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

ORDER PO-2987

Appeal PA09-413

Ontario Power Authority

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BACKGROUND:

Following a review conducted to evaluate the province's energy needs, the Ontario government concluded that additional power generating capacity was required to contend with increased energy demand and aging infrastructure, as well as its commitment to replace coal as an energy source. Several rapidly developing areas of the province were identified as requiring this additional capacity, including northern York Region.

In July 2008, the Ontario Power Authority (the OPA) issued a Request for Proposals (RFP) for the construction and operation of a new power generation facility in northern York Region. This appeal relates to records created during that RFP process, which led to the selection of a proposal to locate the gas-fired peaking generation facility in King Township.[1]

NATURE OF THE APPEAL:

A representative of a community organization submitted a request to the OPA under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the procurement process for the gas-fired power generation plant. The appellant was specifically interested in reviewing the methodology and basis upon which the OPA had scored and evaluated the following parts of the request for proposal (RFP) submissions: electrical connection point and islanding [3.3.1]; municipal and regional appeals [3.3.3]; and community outreach [3.3.4]. The types of records sought by the appellant included "any and all correspondence, letters, reports, tables, charts, graphs, handouts, booklets, guides, memorandums, emails or documents produced by the OPA" and the proponents.

After identifying the responsive records, the OPA notified the companies named in the request pursuant to section 28(1)(a) of the *Act*, which provides parties whose interests may be affected by the disclosure of records relating to them with an opportunity to make submissions. Upon receiving the representations of the affected parties objecting to the disclosure of portions of their RFP submissions, the OPA issued a decision letter granting partial access to the responsive records. Records, or portions of records, were withheld pursuant to sections 17(1) (third party information) and 18(1)(c) and (d) (valuable government information) of the *Act*. The OPA produced an index of records summarizing the responsive records and the exemptions claimed.

The requester, now the appellant, appealed the OPA's decision to this office, and a mediator was appointed to explore resolution of the issues.

During mediation, the appellant clarified that her group's interest lay in the records relating to the successful proponent's proposal.[2] In this way, the records originating with the other proponents' proposals were removed from the scope of the appeal. Prior to the end of mediation, the appellant also raised the possible application of the public interest override and, as a result, section 23 of the *Act* was added as an issue.

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[1] Source: Ontario Power Authority website (http://www.powerauthority.on.ca/clean-energy/york-energy-centre-393-mw-northern-york-region).

[2] In this decision, the successful proponent is referred to as the "first affected party."

As it was not possible to resolve the appeal through mediation, it was transferred to the adjudication stage, where an adjudicator conducts an inquiry. I sent a Notice of Inquiry outlining the facts and issues to the OPA and to the first affected party, initially, seeking representations on the issues.

I received representations from the first affected party. Shortly thereafter, the OPA issued a revised decision letter, disclosing additional records to the appellant, with the consent of the first affected party. In the revised decision, the OPA also indicated that it was relying on additional parts of the section 17(1) and 18 exemptions to deny access to the remaining records, as well as adding the mandatory personal privacy exemption in section 21(1) to deny access to information contained in record 3. I also received representations from the OPA in support of its exemption claims.[3] Although section 21(1) had not previously been claimed in this appeal, its possible application must be considered because it is a mandatory exemption.

Around this time, the appellant notified this office about an error in the numbering of records 1 and 3; however, while the numbers of the two records were reversed, this had not compromised the proper identification of the records sought by the appellant. Following my own review of these records, I was similarly satisfied that the records at issue match the scope of the appellant's request as of the end of mediation.[4]

Once issues with the sharing of the OPA's representations with the appellant were addressed, I sent a modified Notice of Inquiry to the appellant, along with non-confidential copies of the representations of the OPA and the first affected party, in order to seek submissions. Prior to submitting representations, the appellant wrote to me indicating that she (on behalf of the group she represents) was satisfied with the disclosure from record 3 and did not wish to pursue access to the remaining information "as we have never had interest in personal information." The appellant also advised that it continued to seek access to records 4 through 7. The appellant then provided full written representations on the issues.

Next, I provided a copy of the appellant's representations to the OPA to seek reply representations on the possible application of the public interest override in section 23 of the *Act*. After receiving these submissions from the OPA, I concluded that I should seek sur-reply representations from the appellant on the public interest override. I sent a complete copy of the OPA's reply representations to the appellant, asking that certain points be addressed. The appellant provided sur-reply representations.

During the preparation of this order, I asked a staff member from this office to seek clarification of the appellant's intentions respecting record 3 because there was information withheld pursuant to section 17(1), as well as section 21(1). The appellant confirmed that she did not seek access to any personal information contained in record 3, but wished to pursue access to any other information in the record that the OPA was withholding under section 17(1). In addition, I

[3] The OPA's representations were accompanied by an affidavit sworn by the OPA's Vice President, Electricity Resources (8 pages), as well as an "expert opinion" provided by a consultant in the public procurement field (19 pages plus two attachments).

[4] As the appellant has confirmed that she does not seek access to information relating to two of the proposals (#2 and #3), the portions of record 7 corresponding to them are not at issue in this appeal.

concluded that the views of a second affected party - another one of the proponents - should be sought respecting the possible application of section 17(1) of the *Act* to the information respecting two of its bids contained in record 7. I sent correspondence to that company explaining what was at issue, and I subsequently received the second affected party's consent to disclose the information pertaining to it. Accordingly, this consent is reflected in my findings respecting section 17(1) in this order.

When they provided their representations, the OPA and the first affected party requested that certain portions of them not be shared with the appellant or other parties to the appeal. I agreed to withhold some of these portions from the appellant, pursuant to the confidentiality criteria outlined in the *IPC Code of Procedure* or *IPC Practice Direction 7* (Sharing of Representations). However, in order to properly describe the arguments presented, I have decided that at least some portions of these submissions must be reproduced, or summarized, in this order. I note that the representations that might reveal the content of a record in dispute remain confidential. Furthermore, I have only set out portions of the OPA's or first affected party's withheld representations where that information no longer meets the confidentiality criteria due to the passage of time (since its submission), and where I have concluded that doing so is required to adequately explain my reasons for decision.

RECORDS:

The records remaining at issue consist of tables, correspondence and other documents, totalling approximately 52 pages, either in part or in their entirety.

Record 3 - First Affected Party's Proposal Submission (in binder 1 of 2) - *sections 17(1)(a)-(c)*

Exhibit 5 (Section 3.2.14 - Mandatory Requirements Supporting Documentation) – pages 199-209 and 252 (12 pages)

Exhibit 6 (Sections 3.2.13 & 3.3.1(b) - Load Restoration and Islanding) - pages 253-256 (3 pages)

Exhibit 9 (Section 3.3.4 - Community Outreach) - pages 334-342 (in part), 343-352, 360-369 (29 pages) – also claimed to be exempt under *section 21(1)*

Record 4 - RFP Evaluation of Rated Criteria - Second Affected Party's 1st Proposal (2 pages) – *sections 18(1)(c)-(e)*

Record 5 - RFP Evaluation of Rated Criteria - Second Affected Party's 2nd Proposal (2 pages) - *sections 18(1)(c)-(e)*

Record 6 - RFP Evaluation of Rated Criteria - First Affected Party's Proposal (2 pages) - *sections 18(1)(c)-(e)*

Record 7 - Stage 4 - Evaluation & Selection Process spreadsheet (2 pages, partial) - *sections 17(1)(a)-(c) and section 18(c)&(d)*

ISSUES:

A. Does record 3 contain "personal information"?
B. Would disclosure of records 3 or 7 harm third party interests under section 17(1)?
C. Would disclosure of records 4 to 7 harm the economic or other interests of the OPA under section 18?
D. Does the public interest override in section 23 apply?

SUMMARY OF FINDINGS:

Parts of record 3 contain "personal information" according to the definition of that term in section 2(1) of the *Act*. The appellant agrees that personal information ought to be removed from the scope of the appeal, and this information must be withheld. The removal of "personal information" from the appeal's scope renders analysis of the personal privacy exemption in section 21(1) unnecessary.

Section 17(1)(a) of the *Act* applies to parts of exhibits 5, 6 and 9 to record 3. Section 17(1) does not apply to record 7.

Sections 18(1)(c),(d) and (e) do not apply to records 4 to 7.

The public interest override in section 23 of the *Act* does not apply.

This order requires the OPA to disclose the non-exempt portions of the records to the appellant.

DISCUSSION:

A. DOES RECORD 3 CONTAIN "PERSONAL INFORMATION"?

As stated previously, during my inquiry into this appeal, the OPA added a claim of the mandatory personal privacy exemption in section 21(1) to deny access to pages 343-350 of exhibit 9 to record 3. Notably, the personal privacy exemption can only apply to "personal information" as that term is defined in section 2(1) of the *Act*.

In addition, in its representations, the first affected party suggested that another part of exhibit 9 to record 3 (pages 362-369) contains the personal information of other identifiable individuals.

Since the appellant has advised that she does not wish to pursue access to personal information, I have concluded that this matter can be addressed by determining whether exhibit 9 to record 3 contains information that qualifies as "personal information." Any information that falls under the "personal information" definition in section 2(1) of the *Act* will thereby be removed from the scope of the appeal.

To fit within the definition in section 2(1) of the *Act*, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an

individual may be identified if the information is disclosed.[5] The definition of personal information in section 2(1) contemplates inclusion of the following types of information:

> (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 where 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) of the definition of the term in section 2(1) may still qualify as personal information (Order 11).

Older orders of this office established that information associated with an individual in a professional, official or business capacity will not necessarily be considered to be "about" the individual.[6] On April 1, 2007, amendments relating to the definition of personal information in the *Act* came into effect. To some extent, the amendments formalized the distinction made in previous orders between personal and professional (or business) information for the purposes of the *Act*. Sections 2(3) and (4) state:

[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[6] See, for example, Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

However, it remains true that 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.

The portion of exhibit 9 to record 3 identified by the OPA describes the professional work experience of the affected party's employees, particularly their employment history and "information about stakeholder past projects." The OPA submits that this information is personal information that fits within paragraph (b), (f), (g) and (h) of the definition of the term in section 2(1) of the *Act*.

The OPA submits that pages 343-350[7] contain information about the previous community interactions of the affected party's employees, "including stakeholder profiles," and that this information "directly relates to the employment history of individuals." The OPA submits that this employee information is confidentially held, and is subject to the confidentiality provision in the affected party's RFP.

In addition, as part of its representations on section 17(1), the OPA submits that pages 343 to 350 contain personal information about the affected party's employees because "information about these persons … may provide third parties with information about projects not relevant to the information requested."

The first affected party does not object to the disclosure of pages 343-350. With respect to pages 362-369, however, the first affected party submits that this record contains the personal information of property owners, which if disclosed would identify them as vendors of property sold to the first affected party.

Analysis and findings

I have reviewed the records for which the OPA has claimed the personal privacy exemption, and I am satisfied that some portions of pages 343-350 contain personal information. This information consists of the employment and educational histories of the affected party's employees who were to be involved in the project, including information clearly extracted from the résumés of these individuals. Indeed, the header for this information is "Team Member Experience" on page 343 and the following eight pages include the names, educational and employment qualifications and other experience of 15 individuals associated with the affected party's project team. Accordingly, I find that much of the information provided on these pages

[7] As indicated in footnote 88 of the OPA's June 15, 2010 initial representations, the OPA referred to pages 333-350, but I take this to be in error since all other references in this section are to pages 343-350.

properly falls under paragraphs (b) (education or employment history) and (h) (individual's name along with other personal information) of the definition of "personal information" in section 2(1) of the *Act*.

In light of the appellant's indication that personal information is not of interest, the personal information described above that is contained in exhibit 9 to record 3 is removed from the scope of this appeal.

However, in my view, this section of the first affected party's proposal also contains information related to these same individuals that does not qualify as *personal* information under section 2(1) because it fits within the parameters of section 2(3) of the *Act* as business information, or because it is not information about an individual in a personal capacity. Specifically, I find that the names of the individuals who are intended to work on the project, their professional designations, their job titles, and any general descriptions of their assigned tasks or responsibilities for aspects of the project does not qualify as personal information (see Order PO-2637). Accordingly, this information does not qualify for exemption under section 21(1) of the *Act*.

The first affected party did not object to the disclosure of the information contained on pages 343-350, either as personal information or as information that should be withheld under section 17(1), as claimed by the OPA. The OPA indicated in its June 4, 2010 revised decision letter to the appellant that it "agrees to disclosure of these pages." Accordingly, subject to the severance of the personal information described above, I will order pages 343-350 disclosed to the appellant.

It is not necessary to proceed with an analysis of whether the information I have found above to be "personal information" also qualifies for exemption under section 21(1), given the appellant's indication that this information may be removed from the scope of this appeal. However, I note that many previous orders of this office have found personal information of this particular type to be exempt under section 21(3)(d) of the *Act*.[8]

I will also address the part of the OPA's submissions on pages 343-350 that appear as part of its section 17(1) arguments, and as outlined above. I am unable to reproduce the exact wording of the OPA's argument without disclosing the content of the record, but I note that the section containing information about past projects to which the OPA refers is not found at pages 343-350 of exhibit 9 to record 3. Information of the type described in the OPA's representations appears on pages 341 and 342, and it is provided in reference to past projects that the first affected party's entire team have been involved in. As such, I am satisfied that this additional information on pages 341 and 342 constitutes information about the team and/or first affected party, rather than information about any single, identifiable individual. Accordingly, I find that this additional information does not qualify as personal information for the purposes of the definition in section 2(1) of the *Act*. I will, however, consider whether it is otherwise exempt under section 17(1), as claimed.

[8] Section 21(3)(d) states: "A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information, … relates to employment or education history." See Orders M-1084, MO-1257, PO-2637 and PO-2733.

Finally, I note that exhibit 9 of record 3 contains an Agreement of Purchase and Sale, accompanied by a schedule, at pages 362-369. The OPA did not specifically identify this record as containing personal information, but the first affected party claims that it does. On my consideration of it, I find that this record contains the names and other personal information of the vendors of this property under paragraphs (a), (b), (d) and (h) of the definition of that term in section 2(1) of the *Act*. As the appellant has removed "personal information" from the scope of the appeal and it is reasonably possible to sever the personal information about the identifiable vendors, I will so order. Once this personal information is severed, the record is no longer *about* an identifiable individual or individuals. However, the remaining information in this agreement and its schedule must still be reviewed to determine if they are exempt under section 17(1), as the OPA and the first affected party claim.

I will now review the possible application of section 17(1) to the records.

B. WOULD DISCLOSURE OF RECORDS 3 OR 7 HARM THIRD PARTY INTERESTS?

The OPA and the first affected party claim that sections 17(1)(a), (b) and (c) apply to portions of record 3 (exhibits 5, 6, and 9). In addition, the OPA relies on the same parts of section 17(1) to deny access to the responsive information in record 7.[9]

Section 17(1) of the *Act* is a mandatory exemption that applies to exempt the information of a third party if certain requirements are met. The relevant parts of section 17(1) state:

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

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[10] Although one of the central

[9] At issue in the summary record (7) is the information relating to three of the qualifying bids: the successful bid submitted by the first affected party and two unsuccessful bids submitted by the second affected party. In addition, there are headings and categories describing and summarizing the information.

[10] *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.).

purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[11]

There is an exception to section 17(1) that is found in section 17(3). This provision states:

> A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

The exception in section 17(3) is relevant in this appeal because the second affected party – one of the unsuccessful proponents – provided consent to disclose the information in the records relating to it. This consent applies to the withheld information relating to the second affected party that is contained in record 7 and which the OPA claims fits within section 17(1) of the *Act*.

To establish the application of section 17(1), the OPA and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Does the record reveal information that is a trade secret or scientific, commercial, financial or labour relations information?

The types of information listed in section 17(1) that are argued by the OPA and the first affected party to be contained in records 3 and 7 have been described in a number of past orders as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing (Order PO-2010).
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making

[11] Orders PO-1805, PO-2018, PO-2184, MO-1706 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* [2008] O.J. No. 3475 (Div. Ct.).

> enterprises and non-profit organizations, and has equal application to both large and small enterprises (Orders P-493 and 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 (Order 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.

According to the OPA, the withheld portions of the record 3 exhibits contain the commercial and technical information of the first affected party. According to the OPA, record 7 contains the affected parties' financial and commercial information. The OPA's representations on the type of information are not otherwise specifically tailored to the records at issue and merely repeat the wording of the definitions outlined above.

The first affected party submits that the information it seeks to have withheld consists of technical and commercial information. According to the first affected party,

> The information consists of technical drawings and plans, information relating to the technical and engineering solution that [we] offered in response to the electricity generation and load restoration requirements of the RFP, and information that sets out [our] management plans for securing the [necessary] approvals… As such, the information is technical and commercial information directed related to the conduct of [our] business of building and operating electricity supply facilities.

The appellant's representations do not directly address whether the undisclosed information in the records qualifies as one of the types recognized in part 1 of the section 17(1) test. However, the appellant does appear to concede that the records may contain technical or financial information, remarking that "… normally proprietary technical information and financial information reasonably should be withheld from public disclosure, however there are far too many unresolved questions about the OPA scoring methods and other aspects of the proponent's bids." I will be addressing this submission later in the order, as it relates to the possible application of the public interest override.

On my review of the records, I agree with the characterization of the records by the OPA and the first affected party. I find that all of the records contain commercial information, as they address the provision of services for the construction and operation of this particular facility for the OPA. I also find that the information contained in exhibits 5 and 6 of record 3 contain detailed, technical information respecting the site plans, loading and connection issues for the OPA power generating facility. In addition, I find that record 7 contains financial information relating to the affected parties, namely, information concerning bid revenue requirements, cost accounting and operating costs.

Accordingly, I find that all of the information for which section 17(1) is claimed meets the requirements for part 1 of the test for the application of section 17(1) of the *Act*.

Was the information supplied to the OPA in confidence, either implicitly or explicitly?

In order to satisfy part 2 of the test, the OPA and/or the first affected party must establish that the information at issue was "supplied" to the OPA in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties (Order MO-1706). Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020 and PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract are normally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706 and PO-2453). Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not therefore considered to be "supplied" (Orders MO-1706, PO-2371 and PO-2384). The Divisional Court upheld the "reasonableness" of this office's approach to this issue, finding that information in a negotiated contract had not been "supplied" to the institution in question.[12]

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.[13]

Regarding the exhibits to record 3 that are at issue, the OPA submits that this office has previously found that RFP proposals provided to an institution as part of the process followed in seeking a supplier of goods or services through a competitive selection process are supplied for the purposes of part 2 of the test under section 17(1) (Orders MO-1919 and MO-1813). Further, the OPA submits that the exhibits do not consist of mutually generated information, but rather commercial and technical information assembled by the affected party. Citing *Canadian Medical Protective Association v. John Doe*, the OPA submits that "[u]nlike a supply agreement, record 3 was immutable and judged by the OPA, as it was provided."

[12] *Boeing v. Ontario (Ministry of Economic Development and Trade)*, *supra*.
[13] Orders MO-1706, PO-2384, PO-2435, and PO-2497 (upheld in *Canadian Medical Protective Association v. John Doe*, *supra*).

The OPA also submits that the commercial and financial information of the affected parties contained in record 7 was supplied by the proponents, and that it is not "mutually generated" or susceptible to change."

According to the first affected party, the information it seeks to withhold reveals confidential information about its "business assets" and was supplied to the OPA "without being the subject of negotiation." Referring specifically to management plans for securing approvals for the project and the technical information respecting loading and connection provided to satisfy the mandatory requirements of the RFP (contained in the record 3 exhibits), the affected party submits that:

> neither were subject to negotiation or a "back and forth" with the OPA and both types of information can be considered relatively immutable and not susceptible to change (IPC Order PO-2433)… [The] unique design and … solution … from which the financial aspects of [our] bid, including relative operating costs and margins could be estimated by a knowledgeable [individual]… is subject to the inferred disclosure exception.

The appellant's representations do not specifically address the "supplied" component of part 2 of the test for exemption under section 17(1).

Analysis and findings

Having carefully reviewed the information at issue in record 3, in conjunction with the representations of the OPA and the first affected party, I find that it was – with two exceptions – directly "supplied" to the OPA, in support of the bid to construct and operate the gas-fired power generation plant.

In many previous orders, this office has found information submitted in response to an RFP to be "supplied" for the purpose of section 17(1). Information contained in proposal documents that remains in the form originally provided by a proponent is considered not to be the product of any negotiation between the institution and that party.[14] In my view, this reasoning ought to be applied to most of the information at issue in record 3 in the present appeal.

It is generally accepted that the purpose of section 17(1) is to protect the "informational assets" of a third party. In my view, the information withheld from exhibits 5, 6 and 9 to record 3, with two exceptions, constitutes the informational assets of the first affected party in that they represent the methodology and approach employed by this proponent in addressing several issues mandatory to the fulfilling of the RFP requirements. I am satisfied that this information appears in the form it was submitted by the first affected party, and I find that it meets the definition of "supplied" accordingly.

The first exception to my finding that the undisclosed portions of record 3 were "supplied" relates to pages 360-361 of exhibit 9. This record is a two-page letter sent by a third party to the first affected party respecting one aspect of fulfilling one of the mandatory requirements of the

[14] See, for example, Orders MO-1368, MO-1504, PO-2300 and PO-2637.

bid. This record represents the third party's suggestion about how to resolve a specific issue. The second exception relates to the purchase and sale agreement (and schedule), located at pages 362-369 of exhibit 9. In my review of the personal information issue, above, I ordered the personal information severed, with the result being that the information that remains at issue in this record is "no longer *about* an identifiable individual or individuals." On my review of these 10 pages, I reject the argument that either of the letter or real estate agreement ought to be viewed as the first affected party's "informational asset," notwithstanding that it was provided as a component of that party's proposal.

In the circumstances, I find that pages 360-369, contained in exhibit 9 to record 3, were not "supplied" to the OPA in the sense required for the record to satisfy the requirements of part 2 of the section 17(1) test. As all three parts of the test for exemption must be met for section 17(1) to apply, and no other exemptions have been claimed in relation to these pages, I will order them disclosed to the appellant, with the exception of the personal information they contain.

Record 7 is a two-page document titled Stage 4 - Evaluation and Selection Process, prepared by the OPA to evaluate the bids on a comparative and adjusted basis. The record encapsulates key information about each qualifying bid, and I am satisfied that the information featured in it was drawn directly from the proposals submitted by the affected parties to the OPA in response to the RFP process.[15] Accordingly, I find that record 7 contains information that was "supplied" to the OPA within the meaning of part 2 of the test in section 17(1).

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:

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

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

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

4. prepared for a purpose that would not entail disclosure (Order PO-2043).

The OPA maintains that the affected parties had a reasonable expectation of confidentiality with respect to the information supplied to the OPA, particularly given that the RFP's language

[15] As indicated previously, only the information relating to three of the five qualifying bids in record 7 are at issue.

contains an explicit expectation of it. The OPA explains that procurement is done within the close confines of confidentiality agreements and other process matters set by the government of Ontario in conducting the competition.

The OPA then sets out section 2.10 of the RFP, which relates to the confidentiality of documentation provided in response to this particular procurement process. Section 2.10 essentially puts the onus on proponents to "clearly indicate in a separate confidentiality statement … any portion of the … Proposal that contains proprietary or confidential information for which confidentiality is to be maintained by the OPA and its advisors." The RFP acknowledges that all information provided to the OPA is subject to disclosure pursuant to the provisions of the *Act*.

Regarding the factors that determine the reasonableness of an expectation of confidentiality, the OPA submits that the first affected party's proposal was:

- communicated to the OPA 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 first affected party prior to being communicated to the OPA;
- was, for the most part, marked "proprietary and confidential";
- never disclosed publicly or provided to anyone outside the OPA;
- prepared for a purpose that would not entail disclosure; and
- kept in secure locations at all times (OPA offices, with evaluation team members or with the Fairness Advisor).

The OPA submits that the revenue and cost information in record 7 was supplied to the OPA by bid proponents with a reasonably held expectation of confidentiality pursuant to the confidentiality statements. According to the OPA, this cost and revenue information is not available to the public and was prepared solely for the purpose of submitting a successful bid. In the circumstances, therefore, the affected parties had "every reason to believe their information was supplied with both an explicit and implicit expectation of confidentiality." The OPA adds that proponents must be assured that "documents marked as proprietary and confidential will not be unnecessarily provided to third parties."

Regarding the undisclosed portions of record 3, the first affected party relies on the confidentiality statement it prepared in response to section 2.10 of the RFP, quoting it directly:

> In accordance with Section 2.10 of the Request for Proposals for approximately 350 MW of Peaking Generation in Northern York Region (NYR RFP-2008) and the [*Act*] ..., the Proponent designates each and every element, attachment and exhibit of the [first affected party's] Proposal Submission as proprietary and confidential information and such information shall not be disclosed by the

> [OPA], the Evaluation Team or its technical advisors to any person other than those individuals that require such information for the purpose of evaluating, reviewing or approving this Proposal Submission submitted in response to [the RFP] without the express consent of Proponent unless required to do so by law.

The first affected party adds that it has maintained its RFP response in confidence and has not disclosed the withheld information publicly or to any party that is not under an obligation to hold the information in confidence.

As noted, neither of the affected parties provided submissions in support of the application of section 17(1) of the *Act* to record 7.

The appellant does not directly comment on the "in confidence" element of part 2 of the test.

Analysis and findings

First, the OPA's argument that proponents must be assured that "documents marked as proprietary and confidential will not be unnecessarily provided to third parties" deserves comment. In my view, disclosure under the *Act* is not properly characterized as "unnecessary" since it represents disclosure by operation of law. Moreover, such disclosure is expressly contemplated by section 2.10 of the RFP. In other words, although proponents may have entered into the RFP process with the desire to protect the confidentiality of information said to be commercially sensitive, they were put on notice by section 2.10 of the RFP that the OPA could be required to disclose it pursuant to the *Act*, despite any agreement between them to the contrary.

That being said, past orders of this office have found that the inclusion of a notice provision in the record that identifies the *Act* applying to the information is important evidence in determining the "in confidence" component of part 2 of the test. In Order PO-1688, for example, the adjudicator found that the affected parties held a reasonable expectation of confidentiality despite the fact that the confidentiality clause contained a reference to proposals being subject to the provisions of the *Act*. When a notice provision is present, the onus has been found to rest on the individual bidders to identify the components of their submission that contain information they wish to remain in confidence.[16]

In this case, the representations of the first affected party and the OPA focus on an expectation of confidentiality, as evidenced both by the confidentiality statement prepared by the first affected party in response to section 2.10 of the RFP and the manner in which the information prepared for the RFP process was handled to maintain that confidentiality. In the circumstances, I find the first affected party's evidence regarding its expectation of confidentiality to be compelling. I also accept the OPA's evidence that it intended to (and did) receive and hold in confidence the information provided by the proponents.

[16] Orders MO-1861, PO-2453, PO-2478 and PO-2497 (upheld in *Canadian Medical Protective Association v. John Doe*, *supra*).

Based on my review of the information contained in the remaining undisclosed portions of exhibits 5, 6 and 9 of record 3 and record 7, as well as the representations, I am satisfied that this information was supplied with a reasonably-held expectation that it would be treated in a confidential manner by the OPA. The nature of the information itself leads to that conclusion.

I therefore find that the undisclosed portions of records 3 and 7 that remain at issue were supplied in confidence in accordance with part 2 of the test for exemption under section 17(1). I now turn to a review of part 3 of the test.

Would disclosure of the records give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 17(1) will occur?

To meet this part of the test, the parties resisting disclosure (in this case, the OPA and the first affected party) must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" with the release of the information.[17] Evidence amounting to speculation of possible harm is not sufficient.

Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* (Order PO-2435). 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).

All three paragraphs of section 17(1) have been cited by the parties opposing disclosure of the records. As previously noted, this mandatory exemption will apply to certain types of information:

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

The OPA submits that if it is ordered to disclose the records in question, the OPA will "suffer harms consistent with each of *FIPPA* paragraphs 17(1)(a), (b) and (c)", including:

[17] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)

> The existing contractual negotiations of the OPA would be significantly interfered with;
>
> [D]isclosure of the [successful] bid will likely result in proposals no longer being made to the OPA, which would harm the organization … The OPA would not receive proposals in the future when it would be in the public's best interests for such proposals to continue to be made; and
>
> The OPA would suffer undue loss as a result of not receiving as many, or as comprehensive, proposals.

According to the OPA, the exhibits to record 3 contain information about the successful proponent's management and consultation plans, proprietary solutions and strategies for meeting the requirements of the RFP. The OPA argues that if the withheld parts of this record were disclosed, this would significantly interfere with the OPA's contractual negotiations since this type of disclosure is contrary to "market practice in high-tech and similar procurement involving delivery of a customized product or service to the OPA." According to the OPA, such disclosure would result in a loss of competitive advantage. The OPA refers to Order MO-1919 in support of the argument that the disclosure of information related to pricing and bid breakdowns (in record 7) has been held to "establish a reasonable expectation of prejudice to competitive positions of institutions." Further, the OPA argues that providing the details of costs and revenues to third parties could reasonably be expected to significantly prejudice the competitive positions of the proponents because the third parties will "know for future RFPs which numbers each proponent was able to compile and how those numbers related to their success in the bid." Further, the OPA submits that access to record 7 would provide a competitive advantage to the person in receipt of it.

In an opinion provided along with its representations, the OPA's consultant states:

> … the transaction contemplated in [this] RFP … constituted what might be broadly described as a hi-tech form of procurement. Specifically, it involved the site specific development of combustion technology in or near a community. In procurement, I take this to mean that the project involved a technology that had to be modified in a site specific way so as to function in a manner compatible with an existing community … For the purposes of this opinion, I would define a "hi-tech business" to be one involving the delivery of newly invented products *or the use of newly invented technology to deliver a service or otherwise meet a customer need*… Most new technologies in such fields have a short shelf-life, and require heavy, on-going investment in research and development, and in bringing the emerging technology to market [emphasis in original].

According to the OPA's consultant, it is necessary for the vendors of such technologies to take all reasonable steps to extend their "shelf-life" by protecting the secrecy of the technology and the means of modifying it. Accordingly, the opinion provider submits that vendors are prepared to make necessary disclosures to potential customers in seeking a sale, but look to impose

restrictions on further disclosure by the customer "for fear that any such disclosure will rob them of a market [or competitive] advantage."

The OPA refers to Order P-367 where Inquiry Office Holly Big Canoe accepted the evidence of a proponent to an Ontario Hydro bid that its bid documentation essentially provided to a "'how-to' manual for the design and successful implementation of a contract, as it contained full descriptions of structure, systems, and procedures in enough detail that they could be duplicated," thereby causing that company to lose its competitive advantage. The OPA also relies on the first affected party's representations respecting the "harms it will suffer as a result of the disclosure of the record 3 exhibits."

Notably, the portions of the first affected party's representations cited by the OPA were not shared earlier in this inquiry with the other parties because I had accepted the first affected party's position that by sharing its representations with the appellant, I would, in effect, be sharing the contents of the records. However, to provide context for the affected party's opposition to disclosure of record 3, I have decided to set out excerpts from the first affected party's representations that were not originally shared. As noted in the introduction to this order, I have sought to include in this order certain portions that provide a helpful context for the first affected party's position without disclosing what remains, at this point, confidential according to the criteria developed by this office. The first affected party states:

> It is imperative for successful delivery of the facility that [we] be able to manage [our] consultation process and execute on [our] operational and technical plans without anticipated disruptions caused by disclosure of [our] project management plans.

The first affected party submits that disclosure of the technical information in exhibits 5 and 6 of record 3 will give its competitors "very valuable technical intelligence at no cost and will significantly prejudice [it] in future bids for electricity supply generating capacity in Ontario." Further, the first affected party argues that disclosure of the commercial information in exhibit 9 will reveal confidential mitigation strategies for communicating with the community, agencies and organizations to seek support for the project. The first affected party submits that this disclosure would cause harm to its negotiating and competitive positions.

As described in the affidavit sworn by the OPA's Vice President, Electricity Resources, record 7 represents the application of the data resulting from the "stage 3" scoring of the bids to the costs and revenues of each proponent. The OPA submits that the proponents' information in this record is specific to each of their ability to provide a supply of energy at a certain rate. The OPA argues that if each of the competitors knows what others have offered, it will be prejudicial to the proponents' ability to negotiate this type of contract in the future. By extension, the OPA submits that disclosure of the cost and revenue information will make proponents less inclined to provide that information to the OPA in the future.[18]

The OPA argues that it will not receive the information from vendors if they cannot be assured that the information provided in an RFP will be safeguarded. Further, the OPA argues that if it is

[18] Affidavit of VP, Electricity Resources, at paras. 42 to 45.

to receive bids "which honestly focus on the strengths and weaknesses of all parties involved," proponents must be assured that "documents marked as proprietary and confidential will not be unnecessarily provided to third parties." The OPA argues that it would suffer undue loss under section 17(1)(c) as a result of not receiving as many, or as comprehensive, proposals.

Further, the OPA's consultant states that with the concerns of hi-tech companies respecting confidentiality and security, "overly broad disclosure will influence company decisions as to whether to pursue public sector work." This individual adds:

> In my current [public procurement consulting] business, I have been investigating reasons why many solid companies do not pursue government work. I have encountered a number of suppliers who will not pursue government contracts. The reasons vary, but some have identified concerns about the freedom of information process resulting in disclosure of information about their business or their products that allows a competitor to springboard ahead of them. … Reducing the number of bids for government work is not in the public interest.

The first affected party did not provide representations on the application of section 17(1) to record 7.

The appellant states that it cannot argue against the points raised in the evidence provided by the OPA's public procurement consultant because that individual is a "highly qualified professional." However, the appellant wonders about the impact on the government's ability to "do good procurement when it is public knowledge that a[n] RFP has not been adhered to." Furthermore, the appellant submits that because the RFP process has been completed, and because the terms of the contract would not be dissimilar to other power generation contracts in the province, the OPA's concern about disclosure undermining its RFP process is weak.

With regard to the OPA's representations about disclosure permitting future proponents to "gild the lily" and compromise the process of discerning truly strong bids, the appellant notes that this phenomenon is "part of any pitch to sell something," and the adage "buyer beware" has equal relevance.

Analysis and findings

As past orders of this office have acknowledged, the disclosure of information relating to a procurement process must be approached thoughtfully, with consideration of the tests developed by this office, as well as an appreciation of the commercial realties of a procurement process and the nature of the industry in which the procurement occurs (Order MO-1888). In each case, the quality and cogency of the evidence presented, including the positions taken by affected parties, the passage of time, and the nature of the records and the information at issue in them must be considered. Furthermore, the strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability (see Order MO-2496-I).

Based on the representations of the parties resisting disclosure and the content of the records themselves, I am satisfied that disclosure of the portions of the first affected party's bid documents found in record 3 that remain at issue could reasonably be expected to adversely and significantly impact upon that party's competitive position, as contemplated by section 17(1)(a) of the *Act*.

The information in the undisclosed parts of the exhibits to record 3 relate to matters that go directly to the heart of the RFP proposal made by the first affected party, describing in detail the islanding and connection point planning and other services it would be providing under the terms of its proposal to construct and operate the OPA's new facility. As argued by the consultant providing submissions on the OPA's behalf, I accept that the fact situation described in Order P-367 is relevant to the circumstances of this appeal. The exhibits to record 3 essentially represent a "how-to" manual for the design and successful implementation of this contract, containing "full descriptions of structure, systems, and procedures in enough detail that they could be duplicated," thereby causing that company to lose its competitive advantage. In my view, these portions of exhibits 5, 6 and 9 to record 3 represent a significant investment of time, money and resources by the successful proponent, as well as the accumulated experience of the company (Orders PO-1818 and PO-1957).

I accept that procurement in the energy sector, described as hi-tech by the OPA's consultant because of rapid developments in combustion technology, is highly competitive. I am satisfied, therefore, that if this information were to be disclosed, a competitor could reasonably be expected to imitate the format, as well as the substance, of the first affected party's proposal in preparing for future consulting competitions initiated by the OPA, or other government or private sector RFP. For these reasons, in my view, disclosure of the bid-related commercial and technical information at issue could reasonably be expected to result in the "harms" contemplated by section 17(1)(a). Accordingly, I find that the following portions of record 3 exhibits are exempt under section 17(1)(a): pages 199-209 and 252 of exhibit 5; pages 253-256 of exhibit 6; and pages 334-342 and 351-352 of exhibit 9.[19] In view of this finding, it is unnecessary for me to review the possible application of sections 17(1)(b) and (c) to these records.

I now turn to review of the evidence presented respecting harm upon disclosure of record 7, which is the "stage 4" summary prepared by the OPA to compare the bids in certain categories. Importantly, only the column relating the first affected party's bid remains at issue and that party did not provide representations opposing the disclosure. The information relating to the other proposals is no longer at issue, either because the appellant does not seek access to them or because the second affected party has consented to the disclosure of the bid information relating to its two qualifying proposals.

[19] Reference should be made back to my findings under the heading "Personal Information." Given the first affected party's consent to disclose pages 343-350, the only exemption claim these pages were subject to was the OPA's assertion that section 21(1) applied. Previously in this order, I found that these pages should be disclosed to the appellant, subject to the severance of information I found to qualify as "personal information" according to the definition of the term in section 2(1) of the *Act*, as desired by the appellant. Similarly, any "personal information" contained in pages 362-369 was not at issue under section 17(1) and those pages will also be disclosed with personal information severed.

In its representations opposing disclosure of record 7, the OPA directed my attention to Order MO-1919 in support of the argument that the disclosure of costs and revenues could reasonably be expected to significantly prejudice the competitive positions of the proponents because the third parties will "know for future RFPs which numbers each proponent was able to compile and how those numbers related to their success in the bid." However, I note that in Order MO-1919, the City of Toronto's claim for exemption under section 10(1) (section 17(1)'s municipal equivalent) failed – on both parts 2 and 3 of the test – because the adjudicator was not presented with sufficiently detailed and convincing evidence.[20]

It is telling, in my view, that the first affected party did not offer submissions on the application of section 17(1) to record 7 and, further, that the second affected party consented to disclosure of the information in record 7 relating to it. In my view, this weakens the OPA's claim that harm could reasonably be expected to result from disclosure of the information in the Selection Process summary. Earlier in this order, I found that the information contained in record 7 had been supplied in confidence for the purpose of part two of the test under 17(1). However, in my consideration of the potential of harm resulting from disclosure of this same information, several of the OPA's submissions should not pass without comment. Specifically, the OPA contends that the same information in record 7 "directly populated the contract that resulted" from the RFP, and that the "RFP and final form of contract arising from the RFP are publicly available."[21] In other words, at least some of the same information in record 7 that the OPA seeks to withhold is publicly available. I have not been provided with any evidence that harm has resulted from that availability.

Record 7 was created by the OPA and used by it to review, compare and evaluate the relative merits of the five qualifying proposals. I have considered the OPA's representations respecting the harms that will flow from the disclosure of this record, as well as the positions of the affected parties whose proposals are the subject of the appellant's interest. In this context, I am not persuaded that disclosing the information relating to the first affected party's bid in the summary, or the related headings, could reasonably be expected to result in any of the harms outlined in sections 17(1)(a) or (c) of the *Act*.

Respecting the harm under section 17(1)(b), the OPA argues that disclosure of record 7 will make proponents less inclined to provide that information to the OPA in the future. Further, I note the comments of the OPA's consultant that "overly broad disclosure will influence company decisions as to whether to pursue public sector work." However, the language of section 17(1)(b) does not refer to proponents or businesses being "less inclined" to provide information. It refers to information "no longer being supplied."

In Order MO-1781, Senior Adjudicator David Goodis addressed a similar argument that "if this sort of confidential information is disclosed, it is highly likely that, in other competitions held by

[20] Moreover, these arguments in Order MO-1919 were also made by the City of Toronto in denying access to bid records pursuant to sections 11(c), (d) and (e) of the municipal *Act*. The city offered no representations in support of the application of section 11(e) during the inquiry and neither the section 10(1) or 11 claims were upheld.
[21] Affidavit, VP, Electricity Resources, paragraphs 18 and 23.

government institutions, qualified bidders will either not participate or not provide the detailed confidential information here in issue for fear of its disclosure."[22] The Senior Adjudicator stated:

> In the circumstances, there is no reasonable basis for a finding that additional information, apart from that found exempt under sections 10(1)(a) and/or (c) [the equivalent provisions in the municipal *Act*], should be withheld under section 10(1)(b). Once the more sensitive financial and/or commercial information is removed from the records, there is no reasonable basis for additional paragraph (b) concerns.

Similarly, in this appeal, I find that I have not been presented with sufficiently detailed and convincing evidence to establish that disclosure of the specific information remaining at issue in record 7 – extracted from the first affected party's proposal – could reasonably be expected to result in similar information no longer being supplied to the OPA in the future. In the circumstances, I find that the reasonable expectation of harm required by section 17(1)(b) has not been established.

Accordingly, since part 3 of the test for exemption under sections 17(1)(a), (b) and (c) has not been established, I find that section 17(1) does not apply to record 7. I will now review the possible application of section 18 of the *Act* to records 4 to 7.

C. WOULD DISCLOSURE OF RECORDS 4 TO 7 HARM THE ECONOMIC OR OTHER INTERESTS OF THE OPA?

The OPA relies on sections 18(1)(c), (d) and (e) to withhold portions of records 4 to 6. Record 7 is only subject to claim for exemption under sections 18(1)(c) and (d).

The relevant parts of section 18(1) state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

[22] The records at issue in Order MO-1781 related to the RFP for the "restoration, revitalization and management of" Toronto's Union Station.

The purpose of section 18 is to protect certain economic interests of institutions. In the Williams Commission Report, the rationale for including a "valuable government information" exemption in the *Act* was explained as follows:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute. …[23]

For sections 18(1)**(**c) or (d) to apply, the OPA must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the OPA is required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[24] Section 18(1)(d) is arguably broader in scope than section 18(1)(c); however, both sections take into consideration the consequences that would result to an institution if a record was released (Order MO-1474).

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 18 (Orders MO-1947 and MO-2363).

In order for section 18(1)(e) to apply, the OPA must show that:

1. the record contains positions, plans, procedures, criteria or instructions;

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;
3. the negotiations are being carried on currently, or will be carried on in the future; and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution [Order PO-2064].

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation (Orders PO-2064 and PO-2536). The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding (Orders PO-2034 and PO-2598).

According to the OPA, the disclosure of records 4 to 7 will harm the OPA's economic interests and its competitive position because of the negative impact on its RFP processes. The OPA submits that disclosure of the scoring records (records 4 to 6), which "are consistently used by the OPA to review proposals," will undermine the integrity of the process and make it more

[23] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980).
[24] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra*, footnote 17.

difficult to discern between "truly strong bids, and those which are merely being carefully presented." Specifically, the OPA argues that disclosure of records 4 to 6 would allow future proponents to manipulate the RFP process by tailoring their bids merely to satisfy criteria set out in those records. The OPA also submits that:

> One of the Rated Criteria is "Municipal and Regional Approval". If municipalities or public groups are able to view the [scoring rubric], they may alter approvals given or in process just to stymie a successful proponent from constructing their plant. This would cause prejudice to the OPA's economic interests by resulting in undue cost and instability to the RFP process and the subsequent concluded contract.
>
> … [I]f an organization has access to the [scoring rubric], they may submit a higher price without fear of suffering point deductions and critique of their proposal…[25]

The OPA expands on the argument presented above, generally following the theme of exploitation of the RFP process. However, those remaining portions of the OPA's representations are being maintained in confidence and are not reproduced here, although I have considered them in their entirety.

In its affidavit evidence, the OPA indicates that "similar, if not identical, Rated Criteria are used across the OPA's RFP's." Further, according to the OPA's consultant:

> the OPA is subject to a material risk of harm in relation to disclosure of the scoring and related information under consideration here. Specifically, there is a serious risk of prejudicing the OPA's competitive interests as a customer, through discouraging leading players in the relevant market from bidding, if they are asked to provide information that could result in a loss of competitive advantage.

The OPA's consultant also submits that the disclosure of the internal scoring information relating to an RFP undermines the integrity of the RFP process because:

- disclosing only scoring is of little value in the absence of a context to the score and may reflect only the "idiosyncratic scoring" of an individual evaluator;
- disclosure of scoring would serve to undermine the consistency of the process, and the perception of it which might, in turn, result in some proponents not bidding at all;
- disclosure of scoring sheets and rubrics could permit a bidding party to manipulate the tendering process by polishing up their proposal so as to hit the point targets, referred to elsewhere in the OPA's submissions as "gilding the lily".

[25] This reference appears in the OPA's written submissions, marked confidential, but it also appears on page 14 of the OPA consultant's opinion, which was shared with the appellant. Further, the OPA's consultant adds: "whether this would be likely to be the case would depend really upon the circumstances of the individual tender or RFP…"

Respecting another aspect of disclosure that would concern the OPA, it submits:

> A reasonable expectation of probable harm can be drawn from the fact that even when requesting the records, the appellant has acknowledged alignment with a group opposing the construction of the … project which resulted from the records in question.

Explaining this point further, the OPA submits that third party interference with this particular project is not merely speculative since the municipality where the facility is located passed an interim control by-law for study of certain land use planning matters pertaining to the project. In addition, the OPA argues that access to scoring records will damage OPA's economic interests and its financial interests "without benefitting the public interest" due to the resulting "obstruction of the construction" of the facility. The OPA's affiant adds:

> Ultimately, disclosure of the records [4 to 6] will not provide transparency, but instead provide the proponents with internal documents of the OPA used to evaluate proposals. … The OPA has been satisfied with the contracts which it has been able to conclude through usage of the RFP process. … Development of an alternative OPA procurement process would be costly to the OPA and not beneficial to the public.

In support of its claim that section 18(1)(e) applies to records 4 to 6, the OPA refers to the purpose of the exemption, as described in the Williams Commission Report[26] and as outlined by Adjudicator Laurel Cropley in Order PO-2034:

> With respect to the types of "negotiations" to recognize under this exemption claim, the Williams Commission Report recommended at page 323:
>
> > The ability of the government to effectively negotiate with other parties must be protected. Although many documents relating to negotiating strategy would be exempt as either Cabinet documents or documents containing advice or recommendations, it is possible that documents containing instructions for public officials who are to conduct the process of negotiation might be considered to be beyond the protection of those two exemptions. A useful model of a provision that would offer adequate protection to materials of this kind appears in the Australian Minority Report Bill:
> >
> > > An agency may refuse to disclose:
> > >
> > > A document containing instructions to officers of an agency on procedures to be followed and the criteria to be applied in negotiations, including financial,

[26] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980*, vol. 2 (Toronto: Queen's Printer, 1980). The OPA sets out excerpts from pages 321 and 323 of the Report, as these were set out in Order PO-2034 at pages 21 and 22.

> commercial, labour and international negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities where disclosure would unduly impede the proper functioning of the agency to the detriment of the public interest.
>
> We favour the adoption of a similar provision in our proposed legislation.

The OPA submits that the method of scoring constitutes criteria that will be applied to future proposals. The OPA adds that while it does not negotiate with proponents, the use of the scoring method and rubric "is a broader form of negotiation." More specifically, the OPA submits that its "internal process for determining whether a consultant's bid appropriately fits the OPA's requirements is a negotiation."

As stated, the appellant's representations do not directly address the section 18 exemption, but they do respond to the OPA's submissions more generally. For example, the appellant's response to the suggestion that proponents will engage in "gilding the lily" if the information in records 4 to 6 are disclosed is to state that "this is part of any pitch to sell something" and there is another relevant adage, which is "buyer beware." The appellant adds:

> It [is] curious that in the OPA[']s representations] it is presented as though the entity at risk of being hurt by disclosing the requested information is the seller [proponent] who may have gilded the lily. What about such disclosure shedding light on whether the purchaser has done due diligence?

The appellant responds to the OPA's arguments about the identity of the appellant's group and its actions by stating:

> [We] have been upfront about our opposition. And, yes, we have been diligent to pursue any legal avenue open to us. We are volunteers, lay persons, functioning without the financial resources available to the Ministry of Energy & Infrastructure and its agent the OPA and [the successful proponent]. It is difficult to imagine how we could "harm" any of these entities carrying out their activities in a manner consistent with the legislations governing business and living in Ontario and Canada.
>
> We are requesting the information in order to better understand how a critical decision has been made; namely, how [the successful proponent] was selected for a 20 year contract as part of a project with a total value of close to $1 billion, with the goal of solving a gap in electricity supply for northern York Region.

In reference to the OPA's submissions on section 18(1)(e), the appellant submits that while the procurement process requires flexibility which may involve negotiation, "we disagree with the magnitude of such flexibility … [and] how much consistency there needs to be on granting

flexibility to competing vendors." However, these representations focus on the need for transparency and accountability in the process, generally, and more specifically on the appellant's concerns about the clarity of the bid requirements and alleged inconsistencies in the application of the criteria. These concerns are more expansively outlined in the section of this order addressing the public interest override.

Analysis and findings

Dr. Ann Cavoukian, the Information and Privacy Commissioner of Ontario, had the following to say about access to information in the context of public procurement in her 2006 Annual Report:

> Disclosure of the final contracts entered into by governments goes only part way in ensuring meaningful public scrutiny of public expenditures. The signing of a contract for goods or services is generally the culmination of the procurement process established by a particular government institution. Ensuring the integrity and effectiveness of that procurement process is also an essential element of government accountability for the expenditure of public funds.
>
> In recent years, the issue of transparency and accountability in government procurement has come to the forefront. This was particularly highlighted at the federal level with the release of the report of the Gomery Commission, which inquired into the federal Sponsorship Program and advertising activities. Disputes regarding the awarding of contracts have also arisen on a regular basis at both the municipal and provincial government levels.
>
> Elected officials will readily agree that citizens should get the best value for their dollar. Recent experiences have demonstrated that **it is transparency and accountability that ensure that the public procurement process is not only fair, but that successful bids are reasonable and in the best interests of the public**.

The Commissioner's comments were made in the context of third party contracts and the application of section 17(1) of the *Act*. In my view, however, these comments are relevant in the present appeal and also provide guidance in an analysis under section 18 of the *Act* (Order MO-2468-F).

I accept that it is in the public interest that the Ontario government, its agencies and its institutions negotiate favourable contractual arrangements, through formal procurement processes and other related means (Order PO-2632). However, accepting the existence of such a public interest does not affect the requirement that persuasive evidence must be tendered by the institution to establish an exemption from the public right of access to government-held information. In the circumstances of this appeal, I find that I have not been provided with sufficient evidence to satisfy me that any of the section 18 exemptions apply.

Before embarking on my analysis, and providing reasons to explain my findings on sections 18(1)(c), (d) and (e) to the records in the present appeal, however, the standard of proof ought to

be clarified. The OPA's representations refer to a "reasonable expectation of *probable* harm," but as stated elsewhere in this order, "detailed and convincing" evidence of a "reasonable expectation of harm" with disclosure of the information at issue is what is required.[27]

With regard to sections 18(1)(c) and (d), I note that past orders have remarked on the difference in their wording, namely "prejudice the economic interest" and "be injurious to the financial interests," but found that the context of an institution's claim to both of them often provides good reason to consider their potential application simultaneously (see Order PO-2598). In my view, the circumstances of this appeal satisfy me that it is appropriate to address the possible application of section 18(1)(c) and 18(1)(d) together in this order.

The appellant seeks access to information regarding how the OPA scored and evaluated the RFP for the gas-fired peaker plant in northern York Region so that the group she represents can assess the fairness of the procurement process.

One of the orders the OPA relies on in opposing disclosure of the withheld information is Order MO-1919. As I suggested in my analysis of section 17(1), however, Order MO-1919 does not assist the OPA because the adjudicator did not uphold the institution's exemption claims of sections 10(1) or 11(c) and (d) to deny access to very similar records.[28] In rejecting the exemption claim under sections 11(c) and (d), Adjudicator Stephanie Haly stated:

> The majority of the records that the City claims are exempt under sections 11(c) and (d) all relate to the evaluation and scoring of the various proposals submitted by the affected parties in response to the RFP. Page 3 as stated above contains a fee breakdown. Pages 5, 6, 8 and 9 of the Group I records all relate to scoring, ranking or comments about the various submissions of the affected parties. The City's submission that disclosure of this information would telegraph to potential bidders what the City is looking for in a successful proposal and thus could reasonably be expected to prejudice its economic interests or be injurious to its financial interests is unsupported. In fact, I am unconvinced that the City would not receive better proposals once organizations are aware of the way in which the City evaluates a proposal. Furthermore, the City's submission that disclosure of the information on page 3 of the Group I records would result in future RFP proponents not conducting the detailed analysis necessary to make a knowledgeable and realistic proposal is speculative at best. The City has not provided "detailed and convincing" evidence that disclosure of these pages of the Group I records could reasonably be expected to either prejudice its economic interests or competitive position, or be injurious to its financial interests.

[27] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner), supra,* footnote 17.

[28] Sections 10(1), 11(c) and 11(d) of the municipal *Act* are the equivalents of sections 17(1), 18(1)(c) and (d) in the provincial *Act*.

Similar procurement information was at issue in Order MO-2496-I, where Adjudicator Bernard Morrow found that sections 11(c) and (d) did not apply to information relating to the City of Toronto's 3-1-1 info line. In that order, Adjudicator Morrow stated:

> In my view, the City has provided speculative unsupported assertions of economic and financial harms in the event the information in the records is disclosed. The suggestion that disclosure will place a chill over third parties when they consider participating in future RFPs is self-serving and lacks the requisite detailed and convincing evidence to establish a reasonable expectation of harm. The City's view, that providing the appellant and the public with insight into the evaluation process (including the scoring criteria used to determine the winner) would lead to the harms in sections 11(c) and (d), is again self-serving. To conclude, the City has not met the harms test under sections 11(c) and (d) and I, therefore, find that these exemptions do not apply to the records at issue.

In the circumstances of this appeal, I find the OPA's arguments regarding the scoring and scoring rubric in records 4 to 6 and the evaluation summary in record 7 to be speculative and insufficiently persuasive to support a finding that sections 18(1)(c) or (d) apply to them.

The OPA postulates that third parties, namely future proponents, might act in certain ways if the information at issue is disclosed, including taking action to exploit or manipulate the RFP process. However, the OPA has not been able to point to experience with this happening or otherwise provide a reasonable basis for me to conclude that such "exploitation" might reasonably be expected to occur. Among the arguments I find to be speculative in nature is the OPA's assertion that disclosure of the information would result in proponents submitting "carefully presented" or "gilded" bids that are lower in quality because they are simply tailored to fit the criteria, rather than genuinely and comprehensively addressing the bid requirements. In my view, this argument presumes a lack of sophistication and integrity in the bid evaluation process that is without basis.

Similarly, the OPA's consultant suggests that its competitive and economic position would be affected adversely by disclosure of the scoring because this would "undermine the consistency of the process, and the perception of it which might, in turn, result in some proponents not bidding at all." How disclosure would adversely affect the process's consistency is not explained sufficiently to make the connection. If the consultant's suggestion that disclosure would affect the consistency of the process is interpreted as concern about maintaining the process's integrity by protecting the confidentiality of the rubric, I reject that submission. I note that the different levels of scoring outlined in the rubric flow rather naturally from the rated criteria on which they are based. In my view, what is important to the integrity of procurement scoring are the responses provided by a proponent as part of the process, not the content of the rubric matrix itself. In other words, knowledge of the rubric will not assist a proponent if they cannot demonstrably meet the basic criteria of the RFP through the content of their bid (see Order PO-2657). Accordingly, I do not accept that disclosure of records 4 to 6 would compromise the OPA's ability to evaluate the content of future bids and thereby harm its competitive position or financial interests.

Further, I am not persuaded that disclosure of the scores could reasonably be expected to result in a disinterest or disinclination on the part of the industry in competing for government contracts. I am similarly unmoved by the argument that disclosure of the scoring and related information would prejudice the OPA's competitive interests as a customer because the information provided by proponents "could result in a loss of competitive advantage." The information that is at issue, other than input in record 7 from the affected parties' bids is not, in my view, the type of information alleged (i.e. sensitive commercial and/or technical information). In the circumstances, I find that this position is not sufficiently supported by the content of the records to weigh in favour of the application of section 18(c) or (d) to the information at issue.

The OPA further submits that "development of an alternative OPA procurement process would be costly to the OPA and not beneficial to the public." However, this argument presupposes that an alternative procurement process would be required as a result of disclosure, and I am not satisfied by the evidence that this is the case. Much about public procurement is highly formalized and regulated, partly in response to concerns about transparency and fairness in the process. Indeed, at the very least, the rated criteria in records 4 to 6, which the OPA has denied access to, are included in the RFP itself and, as such, are available to the public. It may be that the OPA intended to refer more specifically to the necessity of developing an alternative scoring rubric (which is not part of the RFP) and expending financial resources to do so. Even if this alleged harm to the procurement process had been argued, I would have similarly rejected it since modifications to the rubric appear to me to be necessary based on the nature and requirements of each individual project. In my view, the OPA has not provided sufficiently "detailed and convincing" evidence to establish that an overhaul of either the procurement process or the approach to scoring could reasonably be expected to result (or be required) as a consequence of disclosure.

Other arguments presented by the OPA respecting the damage to its economic and financial interests under section 18 with disclosure of the scoring records revolve around the actions that could be taken by local authorities or the public as a result of disclosure. For example, the OPA refers to the rated criteria regarding local approvals and points to the municipality in this instance passing an interim control by-law in an attempt to delay the construction of the plant. In my view, the phrasing of its submission on this subject is worth noting. The OPA submits:

> If municipalities or public groups are able to view the [scoring rubric], they may alter approvals given or in process just to stymie a successful proponent from constructing their plant. This would cause prejudice to the OPA's economic interests by resulting in undue cost and instability to the RFP process and the subsequent concluded contract.

I find this argument to be entirely speculative. I have not been provided with any evidence that the interim control by-law referred to by the OPA, which is no longer in place, was connected in any way with awareness of information about the process, let alone the content of the scoring or evaluation records in records 4 to 7. Indeed, I accept the appellant's submissions about her group's motivation in seeking access and in this light, it seems just as likely that the actions

taken by municipal officials and/or the public in opposition to the project was influenced by the non-disclosure of this type of information by the OPA.

Further, and as suggested above in relation to the interim control by-law, the passage of time is relevant. The RFP process for this facility has been concluded for more than two years. As I understand it, construction of the plant is well underway. In my view, this highlights the weakness of the OPA's argument that disclosure of the scores and evaluation summary could somehow inject instability into the procurement process and the concluded contract here (see Orders MO-1781 and MO-1789).

Indeed, I take the view that there is also now a lesser degree of sensitivity surrounding much of the information about the affected parties in the scoring records (records 4 to 6) or that was provided by them in their bids, as contained in the record 7 summary. In addition, the sensitivity of the information drawn from the first and second affected parties' bids in record 7 is further lessened, in my view, by the fact that neither party opposes disclosure of that record.[29] That the second affected party consented to disclosure of record 7 for the purposes of section 17(1) should not pass without mention since, in my view, it serves to weaken the OPA's arguments about concern within the industry about disclosure of information related to the deliberative process. I find that this weighs against the reasonableness of an expectation of harm under section 18(1)(c) or (d).

In my view, there are similar shortcomings with the OPA's arguments that rely on the identity of the appellant as a member of a larger group that is known to oppose the construction of the facility. It is true that in past orders, this office has found that the exemptions in section 18(1)(c) or (d) were established based, in part, on the institution's submissions about the identity of the appellant. However, in those orders, the institution tendered sufficient evidence related to the relevance of the identity of the appellant or another third party in the context of ongoing negotiations or processes that were susceptible to interference upon disclosure of the particular information at issue. In this appeal, I have not been provided with evidence to demonstrate that there currently exists any means by which the appellant could "stymie" the already ongoing construction of the facility. The fact that the appellant was, and likely remains, opposed to the project does not itself amount to harm, and I agree with the appellant's representations on the subject. In my view, participation in dissent or active disagreement with government decision-making in a democratic society should not be equated with harm *per se*, particularly as that term is contemplated by sections 18(1)(c) and (d) of the *Act*.

For these reasons, I find that the OPA has failed to provide sufficiently detailed and convincing evidence to establish that disclosure of the information at issue in records 4 to 7 could reasonably be expected to result in harm to the OPA's economic or financial interests for the purpose of sections 18(1)(c) and/or (d). Accordingly, I find that that sections 18(1)(c) and (d) do not apply. I now turn to the review of section 18(1)(e) of the *Act*.

[29] As discussed earlier in the order, the successful proponent did not oppose disclosure and provided no representations regarding record 7, while the second affected party consented to the disclosure of record 7 under section 17(3).

In support of its claim that section 18(1)(e) applies to records 4 to 6, the OPA refers to the purpose of the exemption, as described in the Williams Commission Report and as outlined by Adjudicator Laurel Cropley in Order PO-2034.[30] I accept the purpose of the exemption as set out in that order, but I find the discussion in Order MO-1781, regarding the RFP for the revitalization of Toronto's Union Station, to be more relevant in the circumstances. In that appeal, Senior Adjudicator David Goodis considered the possible application of section 11(e) of the municipal *Act* to: "Positions [including commentary within charts]; Criteria [listed in the left column of each chart]; and Instructions." In rejecting the city's position that section 11(e) applied to the information, the Senior Adjudicator stated:

> The City has commenced negotiations with the preferred proponent as described in the background section above. Although those negotiations are currently on hold, barring any unforeseen circumstance, they will eventually continue with one or other of the proponents. It is therefore submitted that the test set out in section 11(e) is clearly met.
>
> I do not accept the City's position. The information the City refers to cannot be characterized as positions, criteria or instructions. Rather, the records, including the specific portions identified by the City, contain evaluations of various aspects of the proposals, and identification of certain issues to be considered. This type of information falls short of actual positions, criteria or instructions to be applied to negotiations, and does not reveal "pre-determined courses of action or ways of proceeding" [see Order PO-2034]. In my view, had the Legislature intended that evaluative material of this nature to be caught by the exemption, it would have used express language to do so.

In my view, the findings of Order MO-1781 are applicable in the circumstances of this appeal and I have considered them in my determination of the application of section 18(1)(e) of the *Act*. To begin, it is clear that records 4 to 6 are scoring records, including the scoring rubric that provides a basis for the objective review of elements of each proposal. In arguing that the scoring rubric "constitutes criteria that will be applied to future proposals," the OPA admits that it does not negotiate with proponents, but submits that the use of the scoring method and rubric "is a broader form of negotiation," because the "internal process for determining whether a consultant's bid appropriately fits the OPA's requirements is a negotiation." I reject these arguments.

On my review of records 4 to 6, I find that they contain evaluative material of the type before Senior Adjudicator Goodis in Order MO-1781, which "falls short of actual positions, criteria or instructions to be applied to negotiations, and does not reveal 'pre-determined courses of action or ways of proceeding'." Section 18(1)(e) does not provide an exemption for an internal decision-making process in the manner submitted by the OPA in this appeal. Even if I accepted that the scoring rubric constituted "criteria" for the purpose of section 18(1)(e), the fact that these

[30] In that order, Adjudicator Cropley found that section 18(1)(e) did not apply to the training manual excerpt at issue, which related to the mandatory steps for Family Responsibility Office staff to follow in connection with an alternate enforcement provision under the *Family Responsibility and Support Arrears Enforcement Act*.

criteria do not now, and will not in the future, form the basis of any negotiation with proponents, by the OPA's own admission, is fatal to this exemption claim.

I am not satisfied that records 4 to 6 contain the required type of information or that there are specific future negotiations to be conducted by the OPA or on its behalf that could be jeopardized by disclosure of these records. Therefore, I find that section 18(1)(e) does not apply to records 4 to 6.

In summary, I find that the records do not qualify for exemption under any of the discretionary exemptions at sections 18(1)(c), (d) or (e) of the *Act*.

As I have not upheld the exemption claim under section 18, it is therefore unnecessary for me to review the OPA's exercise of discretion in this matter. However, I will now consider whether the public interest override may apply to those portions of record 3 which I have found exempt under section 17(1) of the *Act*.

D. DOES THE PUBLIC INTEREST OVERRIDE APPLY?

The appellant takes the position that the public interest override in section 23 of the *Act* applies to all of the information withheld by the OPA.

Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [my emphasis].

Previously in this order, I found that section 17(1)(a) applies to portions of the exhibits to record 3. In the present appeal, section 23 could be applied to override the third party information exemption in section 17(1)(a) if two requirements are satisfied. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

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

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances of the appeal.

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption (Order P-244).

The appellant's representations on the possible application of the public interest override in section 23 are extensive and use as a starting point the OPA's comment in its initial submissions that the appellant is a "self-admitted advocacy group" whose interests are private in nature. Specifically, the appellant disputes the OPA's assertion that it is pursuing disclosure for personal or private interest and submits that:

> It is our belief that it is in the public good to ascertain the details of this decision process to validate the fairness of a procurement process that may have been seriously flawed. …
>
> Ontario's *Greenbelt Plan, 2005* is being violated. The Plan was created in order to preserve agricultural land to grow our food and to preserve natural open spaces for the benefit of future generations. The [facility] is precedent setting as all other power plants are located within industrially zoned areas. …
>
> [This] is the first attempt to introduce infrastructure into the protected countryside of Ontario's Greenbelt.

The appellant submits that the need for public accountability for a critical decision representing an expenditure of nearly one billion dollars demands greater transparency, particularly in light of public concerns respecting "irregularities" in the procurement process. One example of a suspected irregularity is described in the following manner:

> The Ministry of Energy and its agent the OPA gave multiple, public commitments to full observance of and compliance with the applicable legislation, policies and regulatory processes. Consistent with this, one bidder (who actually submitted two bids using two different sites in King Township) filed applications with King Township for Official Plan amendments and rezoning. We presume it cost this proponent time and money. In contrast the proponent in question determined that amendments were not required. On November 4, 2008, 4 days after the bids were submitted the proponent submitted "anticipated planning and legal opinions to the Township's solicitor." On December 11, 2008 [the] OPA announced that [the] contract had been awarded.
>
> We have little sympathy for an argument that disclosure of [the successful proponent's] proposal would undermine the OPA's RFP process. From what the public sees, the RFP process is very broken. How else to explain that the OPA selected a proponent with a site that does not conform to the *Greenbelt Plan, 2005*

> and for which there is no confirmed connection to the [electrical] grid until 9 months after the contract is awarded? … No one can understand how or why the … bid was selected.

In response to the OPA's submission (offered on the exercise of its discretion) that it considered whether disclosure of the scoring records or evaluation summary would increase public confidence in the operations of the OPA and concluded that it would not, the appellant responds thusly:

> One must question why not; if the process was fair and transparent then all decisions should be defensible and justifiable and thereby disclosure of such information should restore public confidence in the OPA. The statement in [the OPA's representations to the contrary] only fuels speculation that the RFP was not a rational process followed diligently.

The appellant expresses concern about the perceived inadequacies of the Fairness Review conducted concurrently with the procurement, in part due to the scope of the review but also traceable to the appellant's suspicions about the flaws in the procurement process.[31] The appellant argues that since it is public information that the successful proponent was unable to achieve the connection (or islanding) they sought to make, as described in exhibit 6 to record 3, this supports her argument that the disclosure of this record in the public interest.

Further, the appellant submits:

> We believe that obtaining the records is significant as we live in a society where citizens have the right to hold their elected representatives accountable. … Further policy direction taken by the Province of Ontario, including the *Green Energy Act* in 2009 highlights the disconnect between the OPA's direction on this file and the government's overall policy direction towards conservation. These records will provide clarity on this issue by providing the missing link.

In its reply representations, the OPA argues that the appellant has not met any of the requirements for the application of section 23. The OPA submits that the appellant has instead raised private concerns "revolving around NIMBY," attempting to vest them with greater importance than warranted by making "unsubstantiated allegations" related to process.

The OPA notes that in previous orders a compelling public interest has been found not to exist where a significant amount of information has already been disclosed and is adequate to address any public interest considerations (Order PO-2725). In this matter, the OPA submits that the withheld records constitute only a small portion of the documentation regarding the OPA procurement process and the project. The OPA states:

> For example, the Rated Criteria and volumes of information related to the RFP have already been disclosed to the appellant. If nothing else, the appellant's

[31] The OPA retains an independent "fairness advisor" to review RFPs and prepare a report respecting the process. The resulting Fairness Review report is publicly available.

> detailed opposition to the project illustrates how much information to which it already has access.
>
> The remaining records largely relate to the internal RFP methodologies of the OPA and the financial, commercial and technical information of third parties which were confidentially provided to the OPA.

The OPA's representations on section 23 also refer to "the appellant's collateral purpose for the request," stating that

> … the appellant's true purpose for requesting the records is to further its claim against the Province of Ontario. The OPA respectfully submits that this appeal should not be used in the place of discovery which is available to the appellant and … competitors. The *Rules of Civil Procedure* will define what information the [appellant] should receive.

The OPA argues that the RFP process was conducted fairly and this much can be understood without viewing the "sensitive information" in the scoring records or evaluation and selection process form because an independent Fairness Review was conducted and is publicly available. The OPA adds that the review included consideration of the OPA's compliance with the process and that the appellant already has access to information about the rated criteria used that is publicly available.

The OPA states that its historic practice has been not to disclose proponent bids, scoring records or evaluation and selection process forms because doing so would compromise its RFP process. According to the OPA, the appellant has not "expressed any compelling need to receive the records" and has failed to "demonstrate why obtaining the records was significant."

In their sur-reply representations, the appellant states:

> The OPA's accusation of our interest as NIMBY… is not surprising: it is an easy, albeit, faulty response. I have previously reviewed our lack of personal/private interest in the matter. All I can add is the admission that we are not spending time monitoring and trying to understand developments in Canada's Far North as it is not in our backyard. The development in question is in our backyard. If people do not pay attention to their backyard who will? There are some developments happening in our backyard which we do not like, which we abhor; but the due process has been followed and we accept them.
>
> Taken out of context I agree that electricity demand has nothing to do with the records at issue. … Our comments about electricity demand not being provided [by this project] is part of the argument that the initial request for disclosure was driven by our inability to understand the OPA decision to award the contract to [the successful proponent]. We have been seeking to understand the whole picture.

Analysis and findings

To begin, I would like to address the OPA's comments about the appellant's purported "collateral purpose" in pursuing access, including the suggestion that the *Rules of Civil Procedure* ought to determine what information is available to the appellant.[32] Several past orders have dismissed similar arguments from parties resisting disclosure under the *Act*. The relationship between access under the *Act* and civil litigation is dealt with in section 64(1), which states that:

> This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.

As noted by Senior Adjudicator John Higgins in Order PO-2490, the legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis reviewed the argument of a third party appellant who argued that it was improper, in circumstances where the appellant has commenced litigation against it, for the appellant to use the access to information process under the *Act* instead of the discovery process under the *Rules of Civil Procedure*. In rejecting this argument, he stated:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [*Act*] is unfair ... Had the legislators intended the *Act* to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …

I agree with these interpretations of section 64(1) of the *Act*. Accordingly, I reject the OPA's argument that any separate action the appellant may be pursuing in a civil forum (governed by the *Rules of Civil Procedure*) ought to determine the issue of access under the *Act*, or that such action is relevant to the analysis of the possible application of the public interest override.

I now turn to my analysis of the public interest override. For the sake of clarity, I will underline that in order for me to find that section 23 of the *Act* applies to override the exemption of the records I have found qualify under section 17(1), I must be satisfied that there is a *compelling*

[32] Although the OPA's submissions on this point may be interpreted as challenging the appellant's entitlement to pursue access under the *Act* generally, I am addressing the comments here since they appear as part of its representations on the application of the public interest override.

public interest in the *disclosure of those particular records* that *clearly outweighs* the purpose of the third party information exemption.

In my view, the appellant has provided persuasive representations and supporting documentation regarding the concerns of its group, municipal authorities and other organizations with respect to what appears to have been a controversial decision about the bid selection for the gas-fired peaker plant in northern York Region. I accept that there is a public, not merely a private, interest in this subject. I am even prepared to accept that the public interest is a compelling one in the circumstances.

However, my intention in emphasizing certain words of the test for the application of section 23 in the paragraph above is to underscore the fact that my determination of this issue does not end with a finding that a compelling public interest exists. That finding represents the first threshold to be met. Indeed, although I may be persuaded that there is a compelling public interest in the construction of this facility, and the procurement process followed in selecting the successful proponent's bid, the question to be asked is whether that compelling public interest would be served by the disclosure of the specific records withheld under section 17(1).

Would disclosure of the records for which I have upheld the third party information exemption shed light on the government's actions or decisions with respect to this stated area of interest? Having carefully reviewed the exempt records once again for this purpose, I must answer the question in the negative. In my view, disclosure of the first affected party's commercial and technical information contained in the portions of record 3 that I have found exempt does not carry with it the potential to inform the public respecting the integrity of the procurement process. Further, I conclude that any compelling public interest in disclosure *of these particular records* would not outweigh the purpose of the section 17(1) exemption, which is to protect the commercial interests of entities that do business with government (see Order PO-2853). In the circumstances, I find that there is no compelling public interest in the disclosure of the exempt portions of the exhibits to record 3, and this is particularly so in view of the fact that I have found that much of the withheld information in the records does not qualify for exemption.

As the required elements of the test for the application of the public interest override are not met, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the OPA's decision to deny access to the following portions of record 3 under section 17(1) of the *Act*:

    a. pages 199-209 and 252 of exhibit 5;
    b. pages 253-256 of exhibit 6; and
    c. pages 334-342 and 351-352 of exhibit 9.

2. I order the OPA to disclose the responsive records or portions of records which I have found do not qualify for exemption to the appellant by **September 2, 2011** but not before **August 29, 2011**.

   Before disclosing the non-exempt portions of exhibit 9 to record 3, the OPA must sever the information I have found to qualify as "personal information" on pages 343-350 and 362-369. I have marked this information in orange highlighter on copies of these pages provided with this order, and the information is not to be disclosed.

   Records 4 to 6 are to be disclosed in their entirety.

   Record 7 is to be disclosed in part. A copy of record 7 in the form that is to be disclosed to the appellant (with the non-responsive portions severed) is enclosed with this order.

3. In order to verify compliance with this order, I reserve the right to require the OPA to provide me with a copy of the records disclosed to the appellant pursuant to provision 2.

Original Signed by: July 27 2011
Daphne Loukidelis
Adjudicator