentiality of the tender's details (the unit prices) was never questioned. In this case the information at issue is the technical and commercial details of [the affected party's] tender package, itself. The disclosure of similar tender details in Order MO-1364 was not considered.

Finally, to counter the appellant's submission that its confidential information is publicly available, the affected party provides a detailed comparison of what is contained in the proposal with what the appellant asserts is publicly available. It submits that "[i]t is apparent from a review of the materials that the information submitted by [the affected party] in its bid was prepared specifically for the United Counties' RFP in light of the customer's requirements."

The United Counties' Reply Submissions

I sent a copy of the representations of the affected party and the appellant to the United Counties for its reply. I invited the United Counties to review the representations and provide submissions addressing the degree to which the bid at issue was to be publicly opened, and whether that was

communicated in any way to the bidders. In particular, I invited the United Counties to specifically address whether the "public opening" was simply to disclose the name of the bidder, or the name of the bidder and the amount of the bid; or whether it was broader in scope and again, whether that was communicated to the bidders.

The United Counties advised as follows:

> The public opening of Part "A" of the RFP was broader in scope in that it included the nature of the bidder, the bid amounts and the summary of the technology proposed. According to [named individual], Manager, Municipal Information Systems, the public opening date was conveyed at the Vendors Meeting held on September 21, 2007 and in addition the public opening date, time and place is contained in the RFP under the RFP timetable.

Analysis and Findings

I have carefully reviewed the affected party's bid, the terms of the RFP and the submissions of the parties. I note that, other than the content of the RFP at issue in this appeal, there is no evidence of any specific directives or procedures from the United Counties governing the general process and procedures for bids in response to its requests for proposals. Nor has any evidence been provided of any of the United Counties' historical processes and procedures relating to bids.

With respect to the terms and conditions of the RFP, I am satisfied that it provided for a public opening of the content of the affected party's Binder #1 (the equivalent of Envelope #1 in the RFP). Throughout the RFP, there are references to two portions of a responding bid being placed in separate envelopes. For example:

- section 3.3(1) of the RFP provides that the proposal, excluding costs, would be put in one envelope;

- section 3.3(2) provides that a separate envelope should include the project costs;

- section 3.7 (reproduced above) sets out in greater detail what is to be contained in each of two envelopes.

In my view, whether they are referred to as parts A and B (by the United Counties, above) or Binders #1 and #2 (by the affected party) or Envelopes #1 and #2 (in the RFP), is of no consequence, as it is obvious from reading the RFP that each bid was to have two portions.

Section 3.6(10) of the RFP provides that proposals shall be prepared in accordance with the format and requirements of the RFP and, as one would expect, the bid provided by the affected party has two portions. The first portion (Binder #1) corresponds to the required contents of Envelope #1 discussed at section 3.7, set out above. The second portion of its bid (Binder #2) corresponds to the required contents of the Envelope #2 referred to in section 3.7. This portion is defined at section 3.3(2) of the RFP as the "project costs." I find that the two portions of the

affected party's bid are equivalent to Envelope #1 and Envelope #2, as defined in the RFP at issue in this appeal.

The provision at section 3.6(7) of the RFP indicates that the United Counties would consider all proposals to be confidential, and would not release proposals to any persons, other than the United Counties project staff, advisors and provincial support member without first obtaining permission.

This contrasts with sections 3.3(9) and 3.5 of the RFP, which provide for a public opening of the "proposal." It also contrasts with the evidence of the understanding of the parties, who all agree that a portion of the bid would be publicly opened, the affected party only ultimately taking issue with what the extent of the "public opening" entailed.

After considering the evidence on this issue and reading the RFP as a whole, I find that the specific provisions of sections 3.3(9) and 3.5 modify the general terms of sections 3.6(7) and are consistent with section 6.2, which, after referring to the cost summary templates provided in Appendices "B" and "C," provides that the United Counties "commits to the maintenance of confidentiality in reviewing all pricing details of the proposals," being, in my opinion, the second portion of the bid (Binder #2), only. I find, therefore, that the first portion of the affected party's bid, being Binder #1, was subject to an explicit direction of public opening.

With respect to the Orders relied upon by the affected party, I have carefully considered these Orders and find that they are distinguishable from the situation in this appeal. The quotation that the affected party attributes to the adjudicator in Order PO-1794 is actually taken from the submissions of the institution in that appeal. In that Order, Senior Adjudicator David Goodis held that, based on the institution's submissions in that appeal, which included a reference to its written bid procedures and directives, and in the absence of submissions from the appellant on this issue, he was unable to conclude that the information in question was supplied in confidence.

In Order MO-1364, in which the tender package provided to bidders contained a statement that the proposal would be opened publicly, Adjudicator Laurel Cropley determined that the institution in that appeal approached the matter by recognizing that the total price of the contract would be disclosed, but not the unit prices of the tendered bid. She found that this approach was consistent with the practice of a typical public tender opening process. That said, as acknowledged by the affected party, in the Order she references Order PO-1816 where, after referring to a number of orders of this office pertaining to bids, she wrote that:

> It is apparent from a review of these orders that institutional approaches to confidentiality during the tender process and the reasonableness of proponents' expectations are quite varied. It cannot be said that there is one uniform approach.

In this case the United Counties states that the first portion of the bid was to be opened publicly. Furthermore, the provisions of the RFP not only direct that a portion of the bid will be opened publicly, but also set out the content of what is to be publicly opened, and what is not. The RFP

clearly mandates that the envelope containing pricing information (Envelope #2) is not subject to public opening.

Finally, the affected party's representations focus on the lack of time to review the contents of the first portion of a bid in response to the RFP. The issue before me, however, is not whether there would be time to review or copy a proposal at the public opening, but whether an expectation of confidentiality is based on reasonable and objective grounds. One of the circumstances listed above that is to be considered is whether it is "not otherwise disclosed or available from sources to which the public has access." In my view the evidence in this appeal points to the conclusion that Envelope #1 of the submitted bids, which corresponds to Binder #1 of the affected party's RFP in this appeal, was available from sources to which the public has access, because it was to be publicly opened on a specified date by the United Counties.

As a result, I find that, based on the evidence before me and the content of the RFP, the affected party did not have an objectively reasonable expectation of confidentiality, either implicit or explicit, at the time that its Binder #1 (the equivalent of Envelope #1 in the RFP) was provided. I am, therefore, not satisfied that the affected party had a reasonable expectation of confidentiality with respect to the content of Binder #1 (the equivalent of Envelope #1 in the RFP).

Regarding Binder #2, I find that, based on the evidence before me and the content of the RFP, the affected party had a reasonable expectation of confidentiality with respect to the content of this binder (the equivalent of envelope #2 in the RFP). In that regard, I am also not satisfied that the appellant has established that the section 10(1) information, in the manner in which it is set out in Binder #2, is available from the internet, the affected party's website, or from other sources accessible to the public. The information in Binder #2 describes in much greater detail the information which it contains than that which the appellant says is publicly available from the suggested sources.

Conclusion

I have found that the affected party has not provided sufficient evidence to establish that it had an expectation of confidentiality based on reasonable and objective grounds with respect to Binder #1. As all three parts of the section 10(1) test must be met, and the affected party has failed to satisfy the second part of the test, I find that Binder #1 is not exempt under section 10(1) of the *Act*. Accordingly, subject to severing the information that is not sought by the appellant as set out above, I will order that the balance of Binder #1 be disclosed to the appellant.

I will now address the "supplied" component of part two of the section 10(1) test with respect to the contents of Binder #2.

Supplied

As set out above, in previous orders of the Commissioner's office the provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by a 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 Order PO-2384, I addressed the "supplied" aspect of 17(1) of the Provincial *Freedom of Information and Protection of Privacy Act*, which is the equivalent provision to section 10(1) of the *Act*:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
>
> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

In Order PO-2435, Assistant Commissioner Brian Beamish rejected the position of the Ministry of Health and Long-Term Care 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 exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation." He wrote:

> 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.

The representations of the affected party

The affected party refers to Order PO-2618 in support of its position that a successful proposal is still "supplied" to an institution, even if it subsequently results in a contract between the successful bidder and the institution. In its representations on harms, addressed in more detail below, the affected party takes no issue with providing access to its finalized agreement with the United Counties, but asks that the bid be withheld asserting that:

> … public accountability in the expenditure of public funds can be fully achieved by providing access to the negotiated agreement between [the affected party] and the County. It is the agreement - and not [the affected party's] proposal - that provides the greatest amount of information about the project and the public expenditures related thereto.

The affected party submits, however, that should information in Binder #2 be considered as incorporated into the final agreement with the United Counties, the proposal still contains information that qualifies as "immutable" and should not be disclosed. The affected party highlighted the information it viewed as "immutable" on the annotated version of Binder #2 that it included with its representations. In particular, the affected party submits that the following information in Binder #2 satisfies the "immutability" exception, because it is not susceptible to change:

- Equipment Specifications and Costs — Page 7, Appendices C and D
- Infrastructure Implementation Cost Templates — Appendix A
- Operations and Maintenance Cost Templates — Appendix B
- Ownership Structure and Owner's Assets — Page 11
- Investments — Pages 1-3, 6
- Funding, Financing and Banking Information — Pages 1-3, 11

The representations of the appellant and United Counties

The United Counties did not provide any representations on the "supplied" portion of part two of the section 10(1) test. The appellant does not make specific representations on the "supplied" portion of part two of the test.

Analysis and Findings

All parties acknowledge that the proposal was supplied to the United Counties in the context of a bid process.

As set out above, the appellant is not seeking the affected party's financial statements, details of the affected party's sub-contractors or its construction costs. Accordingly, as this information will be withheld in any event, I need not consider whether it qualifies as supplied.

In the course of adjudicating this matter, the United Counties provided a copy of the finalized agreement with the affected party. Reading Binder #2 of the affected party's proposal in conjunction with the finalized agreement indicates that the United Counties chose a particular coverage option offered by the affected party and the parts of Binder #2 that corresponded to that option, both in general and in particular, were incorporated by reference through Appendix "A" of the finalized agreement. As a result, and in accordance with the authorities referenced above, those portions of Binder #2, which found their way into Appendix "A" of the finalized agreement, unless they fall within the "immutability" or "inferred disclosure" exceptions, do not qualify as being supplied because they consist of mutually generated contractual terms. Conversely, the portions of Binder #2 that contain section 10(1) information pertaining to an alternative to the chosen coverage option which did not find their way into Appendix "A" of the finalized agreement, do qualify as being supplied.

With respect to the section 10(1) information in Binder #2 that was incorporated by reference into the finalized agreement, I find that only the following portions of Binder #2 are immutable, because they are not susceptible of change in the negotiation process:

• Equipment Specifications	Appendix C
• Infrastructure Implementation	Appendix A, (pages 17, 18 and 19)
• Operations and Maintenance Cost Templates	Appendix B, (pages 22 and 24)
• Ownership Structure and Owner's Assets	Page 11, (three highlighted portions)
• Investments	Pages 1 (five highlighted portions), 3 (all highlighted portions), 6 (one highlighted portion)
• Funding, Financing, Banking, Projections	Pages 1 and 3 (see above), 9, 10, 11 (see above).

I find that none of the other section 10(1) information in Binder #2 qualifies as being supplied in confidence.

Part 3: Harms

General principles

I will now consider whether disclosing the information in Binder #2 that I have found to be supplied in confidence could reasonably be expected to cause the section 10(1) harms alleged.

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 Representations of the Affected Party

The affected party takes the position that the form and content of its bid, constitute the "informational assets" that it uses to participate in requests for proposals and compete for broadband provisioning contracts.

After submitting that in other appeals considered by this office the RFP's were so detailed that only certain basic information had to be provided in response, the affected party states:

> By contrast, [the affected party's] response to the County's request for proposals is a far more wide-reaching document that establishes a proprietary method for expanding broadband service to rural areas. It is the way in which [the affected party] intends to provide the service that [the affected party] seeks to protect, not merely pricing information and the model number for one piece of equipment. [The affected party's] proprietary methodology for providing broadband service to rural communities is comprised of a specific and proprietary engineered network architecture, specialized equipment, strategic partnerships, a specific roll-out strategy, and a delicate costing exercise in order to achieve high penetration levels at reasonable rates to consumers, the whole of which is dependant upon the expertise and experience of a select team of [the affected party's] professionals.

It submits that its proposal differs substantially from other types of bids considered by this office because it is not a bid to provide services to the United Counties at a quoted price; instead, it contains a detailed description of the actual total costs for building out the proposed network, a portion of which is to be reimbursed by the United Counties. The affected party submits:

> Pursuant to the agreement negotiated between the County and [the affected party], the County will reimburse [the affected party] for a portion of its costs. In other words, the price of the project to the County consists of [the affected party's] costs, as set out in the Binders. In order PO-2435, Assistant Commissioner Beamish suggested that information capable of providing a competitor with the means to determine the bidder's profit margins and mark-ups could result in the harms contemplated by sections 10(1)(a) and (c). The costing information, coupled with [the affected party's] customer pricing information, could lead a competitor to draw accurate references with respect to [the affected party's] profit margins and mark-ups. As a result, it should be exempted from disclosure.

It further states that the value of the information in the bid at issue is the amount of time, money and expertise invested in the development of the bid materials. The affected party submits that these "informational assets" have significant commercial value to the affected party and its competitors. It submits that:

> It is worth comparing the [affected party's] Binders to the bids that were considered for exemption in previous appeals before the IPC. Unlike many of these short bids submitted on standard forms prepared by the institution, the [affected party's] Binders constitute a 200 plus-page document, accompanied by 12 separate Appendices, drafted and formatted in its entirety by [the affected party], and representing input from a number of different professionals.

This, the affected party says, has resulted in successfully competing for bids. The affected party is particularly concerned that its competitors are likely to seek access to the bid at issue in order to improve their own bids to the detriment of the affected party. The affected party states that this would result in interference with its future proposals and negotiations for its competitor's commercial benefit, at its expense.

The affected party submits that it continues to participate in substantial provincial and federal initiatives to expand high speed internet in rural areas and that these programs involve large sums of money. It submits that the bid procedures for these programs are almost identical to the process for which the bid at issue in this appeal was compiled. It submits that the information in the bid therefore remains current, rather than historical.

In support of its position that information in Binder #2 should not be disclosed, the affected party refers to former Assistant Commissioner Tom Mitchinson's Order PO-1894, where he accepted that the disclosure of information about draft agreements of a prospective purchaser or records disclosing the positions or bids of unsuccessful third party bidders prior to the finalization of an agreement can result in section 10(1) harms.

The affected party explains:

> [Former] Assistant Commissioner Mitchinson accepted the submissions of the government institution to the effect that disclosure would significantly prejudice the prospective purchaser in respect of future contract negotiations, as the records

> disclosed the prospective purchaser's negotiating position. Further, harm would result from the disclosure of bid packages because, in the event the sale did not close, the unsuccessful bidders might wish to bid again and it would be inappropriate for their prior confidential bid information to be disclosed.
>
> Assistant Commissioner Mitchinson applied similar considerations in a subsequent case involving a request for disclosure of a statement of requirements, financial arrangements and a methodology for pricing hospital services submitted by a hospital to the Department of National Defence ("DND") with whom it had entered into a partnership to provide health services to Canadian Forces members. In order PO-2343, Assistant Commissioner Mitchinson recognized that because the Department had the right to unilaterally cancel the agreement, the information contained in the records could be used by a competitive health care institution to develop a comparable proposal for the Department. The work done by the hospital in addressing the financial and staffing implications of its proposal would assist other health care institutions in any subsequent arrangement with DND.

In summary, in support of its argument on harms it submits that disclosing the section 10(1) information in Binder #2 that I have found to have been supplied in confidence will have the following effect:

- its highly successful approach to responding to RFP's will be jeopardized;
- the time, money and expertise invested in the development of the bids will be lost;
- it will interfere with future proposals and negotiations with respect to opportunities to participate in government programs relating to broadband expansion which would result in undue loss to the affected party and undue gain to its competitors;
- disclosure of the binders would allow access to technical and financial information that apply to the affected party's future bid processes;
- combined with the customer pricing information, disclosing the actual total costs for building out the proposed network will allow a competitor to draw accurate inferences with respect to the affected party's profit margins, something that was withheld in Order PO-2435.

The affected party is specifically concerned about the possible disclosure of the following information in Binder #2 that I have found to be supplied in confidence:

- its costing information, which, it says, could reveal its profit margins;
- technical information (including network design, coverage and capacity, equipment details, network performance and availability). The affected party

submits that this is of the greatest value, since the choice of technology, subject to financial constraints, is left to the bidder;

- financial information (including annual revenue information and growth projections, monthly "churn" information, its ownership structure, its investments, its business plan for the project, and other funding, financing and banking information). The affected party says that disclosing this information will affect its existing and proposed financing arrangements and allow a competitor to conduct a business analysis to target the affected party's areas of vulnerability, as well as reveal information about the extent of its ability to invest in other broadband projects.

The Representations of the Appellant

The appellant submits that the affected party provided no evidence of economic harm. In particular, it submits that:

- the details regarding the equipment used and specifications, the configuration of equipment, range of services and prices are well known in the industry and/or available through the affected party's website;

- the RFP required bidders to detail the scope of the work, provide an overview of the proposed solution explaining how the bidder would approach the project and provide a description of the proposed services and timeline. The appellant submits that this information would not thereby be the "informational assets" of the affected party and "nor could one reasonably expect that disclosure of most of this information to others would harm [the affected party] or interfere with possible future bids."

- every bidder spent a significant amount of time, money and professional effort to produce its bid and had to provide the same range and type of information;

- Order PO-2478 determined that no section 10(1) harm results from disclosing the form and structure of a proposal;

Analysis and findings

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

I will now address the remaining information.

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

> The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

That said, however, 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 10(1) [Order PO-2435].

Section 10(1)(a): prejudice to competitive position

The affected party takes the position that the disclosure of the information in Binder #2 that I have found to be supplied in confidence will result in the harms listed under sections 10(1)(a), (b) and (c) of the *Act*.

I am not satisfied on the evidence before me that the affected party faces any real competitive threat from another Broadband Service provider in the United Counties. The service is operational in the United Counties and there are, no doubt, many users of the service currently. The project's affordability and viability was directly related to the use and integration of the existing infrastructure. The project also involved, as set out in the affected party's representations, the construction of additional infrastructure and the use of funds from the United Counties received under a Provincial grant program. The magnitude of the infrastructure and investment required to provide the Broadband services to the United Counties, coupled with the funding received under the Rural Connection Broadband Program lead me to conclude that there is no real viable replacement now that the affected party has completed the work.

The affected party relies on Orders PO-1894 and PO-2343 in support of its position that it will suffer harm because other bid processes, involving other locales are ongoing or that future bids will be so similar that its materials will be "almost identical." The harm that was found to exist in Order PO-1894 was to ongoing negotiations between the prospective purchaser and an institution, or to the unsuccessful third party bidders who might wish to bid again, all where the transaction had not been completed. One of the key factor's that led to the conclusion that there was a reasonable expectation of harm in Order PO-2343 was that the contract under consideration in that appeal was at a very preliminary stage. This is not the case here. As discussed above, the negotiations between the United Counties and the affected party have been completed, there is a finalized contractual agreement in place and the work has, to my

understanding, been completed. There are no "ongoing negotiations" between the United Counties and the affected party or a preliminary contractual stage to be interfered with.

In addition, it must be noted that although there will be some carryover of certain information to each proposal, which will be addressed below, each broadband solution in other locations will be dependant on topography, distribution of users and other technical features. The affected party acknowledges this much when it writes that "[i]t is apparent from a review of the materials that the information submitted by [the affected party] in its bid was prepared specifically for the United Counties' RFP in light of the customer's requirements."

Furthermore, the affected party states that the value of the information in the bid at issue is the amount of time, money and expertise invested in the development of the bid materials. The affected party submits that these "informational assets" have significant commercial value to the affected party and its competitors. Essentially, this is an argument that the form and structure of the affected party's bid has commercial value because it would allow competitors to use the information contained in the successful bid to tailor future bids, thereby resulting in its competitors unduly benefitting from the affected party's development efforts. Subject to my determination with respect to a certain amount of information below, I agree with the findings of Adjudicator Frank DeVries in MO-2151, where, in addressing a similar concern that the disclosure of the form and structure of the successful proposal at issue in that appeal would allow others to use it as a "template," he wrote:

> 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).

Furthermore, I am not satisfied that disclosing customer pricing information will allow a competitor to draw accurate inferences with respect to the affected party's profit margins. Firstly, the appellant is not seeking the affected party's construction costs. As well, not all expenses, such as office overhead, are set out in the financial projections. As such, calculating an accurate profit margin would involve sheer speculation. That said, however, disclosing the Business Plan Information at Table 1-2 of Binder #2 would provide the anticipated revenue and expense streams over a five year period for the project.

In all the circumstances, I do accept that there is a reasonable expectation of harm from disclosure of certain information contained in Binder #2 that I found to be supplied in confidence. This would extend to include specific details contained in those portions of Binder #2 the disclosure of which would reveal information relating to the affected party's proposed approach to the project, the anticipated revenue and expense streams over a fixed period for the project or other information obtained as a result of its experience, that will be of such value to future proposals that it is reasonable to expect that its disclosure will cause the affected party the section 10(1)(a) harms alleged.

After reviewing the portions of Binder #2 that I have found to be supplied in confidence, as well as the representations of the affected party and the appellant, I therefore find that the following portions of Binder #2 qualify for exemption under section 10(1)(a):

• Equipment Specifications	Appendix C
• Ownership Structure and Owner's Assets	Page 11, (three highlighted portions)
• Investments	Pages 1 (four highlighted portions) and 6 (one highlighted portion)
• Funding, Financing, Banking, Projections	Pages 1 (see above), 9 and 11 (see above)

As a result, I find that only these portions of Binder #2 are exempt under section 10(1)(a). I have highlighted those portions of Binder #2 in green on a copy of the pages of Binder #2 provided to the United Counties along with a copy of this Order.

Section 10(1)(b): ***similar information no longer supplied***

With respect to the United Counties' procurement and tendering process, it is undeniably in the public interest that any bid information continue to be supplied to the United Counties [the second requirement of section 10(1)(b)]. However, I am not persuaded that disclosing the section 10(1) information in Binder #2 that I have found to be supplied in confidence and that I have not found to be exempt under section 10(1)(a), could reasonably be expected to result in the affected party or other bidders no longer supplying similar information to the United Counties [the first requirement of section 10(1)(b)].

In my view, it is simply not plausible that disclosing the section 10(1) information in Binder #2 that I found to be supplied in confidence and that I have not found to be exempt under section 10(1)(a), could reasonably be expected to result in similar information no longer being supplied to the United Counties. This is because any bidder that did so would imperil its chances of winning financially lucrative contracts from the United Counties.

Section 10(1)(c): undue loss or gain

As discussed above, the affected party's major concern relates to the impact to its future proposals that will result from disclosure of information in Binder #2. In that regard, I have accepted that disclosure of certain information that I have set out above will cause the section 10(1)(a) harms alleged. I also conclude that, for essentially the same reasons, disclosure of only that information could also reasonably be expected to cause the section 10(1)(c) harm alleged.

Conclusion

In all the circumstances, only the information in Binder #2 that I have found to be supplied in confidence and to reasonably be expected to cause the section 10(1)(a) and (c) harms alleged qualify for exemption under section 10(1). For greater certainty, I find that I have not been provided with the type of "detailed and convincing" evidence required to establish that disclosing the other section 10(1) information in Binder #2 that I found to be supplied in confidence, could reasonably be expected to lead to the harms contemplated by sections 10(1)(a), (b) or (c) of the *Act*. Therefore, subject to my discussion on the application of the "public interest override" I will order that the non-highlighted portions of Binders #1 and #2 be disclosed to the appellant.

PUBLIC INTEREST

The application of the "public interest override" at section 16 of the *Act* was not raised at the mediation stage nor did the Notice of Inquiry seek representations on this issue.

In its representations, however, the appellant makes reference to there being a public interest in the disclosure of the withheld information. It submits that bids in response to Requests for Proposals should be made public "in order to ensure that public projects funded with taxpayer dollars can be held accountable, because accountability for public initiatives, services and spending is at the heart of Ontario's freedom of information legislation."

The appellant submits:

> The project that was the subject of the RFP involved the expenditure of $518,000 in public monies - $259,000 from the government of Ontario through OMAFRA and $259,000 from the United Counties.
>
> …
>
> The United Counties, in preparing its RFP, clearly recognized the importance of accessibility and accountability. That is why interested bidders were told that the contents of envelope #1 of the successful bid would be made public. Indeed, the purpose of dividing bids into separate envelopes was so that at the very least the contents of envelope #1 could be made public. It was made clear that it was possible that some of the contents of envelope #2 might be also made public. …

The affected party takes the position that public accountability in the expenditure of public funds can be fully achieved by providing access to the final agreement with the United Counties. It submits that it is the agreement, and not its proposal, that provides the greatest amount of information about the project and the public expenditures related thereto.

Analysis and Finding

Section 16 of the *Act* states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].
The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

In my view, any public interest that may exist in the small amount of information that I have found to be exempt under section 10(1) of the *Act* has been adequately satisfied by the substantial amount of the bid information that I have ordered disclosed. I find that further disclosure is not required to satisfy the public interest identified in section 16. The appellant will be receiving a significant amount of information and in my view this is adequate to address any public interest considerations [Orders P-532, P-568].

Accordingly, I find that there is no "compelling" public interest in disclosure of the remaining undisclosed information in the records. I find that the interest protected by section 10(1) concerning the information that I have not ordered disclosed above cannot be overcome in this case by the "public interest override" in section 16 [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767]. As a result, I find that section 16 has no application in the present appeal.

ORDER:

1. I Order the United Counties to disclose the non-highlighted portions of Binder #1 and #2 to the appellant by sending the appellant a copy by **February 1, 2010**, but not before **January 27, 2010**.

2. In order to verify compliance with the terms of this order, I reserve the right to require the United Counties to provide me with a copy of the records as disclosed to the appellant.

Original signed by: December 23, 2009
Steven Faughnan
Adjudicator