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

ORDER MO-2465

Appeal MA08-28

Town of Aurora

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NATURE OF THE APPEAL:

The Town of Aurora (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specific Request for Proposal (RFP). Specifically, the requester sought access to the following information:

> [A] full copy of the proposal submitted by [named corporation] in relation to the subject RFP and also the contract entered into by the Northern Six Municipalities with [named corporation] in relation to this RFP.

The Town issued a decision letter advising that access was denied to the contract, in its entirety, and to portions of the proposal, specifically, unit price details. Access was denied pursuant to the mandatory exemptions at sections 10(1)(a) and (c) (third party information) of the *Act*.

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

During mediation, the Town explained that it had coordinated the tendering process for the collection and haulage of collection waste, on behalf of six municipalities. It advised that, in addition to the severances made under sections 10(1)(a) and (c), it also severed information that it considered to be personal information. Specifically, the Town advised that it severed individuals' telephone numbers, ages, and work experience found in Statements "A" and "B" of the proposal. The Town confirmed that it was withholding this information pursuant to the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

Also during mediation, the mediator contacted the corporation that submitted the proposal (the corporation) as it might have an interest in the disclosure of the information at issue. The corporation confirmed that it objected to the disclosure of the information at issue.

The appellant advised that he wishes to pursue access to the severed portions of the proposal, and the contract, in its entirety.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues to the Town, initially. The Town responded with representations. I also sent a Notice of Inquiry to the corporation. The corporation provided representations in response. I then sent a copy of the Notice of Inquiry to the appellant, enclosing the non-confidential portions of the representations submitted by the Town and the corporation. The appellant provided representations in response.

RECORDS:

The information that remains at issue consists of portions of the corporation's proposal submitted in response to the specified RFP and the Services Contract for Collectible Waste, in its entirety.

The specific portions of the proposal that remain at issue are the following:

- Page 2: Phone number, fax number and email of Director
- Bid Bond (in its entirety)
- Agreement to Provide Letter of Credit (in its entirety)
- Unit Prices for each type of service (throughout proposal)
- Total Annual Price for each type of service (throughout proposal)
- Statement A: Proponent's Experience in Similar Work Within the Last 5 Years (telephone numbers of contact individuals)
- Statement B: Proponent's Senior Staff (information related to the proponent's senior staff)
- Statement C: Proponent's Proposed Collection Vehicles (number of total minimum daily collection work force)
- Statement D: Preventative Maintenance Program for all Collection Vehicles and Maintenance Policy and Procedure (in their entirety)
- Statement H: Proponent's Employee Recognition and Incentive Policy (in its entirety)
- Statement J: Proponent's Contingency Plan (in its entirety)
- Statement K: Customer Service (percentage figure of annual sales represented by annual value of the contract)
- Statement L: Implementation of Contract Services (in its entirety)

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether the mandatory exemption at section 14(1) 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(2)(2.1) and 2(2)(2.2). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(2)(2.1) 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(2)(2.2) 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.)].

Representations

In its representations, the Town explains that the portions of the proposal that it originally withheld pursuant to section 14(1) of the *Act* were Statements "A" and "B". The Town submits that it took the position that these statements contain personal information belonging to the corporation's senior management and staff.

The Town now concedes that Statement A contains information relating to work undertaken by the corporation and contact information for individuals in their professional, rather than their personal capacity. As a result, the Town agrees that the information contained in Statement A does not fall within the meaning of "personal information" in section 2(1) of the *Act* and withdraws its claim that section 14(1) of the *Act* applies to it.

However, the Town submits that Statement B "consists of a list of [the corporation's] senior staff, who were being put forth by [the corporation] to manage the work for which it was tendering." The Town submits: "The record lists not only each individual's title and responsibilities within [the corporation], but also various details that clearly fall within the definition of "personal information" as outlined by section 2(1) of [the *Act*]." Specifically, the Town points to paragraphs (a) and (b) of the definition of "personal information" in section 2(1) and submits that the information includes information relating to an individual's age (paragraph (a)) and information relating to an individual's education and employment history (paragraph (b)).

The Town submits:

> Statement B provides the age, number of years experience within the industry (including both work with [the corporation] and with prior employers) and details relating to the educational history and work experience of the individuals to whom it pertains. As a result, it is information "about" those individuals.
>
> A very small amount of the information contained in Statement B relates, in part, to the individuals in their professional capacity. The majority of the information relates to the full work experience, educational history and age of the individuals in question. Therefore, it is information of a very personal nature highlighted in the context of the individual's personal capacity…

The corporation submits that page 2 of the proposal contains personal information identifying an individual, together with his email address. The corporation submits that this same individual is also identified on the Bid Bond, which has been severed in its entirety. The corporation also submits that the Agreement to Provide a Letter of Credit contained in the proposal contains the personal information of the corporations' contacts at the bank as it contains their names together with their job titles. The Agreement to Provide a Letter of Credit has also been severed in its entirety.

The corporation submits that Statement A contains the contact information, including names and telephone numbers, of the employees working with the corporation's customers.

The corporation submits that Statement B contains "confidential and personal information readily identifying individuals employed with [the corporation's] senior management team. It submits:

> This information also extends to providing particulars about the employees' employment background before their employment with [the corporation]. The ages of the employees are indicated along with the employees' titles.

The appellant submits:

> Information about an employee does not constitute personal information when the information relates to the individual's employment responsibilities or position [Order P-721]. Information that identifies an individual in his or her employment, professional, or official capacity, or provides a business address or telephone number, is not regarded as personal information [Order P-1409].

The appellant submits that as Statement B has not been disclosed, he is not in a position to assess whether it constitutes "personal information" but he submits that "it is likely that the information in question is associated with individuals in their 'professional' or 'business' capacity rather than their 'personal' capacity."

Analysis and finding

As noted in its representations, the Town now concedes that Statement A contains information relating to work undertaken by the corporation and contact information for individuals in their professional, rather than personal capacity. As a result, the Town concedes that the information contained in Statement A does not fall within the meaning of "personal information" in section 2(1) of the *Act*. I agree with the Town's revised position. From my review of Statement A, the only information that has been severed is the telephone numbers used by individuals in their professional capacity. Accordingly, I find that this information qualifies as professional information rather than personal information, and should be disclosed to the appellant.

Statement B consists of professional profiles of the corporation's senior staff. They list the staff members by name and provide their age, title within the corporation, as well as a brief description of their work experience. The description includes the number of years that each individual has worked for the corporation, the individual's general responsibilities within the corporation, the type and number of years of general experience of the individual, and, in one instance, the university where the individual obtained his professional credentials and the degree he obtained. The only information that has been disclosed to the appellant is the names of the staff members.

Having reviewed the information contained in Statement B closely, I find that some of the information qualifies as the "personal information" of the individual to whom it relates, however, I find that some of the information does not. Specifically, I find that the information that reveals the individuals' ages, the number of years they have been with the corporation, the type and number of years of their general experience, and, for one individual, the information relating to

his professional credentials and the university from which he obtained them, qualifies as their "personal information" as contemplated by paragraphs (a) (age) and (b) (information related to the individual's education or employment history) of the definition in section 2(1) of the *Act*. This is in keeping with past orders which have determined that professional profiles containing information about educational and employment achievements for a time period that predates their current employment qualify as "personal information" [MO-2283].

However, I find that the individuals' titles and brief description of their responsibilities within the company qualifies as information about those individuals in their professional capacity. As noted above, pursuant to sections 2(1)(2.1) of the *Act*, personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a professional capacity. Additionally, prior orders have found that descriptions of an individual's employment responsibilities or position is not information of a personal nature, but may be more appropriately described as being related to the employment or the professional responsibilities of the individual [Reconsideration Order R-980015 and Order P-1180]. Therefore, I find that the individuals' titles and the brief description of their responsibilities within the company do not qualify as personal information within the meaning of the term as defined in section 2(1) of the *Act*.

From my review of the proposal, I note that although the Town has severed the telephone and facsimile numbers of an individual, as well as his email address, as it appears on page 2, it does not refer to this information in its representations. The corporation, however, has identified this information as personal information, along with the individual's name as it appears in the Bid Bond, as well as the names and job titles of the corporation's contacts at the bank as they appear on the Agreement to Provide a Letter of Credit. In my view, all of this information falls squarely within the definition of contact information that identifies these individuals in a professional capacity as contemplated by section 2(2)(2.1) of the *Act*. Accordingly, I find that none of this information qualifies as "personal information" within the meaning of that term in section 2(1) of the *Act*.

In sum, I have found that the only information that qualifies as "personal information" is the following information relating to identifiable individuals in Statement B of the proposal:

- age
- number of years with the corporation
- type and years of general experience
- university credentials and where they were obtained.

Accordingly, I will go on to determine whether this information is exempt from disclosure under the mandatory exemption at section 14(1) of the *Act*.

PERSONAL PRIVACY

Where an appellant seeks the personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs

(a) through (f) of section 14(1) applies. In my view, the only exception with potential application in the circumstances of this appeal is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would *not* constitute an unjustified invasion of another individual's personal privacy.

Under section 14, the factors and presumptions in sections 14(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. From my review of the personal information, section 14(4) has no application in the circumstances of this appeal.

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. In the circumstances of this appeal, I find that the only presumption that might have some application is section 14(3)(d). That section reads:

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

The Divisional Court has stated that once a presumption against disclosure has been established under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption [see Order PO-1764].

If none of the presumptions listed at section 14(3) apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

The portions of section 14(2) that are relevant to this appeal read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

The factors in paragraphs (f) and (h) weigh in favour of privacy protection.

Representations

The Town submits that the release of the personal information in Statement B would constitute an unjustified invasion of personal privacy under section 14(1). Specifically, the Town submits that the information at issue should be seen as "highly sensitive" within the meaning of the factor at section 14(2)(f). Additionally, the Town submits that the personal information was submitted by the corporation and its employees to the Town in confidence and, therefore, the factor listed at section 14(2)(h) is relevant. The Town submits that because these two factors apply, "releasing the information contained in Statement B would constitute an unjustified invasion of personal privacy for the individual to whom the information pertains. Accordingly, the records should not be disclosed to the appellant."

The corporation takes the position that the mandatory exemption at section 14(1) applies but does not make any specific representations on its application to the information that qualifies as "personal information."

The appellant submits that as he has not seen the information at issue, he is not in a position to assess whether it does consist of personal information whose disclosure would amount to an unjustified invasion of personal privacy.

Analysis and finding

Application of the section 14(3) presumptions

As noted above, the only information that I have found qualifies as "personal information" within the meaning of the definition of that term in section 2(1) of the *Act* is found in Statement B of the proposal and consists of the individuals' ages, the number of years they have been with the corporation, the type and number of years of their general experience and, in the case of one individual, the university credentials he obtained and where he obtained them.

Prior orders issued by this office have found that an individual's number of years of service constitutes their employment history, disclosure of which would constitute a presumed

unjustified invasion of privacy under section 14(3)(d) of the *Act* [Orders M-173, P-1318, MO-1796, MO-2344, PO-2050]. Accordingly, I find that the disclosure of the information relating to the number of years that the individuals have been with the corporation falls within the presumption at section 14(3)(d). Additionally, I find that the references to the type and number of years of the individuals' general experience also falls under the presumption at section 14(3)(d) as it represents their employment history.

With respect to the education history component of section 14(3)(d), prior orders have found that academic qualifications consist of "educational history" within the meaning of the presumption [Order P-1290]. Accordingly, I accept that the disclosure of information related to the one individual's university credentials and the institution from which they were obtained would amount to a presumed unjustified invasion of personal privacy as contemplated by section 14(3)(d).

Accordingly, I find that the presumption at section 14(3)(d) applies to the information in Statement B that describes the number of years the individuals' have been with the corporation, the type and number of years of the individuals' prior experience, and the university where the one individual obtained his university credentials as well as the type of credentials he received. Because this presumption applies, in accordance with the ruling in *John Doe* cited above, *for this information*, I am precluded from considering the possible application of any of the factors or circumstances favouring disclosure under section 14(2).

Application of the section 14(2) considerations

As noted above, if none of the presumptions listed at section 14(3) apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The only personal information in Statement B that I have found does not fall under the presumption at section 14(3) consists of the individuals' ages.

Factors weighing in favour of privacy protection

As noted above, the Town submits that the factors at sections 14(2)(f) (highly sensitive) and (h) (in confidence) are relevant in determining whether disclosure of the report would constitute an unjustified invasion of privacy of the individuals to whom the information relates.

14(2)(f): highly sensitive

To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

Other than stating that the information at issue is "highly sensitive" the Town does not provide any details to explain its position.

I have carefully reviewed Statement B and the information for which section 14(1) might apply and am not satisfied that the Town has provided sufficient evidence to demonstrate that

disclosure of the age of the individuals listed in Statement B would reasonably be expected to give rise to a *significant* amount of personal distress. Accordingly, I am not satisfied that this information is *highly* sensitive and find that section 14(2)(f) is not a relevant factor in determining whether disclosure of the personal information would amount to an unjustified invasion of personal privacy.

14(2)(h): supplied in confidence

This factor applies if both the individual supplying the information and its recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

The Town submits that the personal information relating to the corporation's staff members designated to work on the contract was "supplied in confidence" by the corporation. The Town submits that "industry practice and norm is that the parties involved in these types of bidding processes see the information disclosed by a bidder to be implicitly confidential when supplied and continuously held in confidence by the municipality."

Having considered the information at issue and the submissions of the Town, I find that the individuals to whom the personal information relates had a reasonable expectation that the information about their age was supplied in confidence to the Town. Accordingly, I find that the factor at section 14(2)(h) is a relevant factor in determining whether disclosure of the personal information remaining at issue would amount to an unjustified invasion of personal privacy.

Factors weighing in favour of disclosure

None of the parties have specifically raised any of the factors weighing in favour of disclosure listed in section 14(2) of the *Act* as relevant to the determination of whether disclosure of the report would amount to an unjustified invasion of the personal privacy of the individuals to whom the personal information relates. Additionally, having reviewed the information at issue, I do not find that any of them apply. Accordingly, I find that none of the factors listed in section 14(2) that favour disclosure are relevant considerations.

Weighing of factors

I have found that none of the factors favouring disclosure apply and the factor favouring privacy protection at section 14(2)(h) (supplied in confidence) applies to the personal information at issue. In the absence of evidence to establish that disclosure of the personal information would *not* constitute an unjustified invasion of privacy of the individuals to whom it relates, I find that the requirements of the section 14(1)(f) exception have not been established and that the information identifying the age of the individuals listed in Statement B should not be disclosed.

Summary conclusion

In sum, I have found that the presumption at section 14(3)(d) applies to the information listed in Statement B related to the individuals' number of years of experience with the corporation, their type and years of general experience and the one individual's university credentials and the institution from which they were obtained. I have also found that, following the weighing of the relevant factors in section 14(2), in the absence of evidence to establish that disclosure of individuals' ages would *not* constitute an unjustified invasion of their personal privacy, the exception to the exemption at section 14(1)(f) does not apply.

As section 14(4) does not apply and there is no evidence that there is a compelling public interest in the disclosure of this information, I find that section 14(1) applies to exempt all of the information that I have found qualifies as "personal information" of the individuals listed in Statement B of the proposal. For the sake of clarity I will provide the Town with a highlighted copy of Statement B identifying the information that *should not* be disclosed.

THIRD PARTY INFORMATION

The Town and the corporation claim that portions of the proposal and the entire contract are exempt under the mandatory exemption at sections 10(1)(a) and (c). The corporation's submissions also suggest the possible application of section 10(1)(b). Those sections read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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;
>
> (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 Town and/or the corporation 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), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The types of information listed in section 10(1) have been discussed in prior orders. Those that might be relevant to the current appeal have been defined in past orders of this office as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I adopt these definitions for the purpose of this appeal.

The Town submits that in its proposal the corporation was required to provide a list of the prices per unit that it would charge the Town and the other municipalities under the contract. Also it submits:

> The information is, as noted in the Notice of Inquiry, "information that "relates solely to the buying, selling or exchange of merchandise or services." The

> information relates to "pricing practices", "operating costs" and is a very clear example of the type of information that subsection 10(1) seeks to protect from disclosure to a third party's competitors. It also outlines [the corporation's] practices with respect to the maintenance and repair of its vehicles, its employee relations practices, and practices governing its relationships with its clients. As a result, this information is necessarily "commercial" and "financial" in nature, as contemplated by subsection 10(1) of the [the *Act*] and meets the first element of the test.

With respect to the contract, the Town submits:

> The contract relates to services performed by [the corporation] for the [Town], and the other parties to the contract, for consideration. It is the tangible manifestation of the commercial and financial relationship contemplated in the proposal and outlines the price unit details governing the agreement and the provision of services. As a result, it is both "commercial" and "financial" in nature, as contemplated by subsection 10(1).

The corporation does not directly address whether the proposal and the contract contain any of the types of information specifically listed in section 10(1) of the *Act*. However, their representations suggest that it takes the position that both records contain information of a technical, commercial, and financial nature.

The appellant states that the proposal as a whole contains much more than just information related to unit prices and submits that "the Town may have omitted sections of the proposal that do not qualify as "commercial" or "financial" information.

With respect to the contract, the appellant submits that he seeks access to the contract "to examine the terms and conditions required under the RFP." He states: "Such information will not reveal a trade secret or scientific, technical, commercial, financial or labour relations information."

Having considered the information contained in the proposal and the contract, as well as the representations of the parties, I am satisfied that the information at issue consists of commercial information within the meaning of section 10(1) of the *Act*.

In my view, both the proposal and the contract are directly related to the "buying, selling or exchange of goods or services," specifically the corporation's provision of services for the collection of "Collectible Waste" to the Town and five other municipalities. Accordingly, I find that this information qualifies as "commercial information" for the purposes of part 1 of the section 10(1) test.

Accordingly, I find that the first part of the section 10(1) test has been satisfied.

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 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 confidence

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

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

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

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

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

- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497]

Representations

The Town submits that it is clear that the proposal was "supplied in confidence" to the Town by the corporation. The Town submits: "the document involved no negotiation by the two parties and was prepared by [the corporation] and its officials. Therefore, the proposal was 'supplied' by [the corporation] to the Town. With respect to the "in confidence" component of part 2 of the section 10(1) test the Town points to a confidentiality provision in the RFP, to which the proposal responded, as evidence that the proposal was supplied "in confidence." It submits:

> [The] language [in the confidentiality provision] demonstrates that the information to be contained in the proposal, which [the corporation] had no choice but to supply in tendering a bid, was explicitly contemplated as confidential in all steps of the tendering process. Moreover, industry practice and norm is that the parties involved in these types of bidding processes see the information disclosed by a bidder to be implicitly confidential when supplied and continuously held in confidence by the municipality.

Addressing the contract, the Town submits:

> [The] Town believes that it was, in fact, "supplied" by [the corporation]. The [Town] acknowledges the Information and Privacy Commissioner's view that negotiated contracts do not qualify as having been "supplied." It is the [Town's] contention, however, that one of the central elements of the contract is the pricing provided in exchange for services…
>
> …
>
> Unlike Order P-385, where the adjudicator found that the price lists in the record were negotiated between the parties … these details were "supplied" by [the corporation].

The Town points to a confidentiality provision in the contract that outlined the obligations of all parties to keep the terms confidential. The Town submits that the provision "is evidence that the parties to the contract have the explicit contractual right to expect that the information contained therein will be held in confidence."

The corporation takes the position that it is "the industrial norm in the [RFP] process that parties in these types of bidding processes operate on the basis that the information disclosed by a bidder is deemed to be implicitly confidential when supplied to a public body and continues to be held in confidence by a public body."

Addressing the contract the corporation submits:

> It is the corporation's position that the contract was supplied to the [Town] in that it corresponded to the terms of the RFP prepared by the [corporation] echoing the [Town's] position that the contract was, in fact, supplied to the [Town] by the [corporation].

The corporation states that there were six earlier versions of the contract before its execution but later submits that there was no negotiation process between the parties regarding the price unit details. The corporation submits:

> [T]he Information and Privacy Commissioner's approach taken with its characterization of the term "supplied" does contain enough latitude that some contracts do qualify as having been "supplied". Deconstructing the RFP and the corresponding contract enables a party to precisely determine prices, costs, and profitability of the [corporation]. It can be seen that a small change in unit prices could win or lose a bid and knowing the price of a previous successful bid could be a significant advantage to unsuccessful bidders in the future.
>
> The information with respect to the unit price details contained in the RFP … was originally, and only, provided by the [corporation]. It is not information that has resulted from negotiations between the [Town] and the [corporation].
>
> With respect to the other amendments to the contracts supplied by the [corporation], the amendments are either identical to the one which was proposed by the [corporation] or are in substance identical to terms confidentially supplied to the [Town] by the [corporation]. Additionally, the [corporation] was provided with a proposed *pro-forma* draft agreement containing expected contractual terms. As indicated above, the [corporation] supplied a number of amendments to the *pro-forma* agreement. Disclosure of the amended contractual terms reveals the [corporation's] competitive strategy. [Section 10(1)] of the *Act* protects affected parties' informational assets…Even if portions of the contract are not exempt from disclosure, the portions of the contract that do relate to the [corporation's] information assets can be exempt from disclosure.

The appellant makes no specific representations on whether the proposal was supplied to the Town by the corporation but submits generally that the information contained in the proposal does not qualify as confidential information. With respect to the contract, the appellant submits that the corporation's admission in its representations that there were six versions of the contract reinforces that notion the contract was mutually generated rather than "supplied" by the

corporation. He also submits generally that "the contract as a whole does not qualify as 'confidential information'."

Analysis and finding

As noted above, there are two documents at issue in this appeal: the proposal, portions of which have been disclosed; and the contract, which has been withheld in full. I will first address the application of part 2 of the section 10(1) test to the proposal.

Both the Town and the corporation submit that the proposal was prepared by the corporation and was therefore "supplied" to the Town in response to its RFP. Both parties also submit that industry practice dictates that information that is submitted by a bidder in response to an RFP issued by a public body is implicitly confidential and is understood to be held in confidence by that public body.

Previous orders of this office have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis [Order M-169].

Based on the representations of the Town and the corporation and having reviewed the proposal itself, I am satisfied that the information which it contains has, in fact, been "supplied" to the Town by the corporation. Further I find that the corporation had a reasonable expectation that the Town would not disclose the commercial information contained therein that is not otherwise available to the public. Accordingly, I find that part 2 of the section 10(1) test has been established for the portions of the proposal that remain undisclosed.

Dealing now with the contract, I have examined it closely and do not agree with the Town and the corporation that this record is an exception to the usual situation where the terms of a contract do not qualify as having been "supplied." This position was outlined in Order MO-1706 by Adjudicator Bernard Morrow:

> In general, 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 the result of an immediate acceptance of the terms offered in a proposal. Except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret), agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied."

The principles established in Order MO-1706 have been followed by a number of orders issued by this office, including Orders PO-2371, PO-2384 and PO-2435.

In Order PO-2435, Assistant Commissioner Brian Beamish applied the reasoning set out by Adjudicator Morrow in the context of certain information relating to pricing. In Order PO-2435, the Assistant Commissioner found that certain third party *per diem* amounts referred to in an agreement, were not "supplied" by the third party. He stated:

> 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 released by [Management Board Secretariat], 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 [an 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 [Management Board Secretariat] is a form of negotiation.

The Town submits that one of the central elements of the contract is pricing and the prices were supplied by the corporation, not negotiated. The corporation also submits that there was no negotiation between the parties regarding pricing details and that in addition to pricing, the general terms of the contract correspond to the terms of the proposal that it prepared and supplied to the Town. It submits that although the contract was amended, the amendments were identical to terms supplied to the Town by the corporation.

Adopting the reasoning outlined in the prior orders referenced above, in my view, the Town's and the corporation's submissions do not provide any evidence to suggest that the contract at issue falls outside of the general presumption that the terms of a contract will not normally qualify as having been "supplied." However, as noted above, there are two exceptions to this presumption which must be considered before concluding that the contract was not "supplied" within the meaning of part 2 of the section 10(1) test.

With respect to the first exception ("inferred disclosure"), there is no evidence before me that would suggest that disclosure of any of the information contained in the contract would permit a person to make an accurate inference with respect to underlying non-negotiated confidential information supplied by the corporation to the Town. I find, therefore, that the "inferred disclosure" exception does not apply to the information in the contract.

With respect to the second exception ("immutability"), I am not persuaded that it applies in the circumstances of this appeal. The immutability exception applies to specific information in a contract that is not susceptible of change and, therefore, cannot be negotiated. Examples of this type of information would include the operating philosophy of a business, or a sample of its products. In the circumstances of this appeal, I find that the contractual terms contained in the contract between the corporation and the Town were negotiated and clearly susceptible of change. This includes the unit price information. I find, therefore, that the "immutability" exception does not apply to the information in the contract at issue.

In short, I find that the information in the contract was the product of a mutual negotiation process between the corporation and the Town. It cannot, therefore, be said that the corporation "supplied" the information in the contract to the Town. Consequently, I find that the Town and the corporation have failed to satisfy the requirements of part 2 of the three-part section 10(1) test for the contract.

Although both the Town and the corporation submit that they agreed that the terms of the contract would be kept confidential, it is not necessary for me to consider the "in confidence" element of part 2 of the test for the contract, because I have already found that the Town and the corporation have failed to satisfy the first component of part 2, that the corporation "supplied" the information in the contract to the Town.

In their representations, both the corporation and the Town also submit that the harms contemplated in part 3 of the three-part section 10(1) test could reasonably be expected to occur if the information in the contract is disclosed to the appellant. However, the Town and the corporation must satisfy all three parts of the section 10(1) test to establish that the record at issue is exempt from disclosure. If they fail to meet any part of this test, the section 10(1) exemption does not apply. Given that I have found that the corporation and the Town have failed to satisfy part 2 of the section 10(1) test with respect to the contract, it does not qualify for exemption under section 10(1) of the *Act* and I will order the Town to disclose it to the appellant. It is therefore not necessary for me to consider whether they have satisfied part 3 of the section 10(1) test with respect to that record.

As I have found that the second part of the section 10(1) test has been satisfied for the portions of the proposal that are at issue, I will go on to consider whether the Town and the corporation have established that part 3 of the section 10(1) test applies to that information.

Part 3: harms

To meet this part of the test, the Town and/or the corporation 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 need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1) [Order PO-2435].

Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

Representations

Addressing the proposal, the Town submits:

> [T]he release of [the corporation's] price details to the appellant risks significantly harming [the corporation's] competitiveness and market position. Though the contract between the parties is for a term of ten (10) years, it may hinder [the corporation's] competitiveness in any similar tenders with the same municipalities at the end of the contract term, as competitors will already be aware of [the corporation's] best offer.
>
> More directly, however, [the corporation] would be at a disadvantage for all upcoming RFPs with neighbouring municipalities, if its competitors were already aware of its most competitive offer. [The corporation's] competitors would easily be able to undercut any future proposals by [the corporation], in a process that is structured and intended to prevent exactly that scenario. If [the corporation] cannot compete effectively in future tenders, the disclosure will have led directly to very real financial loss to [the corporation], and corresponding gain to [the corporation's] competitors, as contemplated by section 10(1)(c).
>
> This reality not only threatens harm to [the corporation's] position in the marketplace and its future viability as a business, but also offends the tendering and bidding process more generally. It runs afoul of the spirit and purpose of the way municipal governments have structured their efforts to contract out for services, and their efforts to ensure the process is fair to all parties involved. Moreover, it is possible that the Contract may, for whatever reason, be terminated before the end of the ten (10) year term, in accordance with the termination rights and obligations outlined in the contract. The result would be that the [Town's] next RFP would produce bids from industry members, aware of the pricing in the current contract, which are much less competitive than they would [be] if the information was not disclosed. This puts the [Town] as well as City tax payers in six municipalities, at a great disadvantage.
>
> Therefore, the Town believes that it was justified in withholding disclosure of the price unit details in the proposal and requests that you refuse the appellant's request with respect to these details.

In its representations, the corporation lists the contents of the proposal and explains why, in its view, the information should not be disclosed. For each individual type of information. the corporation submits that the information amounts to its "confidential and proprietary information." With respect to the information that remains at issue, I will summarize the corporation's position:

- *Bid Bond*

The corporation explains that the document reveals the Bond number, the amount of the security deposit and identifies the company acting as surety for the deposit. The corporation submits that this information reflects its banking and financing arrangements.

- *Agreement to Provide Letter of Credit*

The corporation submits that the Agreement to Provide Letter of Credit reflects its banking and financing arrangements as it identifies the name of the bank and the individuals employed by that bank with whom it deals.

- *Unit Prices and Total Annual Price for Each Type of Service*

With respect to all of the price per unit particulars and total annual prices listed in the proposal, the corporation submits only that they amount to its "confidential and proprietary information."

- *Statement C: Total Minimum Daily Collection Work Force (number of vehicles)*

The corporation submits that Statement C "provides particulars about [the corporation's] fleet of vehicles for its business." It submits that "[d]isclosure of such information is counterproductive to the [corporation's] commercial interests.

- *Statement D: Preventative Maintenance Program for all Collection Vehicles and Maintenance Policy and Procedure*

The corporation submits that Statement D contains particulars about its "business strategy" such as its "preventative maintenance program for its fleet of recycling service collection vehicles." Specifically, it submits that this statement contains information regarding the number of vehicles and the corporation's maintenance practices.

- *Statement H: Proponent's Employee Recognition and Incentive Policy*

The corporation submits that Statement H reveals business practices, specifically, its "unique management practices with its work force."

- *Statement J: Proponent's Contingency Plan*

The corporation submits that its contingency plans for various occurrences amount to business practices which are its proprietary and confidential information.

- *Statement K: Percentage of Annual Sales Represented by Annual Value of the Contract (percentage figure)*

The corporation submits that through quantification of the figure severed from this statement, a competitor could ascertain the corporation's revenues and the value of its other businesses.

- *Statement L: Implementation of Contract Services*

The corporation explains that this statement details its human resources plans and the training of its employees.

With its representations, the corporation submitted an affidavit sworn by the Chief Operating Officer and Director the corporation. In his affidavit, he submits that there is a reasonable expectation of harm if the information that remains at issue in the proposal was disclosed. Specifically, he submits

> I verily believe that [the corporation] will invariably lose revenues and face an undue financial hardship as a result of the disclosure of the information to the requesting party.
>
> …
>
> I verily believe that disclosure of the information to third parties must be prevented or substantially limited to prevent exploitation by competitors of the [corporation's] proprietary information in the marketplace…
>
> If competitors are aware of the successful bidding party's best offer, such disclosure would hinder the successful party's future competitiveness for similar tenders because competitors would already have disclosure of the successful [corporation's] best offer in a process designed to protect against such a scenario from occurring. In addition to the foregoing, such disclosure offends the tendering process by running afoul of the spirit and purpose of the public bodies who have structured their efforts to contract out for services in their efforts to ensure that such a contracting out process is fair to all parties involved. A corollary extrapolation is that competing bids could be less competitive then they would be if the information was not disclosed; thereby, putting public bodies (and taxpayers) at a disadvantage.
>
> By obtaining access to such records, a sophisticated competitor could ascertain the cost of materials and services on a retroactive basis in order to deconstruct how the [corporation] meets its contractual obligations. In general, disclosure would provide competitors with the unique benefit of learning the [corporation's] way of conducting business and allowing it to more readily undercut, or replicate, its approach. Future harm that might reasonably be expected to occur from disclosure under such circumstances is that the tendered price would be manipulated thus compromising the integrity of the bidding system and affecting

the competitive position of winning bidders. Competitors would be gaining a competitive advantage by being provided with information that they would not normally have about other businesses.

I verily believe that public bodies' bottom line would be adversely impacted through such disclosure by eliminating incentives for potential vendors or suppliers to provide the best deal, or in the alternative, inhibit that process. I also verily believe that the pool of potential vendors and suppliers would be reduced. Disclosure would allow competitors to know the [corporation's] methodology, approach and/or process to servicing public bodies – including pricing – in addition to disclosing the innovative strategies that we uniquely formulated by the [corporation] to address public bodies' needs. Competitors receiving such confidential information would be provided with an unfair advantage and a competitive advantage to outmaneuver or outbid the corporation for future tenders or RFPs. Therefore, I verily believe that maintaining the confidentiality of the impugned information is essential to ensure the integrity of the tendering and RFP process.

Disclosure would provide competitors with detailed and specific information about the [corporation] and competitors would then be able to anticipate the [corporation's] revenues through disclosure of the information at issue. Meanwhile, it is understood by all parties involved in the process that the RFP/tending process is intended to be confidential and invariably disclosing such information would limit participation in tenders or RFPs to the detriment of public parties and taxpayers. By undercutting the [corporation's] bids, the [corporation] would lose revenues and be less competitive and financially able.

Against this background, I verily believe that obstructions to further negotiations will occur and I verily believe that actual contractual negotiations would be adversely impacted through disclosure, too.

Considering the competitiveness of the municipal recycling services market, it is not unreasonable to expect that this practice would occur. For example, a recycling business' major costs are fuel, and labour. Disclosure of the pricing unit information enables a competitor to make assumptions relating to productivity and provide for the recovery of the [corporation's] fixed costs. Disclosing detailed pricing information enables competitors to obtain with certainty how the [corporation's] allocation of costs and profit assumptions were arrived at. Such disclosure would thereby undermine the [corporation's] future bids. Bidders like the [corporation] make assumptions on productivity. For example, in the recycling industry, a bidder will make an assumption with respect to how many homes can be serviced per hour. Based on these assumptions the bidder calculates a unit price to cover costs and provide a process. Disclosure of unit prices can in some measure reveal what assumptions have been made about productivity. Further, pricing structure underlies a bidder's competitive advantage and the disclosure of such unit prices allows competitors to underbid

> the [corporation's] position for future RFPs or bids, or tenders. Essentially, the disclosure of the pricing information enables a competitor to ascertain the [corporation's] cost base and revenue sources.
>
> Disclosure destroys competitiveness because it enables a competitor to use the [corporation's] in-depth knowledge of costs to gain a competitive advantage. This significantly undermines the purpose of confidentiality in the RFP and tender bidding process. Industry competitors are asked to compete on a confidential basis with the expectation that the information they provide will not later be exposed to competitors and used against them to their detriment in other competitions for business. Providing the information to a competitor provides the competitor with an unfair advantage over the parties for future competitions at the expense of the [corporation].
>
> A bidder's costs and productivity assumptions underlying a contract are considered to be confidential proprietary information which is central to any analysis undertaken by the [corporation] before entering into the RFP/tendering process. Disclosure to the [appellant] enables it to obtain access to such information without incurring any of its own development costs directly affecting the [corporation's] competitive advantage through the revelation of such information.
>
> Providing the records at issue in the appeal to the [appellant] would provide it and other competitors with an opportunity to fine tune their figures to offer more competitive bids than other competitor's bids such as the [corporation]. Revealing unit pricing would demonstrate to any competitor how the [corporation] operates and what profits it earns. This is the [corporation's] secret and confidential information.

The appellant submits that:

> The risk of harm must be measured in relation to the competitive, negotiating or financial position of the third-party or to the continuing ability of the institution to secure the supply of like information where it is in the public interest to do so. Any potential harm to a third-party must be *significant* or *undue*.

The remainder of the appellant's submission addressing harms relate specifically to the contract which I have already found is not exempt under section 10(1) of the *Act*.

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

The corporation submits that if the information at issue in the proposal is disclosed "the pool of potential vendors and suppliers would be reduced." It also submits that "invariably disclosing such information would limit participation in tenders or RFPs to the detriment of public parties and taxpayers." This suggests that the corporation is claiming that the harm contemplated by section 10(1)(b) of the *Act* applies, specifically, that similar information would no longer be

supplied to the Town. In my view, the representations of the corporation, however, fail to provide the requisite "detailed and convincing" evidence to support this position.

In Order MO-2283, Assistant Commissioner Beamish addressed the possible application of section 10(1)(b) to information submitted by third parties in response to a RFP issued by the City of Oshawa (the City) for the construction of a sports and entertainment facility. In that appeal, the City took the position that disclosure of the information at issue would result in the information no longer being supplied as contemplated by section 10(1)(b). In that order Assistant Commissioner Beamish stated:

> In effect, the City is taking the position that companies will no longer provide the type of information that is necessary in order for the City to evaluate expressions of interest and proposals. In other words, companies will consciously submit incomplete or inadequate bids if they believe that certain information in these bids could become public. In my view, this is an exaggerated and entirely hypothetical proposition. Given the scope of projects put up for public bid, and the value of those projects, detailed and convincing evidence is required that companies will withdraw from the bidding process. That has not been provided.

I agree with the reasoning outlined by Assistant Commissioner Beamish and adopt it for the purposes of this appeal.

In my view, a contract to provide services for collectible waste to any municipality, let alone six of them, is potentially profitable and, in keeping with the reasoning in Order MO-2283, requires detailed and convincing evidence to demonstrate that companies could reasonably be expected withdraw from the bidding process for such contracts. The corporation merely asserts that "the pool of potential vendors and suppliers would be reduced" but provides no evidence to support its claim. I find that the corporation's representations on the possible application of section 10(1)(b) are general and highly speculative and do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)* (cited above).

Accordingly, I find that section 10(1)(b) has no application in the circumstances of this appeal.

Section 10(1)(a) and (c): prejudice to competitive position, undue loss or gain

I have carefully considered the representations of the parties and the records at issue in this appeal. In my view, the evidence presented by the Town and the corporation is too general in nature and, in some circumstances, highly speculative, and therefore, does not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal.

The comments of Assistant Commissioner Beamish in Order PO-2435 are instructive in understanding this office's approach to the harms issue, particularly with regard to government contracts in which the expenditure of public funds is at issue. He states:

Both the Ministry and SSHA [Smart Systems for Health Agency] make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".

Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In Public Government for Private People, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

> …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar

> circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

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

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

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

While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

In my view, the analysis and findings of Assistant Commissioner Beamish in Order PO-2435 are applicable in the current appeal. The representations of the Town and the corporation are general in nature and lack particularity in describing how the harms identified in section 10(1)(a) or (c) could reasonably be expected to result from disclosure in this case. As mentioned by Assistant Commissioner Beamish, the need for public accountability in the expenditure of taxpayer money is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1) of the *Act*.

I will first address the Town's submissions and then the corporation's.

The Town submits that disclosure of the price details in the proposal could reasonably be expected to cause the corporation significant prejudice and/or undue loss because if competitors were aware of the corporation's best offer, as detailed in the proposal, it will hinder the corporation's competitiveness and market position with respect to similar tenders at the end of the contract term. In my view, this is an entirely speculative argument. In the circumstances of this appeal, the contract term is for ten years. Ten years is a lengthy period of time and it is reasonable to assume that the economy and market conditions are likely to alter considerably in unpredictable ways during that period. I find that the Town has not provided any detailed or convincing evidence to demonstrate how ten years from now, price unit details from today could reasonably be expected to cause either of the harms contemplated in sections 10(1)(a) or (c) of the *Act*.

The Town also submits that were the corporation's price details disclosed it could reasonably be expected to result in a "very real financial loss to [the corporation] and corresponding gain to [the corporation's] competitors" because competitors would be aware of its most competitive offer which would hinder its competitiveness with respect to future tenders submitted in response to similar RFPs issued by other institutions. However, as noted above, Assistant Commissioner Beamish stated in Order PO-2435:

> [T]he 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.

In keeping with the reasoning expressed in Order PO-2435, I do not accept that a mere statement by the Town that disclosure of the price details contained in the proposal submitted by the winning proponent amounts to the requisite detailed and convincing evidence of harm required

to outweigh the need for public accountability and transparency with respect to the spending of public funds. Accordingly, I do not accept that the Town has established that disclosure of the price unit details could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c) of the *Act*.

Finally, the Town submits that the contract may be terminated before the ten-year term is up and if the price details in the proposal were disclosed, the corporation's competitive position could reasonably be expected to be significantly prejudiced and/or it would suffer undue loss. The Town argues that if the contract were terminated, it would issue a new RFP for the same services and other industry members would be aware of the pricing put forward by the corporation in response to the first RFP. In my view, this is also a highly speculative argument. Although there may be termination provisions outlined in the contract, the contract is set for ten years. There is no evidence before me to suggest that it is reasonable to expect that the contract will be terminated before the ten-year term is up. Moreover, even if there were such evidence, following the reasoning in Order PO-2435 discussed above, the fact that the winning proponent of a government contract may be subject to a more competitive bidding process in the future does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them. In my view, the Town has not provided the detailed and convincing evidence required to link disclosure of the price details in the proposal to the reasonable expectation of harms as listed in sections 10(1)(a) and (c).

Accordingly, in my view, the Town has not provided the requisite "detailed and convincing" evidence to demonstrate that were the information at issue in the proposal disclosed, it could reasonably be expected to result in either of the harms contemplated by sections 10(1)(a) or (c) of the *Act*.

The corporation's representations on the disclosure of the information at issue in the proposal are similar in nature to those submitted by the Town but also address each specific component of the proposal. Accordingly, in determining whether the corporation has met its onus of establishing that the third party information exemption applies to the information remaining at issue, I will address each component separately.

Bid Bond Details

The corporation submits that the Bid Bond details reference the bond number and identifies the insurance company with which it has an agreement. Having considered the information, as well as the representations submitted by the corporation, there is no evidence before me to demonstrate how disclosure of its Bid Bond could reasonably be expected to cause significant prejudice to its competitive position or cause it undue loss. Accordingly, I find that the corporation has not established that either of the harms in sections 10(1)(a) or (c) could reasonably be expected to occur were the information at issue in the Bid Bond disclosed and the exemption at section 10(1) does not apply to it.

Agreement to Provide Letter of Credit

The one page Agreement to Provide a Letter of Credit submitted by the corporation was required by the Town. In its RFP, the Town provided a standard form letter to be completed by the proponent in which the dollar amount was identified. The only information contained in the letter that was not in the RFP is the name of the bank that the corporation has entered into the agreement with and the employees at that bank with whom the corporation has dealt. Given that the RFP required the tenderers to provide an agreement from a Canadian Chartered Bank to provide a letter of credit in a particular sum, I am of the view that disclosure of the information identifying the banking institution (and its employees who dealt with this matter) could not reasonably be expected to result in the harms set out in sections 10(1)(a) and (c) of the *Act*. Accordingly, I find that the Agreement to Provide a Letter of Credit is not exempt under section 10(1) of the *Act*.

Unit Prices and Total Annual Prices

All of the price per unit figures for the various services have been severed from the proposal as released to the appellant. The total annual price (based on the price per unit figures) for each of the various services have also been severed. The corporation submits that this information is its confidential and proprietary information. The submissions made in the affidavit sworn by the corporation's Chief Operating Officer and Director (the Director) speak most specifically to this type of information.

The Director submits that were the price figures disclosed, competitors would be aware of the corporation's best offer which would significantly prejudice its competitive position and result in an undue loss when responding to similar tenders. The Director further submits that disclosure of the price figures would allow a competitor to deconstruct the corporation's bid, allow it to determine the cost of materials and services and, as a result, allow it to "more readily undercut, or replicate, its approach." More specifically, the Director states: "Competitors receiving such confidential information would be provided with an unfair advantage and a competitive advantage to outmaneuver or outbid the corporation for future tenders or RFPs." The Director also submits that disclosure of the pricing unit information would enable a competitor to understand how the corporation's allocation of costs and profit assumptions were arrived at which would undermine the corporation's future bids

I agree that disclosure of pricing information may subject the corporation, the winning proponent, to a more competitive bidding process for future contracts. However, in keeping with Assistant Commissioner Beamish's reasoning in Order PO-2435, I do not accept that the fact that it may be subject to a more competitive bidding process would significantly prejudice its competitive position or result in undue loss to the corporation. In my view, the submissions made by the corporation, including those submitted by the Director in his affidavit, do not provide "detailed and convincing" evidence to demonstrate that the corporation would be *significantly* prejudiced or would suffer an *undue* loss. Accordingly, I do not accept that the corporation has established that disclosure of the pricing information in the proposal could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c) of the *Act*.

Statement C: Proponents Proposed Collection Vehicles

Statement C describes the corporation's proposed collection equipment outlining their type, primary use, capacity and date of manufacture. The statement also lists the number of the total minimum daily collection work force, which is the only information itself that has not been disclosed to the appellant. Having considered the information, as well as the representations submitted by the corporation, I conclude that there is no evidence before me to demonstrate how disclosure of its total minimum collection work force could reasonably be expected to cause significant prejudice to its competitive position or cause it undue loss. Accordingly, I find that the corporation has not established that either of the harms in sections 10(1)(a) or (c) could reasonably be expected to occur were the information at issue in Statement C disclosed, therefore, the exemption at section 10(1) does not apply.

Statement D: Preventative Maintenance Policy for all Collection Vehicles and the Maintenance Policy and Procedure

Statement D describes the corporation's preventative maintenance program for all its vehicles and identifies the number of vehicles that the corporation operates and owns. The attached 'Maintenance Policy and Procedure' provides further details on the corporation's maintenance practices. From my review of the information, it is not clear how its disclosure could reasonably be expected to result in the harms detailed in section 10(1)(a) or (c). Additionally, in my view, the corporation has not provided sufficiently detailed evidence to demonstrate that disclosure of this information could reasonably be expected to cause significant prejudice or undue loss to the corporation. Accordingly, without this evidence, I find that the corporation has failed to establish that part 3 of the section 10(1) test has been met for this information.

Statement H: Proponent's Employee Recognition and Incentive Policy

Statement H describes how it recognises its employees for doing good work and provides incentive for them to do so. The corporation submits that this information reveals "unique management practices with respect to its work force." However, it does not explain how disclosure of this type of information could reasonably be expected to result in significant prejudice to its competitive position or result in undue loss. Accordingly, in my view, the corporation has not provided the requisite "detailed and convincing" evidence to demonstrate that disclosure could reasonably be expected to result in either of the harms contemplated by section 10(1)(a) or (c) and, as a result, I find that the exemption at section 10(1) cannot apply to this information.

Statement J: Proponent's Contingency Plan

Statement J details the corporation's contingency plans to ensure that the services will be provided to the Town. The information about the contingency plans is general in nature and describes how it has responded to two specific challenges in the past and lists a number of preventative measures that it takes. The corporation submits that this information amounts to business practices which are its proprietary and confidential information. From my review of the information it is not clear how disclosure of this information could reasonably be expected to

result in the harms detailed in section 10(1)(a) or (c). Additionally, in my view, the corporation has not provided sufficient evidence to demonstrate that disclosure of this information could reasonably be expected to cause significant prejudice or undue loss to the corporation. Accordingly, I find that the corporation has failed to establish that part 3 of the section 10(1) test has been met for this information.

Statement K: Customer Service

The information that is at issue in Statement K is the percentage figure of the corporation's annual sales represented by the annual value of the contract. The corporation submits that through "quantification of the figure severed from this statement, a competitor could ascertain [the corporation's] revenues and the value of its other businesses." In my view, the corporation has not provided the necessary evidentiary link to demonstrate not only how disclosure of the percentage figure (which only represents a portion of the corporation's total annual sales), would permit a competitor to ascertain the corporation's revenues and the value of its other contracts but also, how this information could reasonably be expected to cause it significant prejudice or an undue loss. Without the requisite "detailed and convincing" evidence to show that the harms contemplated by sections 10(1)(a) and (c) could reasonably be expected to occur, I find that the corporation has not met the requirements of part 3 of the section 10(1) test, and the exemption cannot apply to this information.

Statement L: Implementation of Contract Services

Statement L outlines the steps that the corporation will take if and when the contract is awarded. Other than stating that this information is its confidential and proprietary information, the corporation makes no submissions on how disclosure of this information could reasonably be expected to result in either of the harms in sections 10(1)(a) or (c) of the *Act*. From a review of the specific information contained in Statement L, in my view, it is also not readily apparent that either of those harms could reasonably be expected to occur if the information were to be disclosed. Accordingly, I find that the corporation has not provided detailed and convincing evidence to establish that the harms component of the section 10(1) test has been met for the information contained in Statement L and the exemption does not apply to it.

Therefore, in my view, the corporation has not provided the requisite "detailed and convincing" evidence to demonstrate that were any of the information remaining at issue in the proposal disclosed, it could reasonably be expected to result in either of the harms contemplated by sections 10(1)(a) or (c) of the *Act*.

In sum, I have found that neither the Town nor the corporation have provided the kind of detailed and convincing evidence required to support non-disclosure under these circumstances. For the reasons set out above, I find that part 3 of the section 10(1) test, the harms component, has not been met with regard to the information at issue in the proposal and the exemption does not apply. Accordingly, I will order the Town to disclose the information to the appellant.

ORDER:

1. I uphold the Town's decision to withhold access to the portions of the records I found exempt under section 14(1) of the *Act* (the portions of Statement B that reveal an individual's age, number of years with the corporation, type and years of general experience, and type of university credentials and where they were obtained). For the sake of clarity, I will provide the Town with a highlighted copy of Statement B identifying the information that the Town is to withhold from the appellant.

2. I order the Town to disclose the remaining information to the appellant no later than **November 27, 2009** but not before **November 20, 2009**.

3. In order to verify compliance with this order, I reserve the right to require the Town to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2, upon my request.

Original signed by: _____ October 23, 2009
Catherine Corban
Adjudicator