Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3055

Appeal PA09-290

Ministry of Community Safety and Correctional Services

February 24, 2012

Summary: The appellant sought access to records created as a result of the Ministry of Community Safety and Correctional Services' procurement of an Offender Telephone Management System. Portions of the records were denied under sections 13(1), 14(1), 15, 17(1), 18(1), 19, and 21(1) of the *Act*. This order upholds the ministry's decision, in part, and determines that the exemptions at sections 14(1), 15, 17(1), 19, and 21(1) apply to portions of the records. The remaining portions of the records, for which the exemptions at sections 13(1), 14(1), 15, 17(1), 18(1), 19, and 21(1) are found not to apply, are ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 13(1), 14(1), 15, 17(1), 18(1), 19, and 21(1).

Orders Considered: MO-2249, PO-1816, PO-1832, PO-1888, PO-1993, PO-2435, PO-2453, PO-2578, PO-2651, PO-2774, PO-2834, PO-2843.

OVERVIEW:

[1] This order disposes of the issues raised by a request submitted under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for records created due to the Ministry of Community Safety and Correctional Services' (the ministry) procurement of an Offender Telephone Management System (OTMS) designed specifically for use by correctional institutions.

[2] The ministry estimated that approximately 61,000 pages of records would be responsive to the appellant's request and issued a fee estimate of $12,000 for searching

and photocopying the records. In an attempt to reduce the fee, the appellant decreased the time span covered by the request. As a result, the number of pages was reduced to 3,938 and the fee estimate was reduced to $570. The appellant paid 50% of the fee estimate as required by section 7 of Regulation 460 made under the *Act* and the ministry continued to process the request.

[3] Subsequently, the ministry issued a decision letter advising that partial access was granted to 540 pages of records and that access was denied to remaining records or portions of records pursuant to the exemptions at sections 13(1) (advice or recommendations), 17(1) (third party information), 18(1) (economic and other interests), 19(a) (solicitor-client privilege), 20 (danger to safety or health), and 21(1) (personal privacy) of the *Act*. The ministry further advised that it was charging a revised total fee of $798, and therefore, a balance of $531 was owed. The appellant paid the balance and was granted partial access to the responsive records. The appellant then appealed the ministry's decision to deny access to the remaining records or portions of records.

[4] During the inquiry into this appeal, I sought and received representations from the ministry and the appellant. Prior to submitting representations, the ministry issued a revised decision letter and accompanying index disclosing to the appellant a significant number of additional records in whole and in part. As a result, the total number of records remaining at issue was reduced to 999.

[5] In its representations, the ministry advised the following:

- it now claims sections 14(1)(i), (k), and (l) (law enforcement) of the *Act* to some records;
- it is withdrawing its claim that sections 18(1)(f) and (g) apply to some records and wishes instead to claim sections 18(1)(c) and (d) for those records;
- it is withdrawing its claim that sections 20 and 21(1) apply to the records; and,
- it located an additional one-page record responsive to the request that it has identified it as page 153(a) for which it claims section 17(1) and 18(1)(c) and (d).

[6] I also sent a copy of the Notice of Inquiry to the two companies that submitted proposals in response to the ministry's Request for Proposals (RFP) regarding the OTMS. Both of the proponents, which are affected parties in this appeal, submitted representations through the ministry, objecting to the disclosure of the information in which they have an interest.

[7] In the discussion that follows, I uphold the ministry's decision, in part, and I order the ministry to disclose portions of the records to the appellant. Specifically, I reach the following conclusions:

- portions of the records contain solicitor-client privileged information subject to the exemption at section 19(a);
- portions of the records contain information that qualifies as third party commercial information subject to the exemptions at section 17(1)(a) and (c);
- the discretionary exemption at section 13(1) does not apply;
- portions of the records contain law enforcement information subject to the exemptions at section 14(1)(i), (k), and (l);
- portions of the records contain information that, if disclosed, would reveal information received in confidence from another government subject to the exemption at section 15(b);
- the discretionary exemptions at section 18(1)(c) or (d) do not apply;
- portions of the records contain information that is not responsive to the request;
- portions of the records consist of "personal information" as defined in section 2(1);
- portions of the records contain information that, if disclosed, would constitute an unjustified invasion of an individual's personal privacy subject to the exemption at section 21(1);
- a compelling public interest in the disclosure of the information that is subject to the exemptions at section 15, 17, and 21 does not exist; and
- the ministry's exercise of discretion to deny access under section 13, 14, 15, and 19 should be upheld.

RECORDS:

[8] The 999 pages of records that remain at issue are listed on an index of records entitled "Requester Report." They can be characterized, broadly, as follows:

- two proposals submitted by the affected parties, the proponents;

- portions of the agreement between the ministry and the successful proponent;

- correspondence, including emails, between the ministry and the proponents; and,

- internal government emails between ministry legal counsel, procurement and information technology advisors, senior ministry officials and program area staff, many of which are part of email chains, are duplicative, and all of which reference the procurement process, the proposals, or more specifically the affected parties.

ISSUES:

A. Should the ministry be permitted to change or claim new discretionary exemptions after the 35-day period set out in section 11.01 of this office's *Code of Procedure* has expired?

B. Does the discretionary solicitor-client privilege exemption at section 19(a) apply to the records?

C. Do the mandatory third party commercial information exemptions at sections 17(1)(a) and/or (c) apply to the records?

D. Does the discretionary exemption at section 13(1) apply to the records because disclosure of the information would reveal advice or recommendations?

E. Do the discretionary law enforcement exemptions at section 14(1)(i), (k), and (l) apply to the records?

F. Does the discretionary exemption at section 15(b) apply to the records because disclosure of the information would reveal information received in confidence from another government?

G. Do either of the discretionary exemptions at sections 18(1)(c) and/or (d) apply to the records because disclosure of the information could reasonably be expected to prejudice the ministry's economic interests or competitive position or be injurious to the Government of Ontario's financial interests or its ability to manage the economy?

H. Is some of the information in the records not responsive to the request?

I. Do the records contain "personal information" as defined in section 2(1), and if so, to whom does it relate?

J. Does the mandatory exemption at section 21(1) apply to the records because disclosure of the information would constitute an unjustified invasion of an individual's personal privacy?

K. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions at sections 15, 17(1), and 21(1)?

L. Should the ministry's exercise of discretion to deny access under to some records under sections 14(1), 15, and 19 be upheld?

DISCUSSION:

A. Should the ministry be permitted to claim new discretionary exemptions after the 35-day period set out in section 11.01 of this office's *Code of Procedure* has expired?

[9] In its representations, the ministry states that for some of the records it is claiming different exemptions from the ones that it initially claimed. Specifically, it states that it is withdrawing its claim that sections 18(1)(f) and (g) apply to some of the records and wishes instead to claim sections 18(1)(c) and (d) for those records. It also states that for some records it is adding the section 19(a) exemption claim which it had not initially claimed for those records. Finally, it states that it wishes to claim the application of the discretionary law enforcement exemptions at sections 14(1)(i), (k), and (l) to some of the records.

[10] This office's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[11] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural

justice was found in excluding a discretionary exemption claimed outside the 35-day period.[1]

[12] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the ministry and to the appellant.[2] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[3]

[13] In Order PO-1832, Adjudicator Donald Hale states as follows:

> In determining whether to allow the ministry to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the ministry. I must also balance the relative prejudice to the ministry and to the appellant in the outcome of my decision.

[14] The ministry advances four distinct arguments as to why it should be allowed to claim additional exemptions despite the fact that the 35-day period has expired:

- there is a large volume of records;[4]
- solicitor-client privilege is one of the new exemptions being claimed for some of the records;[5]
- significant policy and legal issues are at stake, and the public interest supports raising these exemptions at the adjudicative stage rather than not at all, particularly with respect to the law enforcement exemption at section 14(1); and
- the ministry is not aware and has not been provided with any evidence to suggest that the appellant's interests have been prejudiced by the late raising of exemptions and the appellant can be given an opportunity to make submissions on this point, as well as on the application of the new exemption claims.

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[1] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.), and, *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[2] Order PO-1832.
[3] Orders PO-2113 and PO-2331.
[4] Order MO-2249.
[5] Order PO-2651.

[15] The appellant did not make any specific representations on the ministry's late raising of additional discretionary exemptions.

[16] Having considered the specific circumstances of this appeal I have decided to allow the ministry's late raising of the additional discretionary exemptions for three reasons.

[17] First, in keeping with the reasoning of Adjudicator Steven Faughnan in Order MO-2249 (as cited by the ministry in its representations), I find that in the circumstances of this appeal there is a considerable volume of records which makes it more difficult to identify, with particularity, the exemptions that apply. I also note that the additional exemption claims followed the ministry's comprehensive review of the records which resulted in the disclosure of a significant number of responsive records to the appellant and narrowed the issues in this appeal.

[18] Second, I agree with Adjudicator Colin Bhattacharjee's reasoning in Order MO-2222 (also cited by the ministry in its representations) to allow the late raising of a section 19 claim "given the importance that the courts have ascribed to the principle of solicitor-client privilege." I believe that it is important to consider the possible application of section 19 to all of the records for which the ministry purports to claim it.

[19] Finally, and most significantly, I am satisfied that the appellant has not been prejudiced in responding to the ministry's additional claims and no delay in the appeal process was incurred as a result. As all of the records for which new exemptions have been claimed were previously withheld due to other exemption claims, no additional records are being withheld. The appellant was notified of these exemption claims prior to the time that I sought his representations and, at that time, he was provided with an opportunity to reply not only to their application, but also to raise concerns about their late raising. The appellant did not make any submissions on whether he was prejudiced by the late raising of the additional exemptions and, in my view, he was not. Accordingly, I will go on to consider whether the additional exemption claims apply to the records at issue.

B. Does the discretionary solicitor-client privilege exemption at section 19(a) apply to the records?

[20] Section 19(a) of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;

[21] Section 19 contains two branches. The institution must establish that at least one branch applies. In this case, the ministry claims that branch 1 applies. Branch 1 arises from the common law and section 19(a).

Branch 1: common law privilege

[22] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[6] In the circumstances of this appeal, the ministry claims that solicitor-client communication privilege is applicable.

Solicitor-client communication privilege

[23] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[7]

[24] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[8]

[25] The privilege applies to "a continuum of communications" between a solicitor and his or her client:

> …where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[9]

[26] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[10]

[27] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[11]

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[6] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] Orders PO-2441, MO-2166 and MO-1925.
[9] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[10] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[11] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

Representations

[28] The ministry claims that a large number of the records at issue are subject to the solicitor-client privilege at section 19(a). It submits that because the records relate to a complex procurement where legal advice was sought, the solicitor-client communication privilege applies to exempt them from disclosure:

> Since 1981, the Supreme Court of Canada has ruled that there are contractual and therefore legal implications that arise from procurement.[12] Accordingly, it is standard practice for ministry legal counsel to be assigned to provide advice. Ministry legal counsel provides advice on all aspects of procurement from the initial preparation of the RFP until the time the contract is awarded. Ministry legal counsel was copied on many of the emails, and would have responded whenever she felt it was appropriate to do so. In some cases, she responded directly to the email and in other cases, it was used in the formulation of subsequent legal advice. In this instance, almost all of the legal advice was provided by the same lawyer – the only exception to this being one occasion, when she was out of the office.

[29] The ministry submits that it applied the section 19(a) exemption based on existing jurisprudence, such as order PO-1651, using the following criteria:

- the records contain written communications between legal counsel and her client, and are direct communications between a solicitor and client; and,

- the written communications were prepared on a confidential basis, for the purpose of seeking or providing legal advice relevant to the procurement process.

[30] The ministry specifies that it has claimed solicitor-client privilege in the following circumstances:

- when legal counsel was asked for advice (even if she was one of a number of people who were asked for their advice in the same email);

- when legal counsel provided advice; and,

- when legal counsel's advice was referenced in another email.

[12] *Ontario v. Ron Engineering* [1981] 1 S.C.R. 111.

[31] The appellant does not make any specific representations on the possible application of section 19(a) to the records.

Analysis and finding

[32] I have carefully reviewed the contents of all records and portions of records for which the ministry has claimed the solicitor-client privilege exemption at section 19(a) and find that the disclosure of the large majority of this information would reveal the substance of confidential communications between a solicitor and a client directly relating to the provision or seeking of legal advice.

[33] All of the records for which this exemption has been claimed are emails. These communications are between ministry staff, most frequently between the project manager assigned to the OTMS project, and legal counsel (along with other ministry staff), either seeking or providing legal advice or seeking or providing information required by legal counsel to enable her to provide legal advice. As indicated by the ministry, some emails are not directly addressed to or from legal counsel but other ministry staff to inform them of matters related to the RFP and legal counsel is copied on the communication. Other emails do not include legal counsel in the communication chain but would reveal specific legal advice provided by or sought from legal counsel.

[34] Having reviewed the records, I find that all portions severed by the ministry pursuant to section 19(a), with a few minor exceptions, qualify for exemption as solicitor-client communication privileged information. In my view, their disclosure would reveal legal advice that was provided by or sought from legal counsel, in confidence. I am also satisfied that there has been no waiver of privilege with respect to the records through any communication with the proponents. Accordingly, I find that section 19(a) applies to most of the information for which it was claimed.

[35] Of particular note is an email on pages 141 and 142 (duplicated on pages 599 and 600) for which the ministry has claimed both section 17(1) and 19(a). Having reviewed the information that has been severed from these pages, particularly the content of the email dated Tuesday, October 14, 2008 17:10, I accept that disclosure of the severed portions would reveal legal advice sought from legal counsel with respect to the awarding the OTMS contract and that this information is subject to exemption pursuant to section 19(a). The very same email is duplicated on page 138, as well as on pages 538 and 539, and pages 928 and 929. However, in these instances, the ministry has only claimed section 17(1) to the information. Given that I find that section 19(a) clearly applies to this email and that the ministry appears to have intended to claim the solicitor-client exemption to this information, I also find that section 19(a) applies to exempt the information in all duplicate copies of the email dated Tuesday, October 14, 2008 17:10, found on page 138, pages 538 and 539, and pages 928 and 929, from disclosure.

[36] Following similar reasoning, I also find that the following information qualifies for exemption pursuant to section 19(a):

- all severances to the email dated Thursday, October 16, 2008 12:10 PM on page 602, as well as the severances in duplicates of that email found on pages 938 and 939; and

- all severances to the emails dated October 23, 2008 1:41 PM and October 23, 2008 2:15 PM on page 536, as well as the severances made to duplicate copies of those emails found on page 973.

[37] However, there are two groups of information that the ministry has severed pursuant to section 19(a) that I find do not qualify for exemption as solicitor-client privileged information.

[38] One exception to the information that I find qualifies for section 19(a) is found in the emails dated Thursday, November 6, 2008 at 10:22 AM and 11:07 AM on pages 580 and 581. The ministry has disclosed all of the information in these emails, with the exception of several one word severances. Although these pages consist of emails to and from the ministry's legal counsel, I do not accept that disclosure of this word in the context of the information that has already been disclosed would reveal the substance of confidential communications between a solicitor and a client directly relating to the provision or seeking of legal advice. Accordingly, I find that section 19(a) does not apply to this information. As section 17(1) has also been claimed for this information its disclosure is contingent on the application of that section which I will determine below.

[39] The second exception is the severances made to the icons representing electronic documents in the emails dated Wednesday, November 12, 2008 11:52 AM on page 587, Wednesday, October 24, 2008 2:38 PM on page 975, Wednesday, October 29, 2008 2:26 PM on page 986, and Wednesday, October 29, 2008 2:36 PM on page 987. Although these are both emails from the ministry's legal counsel, the ministry has disclosed all information except for the icon representing an electronic document. As I do not accept that disclosure of this information alone consists of or would reveal advice sought or given by the ministry's legal counsel, I find that section 19(a) does not apply to the icons themselves. As section 17(1) has also been claimed for this information its disclosure is contingent on the application of that section which I will determine below.[13]

[40] Additionally, it should be noted that in some instances the ministry has not been consistent with the severances it has made to duplicate records. For example:

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[13] It should be noted however, that I find that the disclosure of the severances to the email dated Wednesday, October 29, 2008 2:02 PM also found on page 987, would reveal legal advice sought by the ministry and this information therefore qualifies for exemption under section 19(a).

- in the email dated Tuesday, October 21, 2008 at 12:36 PM found on pages 121, 122, and 123, the ministry has severed several words that it has disclosed in duplicates of this email found on pages 148, 149, 956 and 957;

- in the email dated Monday, October 27, 2008 at 9:39AM at page 157 the ministry has severed a word in the first paragraph of the email which has otherwise been disclosed in duplicates of this email found at pages 182, 198, 201, 204 and 206; and

- in the email dated Thursday, October 16, 2008 12:10 PM on page 602, the ministry has disclosed a paragraph in the middle of the email which it has severed in duplicates of that email found at pages 938 and 939.

[41] Given that, in these specific instances, the appellant is already aware of information that has been severed, it would be absurd to withhold it. However, as the emails are duplicates and the appellant already has at least one copy of each email where the exact same information has not been severed, I will not order the ministry to disclose it.

Summary

[42] I find that section 19(a) applies to all of the records for which it has been claimed with the exception of the following information:

- the severances in the emails dated Thursday, November 6, 2008 at 10:22 AM and 11:07 AM on pages 580 and 581;

- the severances made to the icons representing an electronic document in the emails dated Wednesday, November 12, 2008 11:52 AM on page 587, Wednesday, October 24, 2008 2:38 PM on page 975, Wednesday, October 29, 2008 2:26 PM on page 986, and Wednesday, October 29, 2008, 2:36 PM on page 987.

C. Do any of the mandatory third party information exemptions at sections 17(1)(a) and/or (c) apply to the records?

[43] The ministry submits that a significant amount of information at issue is exempt pursuant to the mandatory third party information exemptions at sections 17(1)(a) and/or (c). It claims that some of this information is also exempt pursuant to the solicitor-client privilege exemption at section 19(a). As I have already found that the following pages of records contain information for which both sections 17(1) and 19(a) have been claimed are already exempt from disclosure pursuant to the solicitor-client privilege exemption, it is not necessary for me to determine whether those portions are

also exempt pursuant to section 17(1). Accordingly, on portions of pages 138, 141, 142, 157, 182, 198, 201, 204, 206, 207, 208, 209, 210, 212, 213, 214, 215, 509, 536, 538, 539, 556, 570, 599, 600, 602, 603, 928, 929, 938, 939, 969, 977, 981, 985, 988, and 990, are no longer at issue.

[44] The relevant portions 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;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[45] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[14] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[15]

[46] For section 17(1) to apply, the institution and/or the third 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
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

[14] *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).
[15] Orders PO-1805, PO-2018, PO-2184, MO-1706.

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

Part 1: type of information

[47] The types of information listed in section 17(1) have been discussed in prior orders. The following types of information are relevant in the circumstances of this appeal:

> *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.[16]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[17] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[18]
>
> *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.[19]

Part 1: Representations

[48] The ministry submits that all of the records for which section 17(1) has been claimed contain commercial information, as they relate to "the procurement of a telephone system pursuant to a formalized procurement process."

[49] It further submits that the records contain "references to revenues (expressed in either amounts or in percentages, and as estimate, projections or otherwise)" which qualify as "financial information" as contemplated by section 17(1).

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[16] Order PO-2010.
[17] *Ibid.*
[18] Order P-1621.
[19] *Supra* note 16.

[50] Finally, it submits that "the proposals and any records that describe the features of the telephone system, … proposed technological solutions, … and discussions around connectivity and design, … are all examples of records containing technical information."

[51] The successful proponent submits that none of the records, in which it has an interest, should be disclosed. It submits that the information contained in the records consists of trade secrets, technical information, commercial information, or financial information. It states that the records contain information relating to the pricing of products and services, service level agreements, technical aspects of the solution and other key commercial terms. It states that such terms are trade secrets, technical information, commercial and/or financial in nature and are propriety to the company.

[52] The unsuccessful proponent also objects to the disclosure of the records in which it has an interest and submits that section 17(1)(a) applies to exempt them, however, it does not specifically identify the types of information that the records contain.

[53] The appellant does not make any specific representations on the types of information that the records may contain.

Part 1: Analysis and finding

[54] Having reviewed the records remaining at issue for which section 17(1) has been claimed, I find that all of them pertain to the ministry's procurement process for the OTMS. They relate to a proposed commercial enterprise to be entered into jointly by the ministry and whichever company was to become the successful proponent. Accordingly, I find that the majority of the information at issue qualifies as "commercial information". In addition, I find that many records contain financial information including specific references to real and anticipated revenue. Finally, I also accept that the records contain technical information relating to how the OTMS is proposed to be structured and how it is to ultimately function. Although the successful proponent suggests that the records also contain information that amounts to trade secrets, I have not been provided with sufficient evidence to make such a finding.

[55] The name of the unsuccessful proponent has been severed throughout the records. The name of the successful proponent has been severed on some pages, for example 580 and 581. Previous orders of this office have considered whether the name of a commercial entity qualifies as "commercial information" for the purposes of section 17(1). Generally speaking, the identity of a business itself has not been found to qualify as "commercial information" as the fact that a commercial entity seeks to do business with the government is, in and of itself, not sufficient to bring the information within the definition of that term.[20] However, in circumstances where disclosure of the names

[20] Order 373, P-1574, PO-1802, PO-1816.

themselves can be said to relate directly to the "buying, selling or exchange or merchandise or services," such as customer lists, they have been found to constitute "commercial information." [21]

[56] I agree with the reasoning expressed in prior orders that the fact that a commercial entity seeks to do business with the government is not sufficient to bring the information with the realm of the definition of "commercial information." In the circumstances of the current appeal, the ministry has severed the name of the unsuccessful proponent in every instance that it appears and the name of the successful proponent in some circumstances. In my view, in none of the instances can disclosure of the name itself be said to relate directly to the "buying, selling or exchange of merchandise or services." Therefore, I find that it does not constitute commercial information. However, in the event that there are instances within the records where the names of either of the proponents or the successful proponent's supplier can be said to qualify as "commercial information" I will include it in the rest of my analysis of the application of the remainder of the section 17(1) test.

[57] I have found that the great majority of the information for which section 17(1) has been claimed qualifies as commercial information and also includes both financial and technical information. Accordingly, I accept that the information at issue (with the exception of the names of the proponents), meets the first part of the three-part section 17(1) test.

Part 2: supplied in confidence

[58] 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.[22] 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.[23]

[59] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[24]

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[21] Order 76.
[22] Order MO-1706.
[23] Orders PO-2020, PO-2043.
[24] *Supra* note 14; Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No 2243 and Order PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[60] 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.[25]

[61] 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.[26]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; or
- prepared for a purpose that would not entail disclosure.[27]

Part 2: representations, analysis and findings

[63] As a preliminary note, in his representations, the appellant does not directly address the question of whether or not the information for which section 17(1) has been claimed was supplied in confidence to the ministry. He does however express concern over the fact that the ministry continues to redact the effective date of the successful contract on page 258 despite acknowledging the public nature of the agreement. The appellant should be advised that the date has not been severed from this page and is not at issue in this appeal. Although there is a space on page 258 where it appears that the contract's effective date should have been inscribed, that

[25] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (*ibid.*).
[26] Order PO-2020.
[27] Orders PO-2043, PO-2371, PO-2497.

portion remains blank. That portion also remains blank on page 659 which is a duplicate copy of page 258. Page 447 is a third copy of page 258. In this version the effective date of the contract has been handwritten into the space at the top of the page. According to the ministry's index, page 447 has been disclosed to the appellant.

[64] In their representations, the ministry and both proponents submit that all of the information in the records that have been severed pursuant to section 17(1) was supplied in confidence by the proponents. Having carefully considered the representations of the parties and the information for which the third party commercial information exemption has been claimed, I find that some of it has been supplied in confidence to the ministry by the proponents while some of it has not.

References to the proponents

[65] In its representations, the ministry submits that disclosure of references to the company name of all proponents would reveal underlying information supplied by the proponents and therefore should be exempt from disclosure as third party commercial information. Accordingly, the ministry has severed all references to the name of the proponents pursuant to section 17(1).

[66] The ministry has severed the name of the unsuccessful proponent throughout the records, including pages 118, 120, 173, 175, 176, 188, 189, 190, 191, 192, 249, 250, 251, 253, 254, 467, 507, 541, 565, 586, 926, and 927. The unsuccessful proponent submits that the very fact that it submitted a proposal in response to the RFP is confidential.

[67] The ministry has also severed, pursuant to section 17(1), the name of the successful proponent in some instances, including pages 541, 580, 581, 608, 616, 619, 620, 624, 632, 636, 637, and 975, as well as the name of the successful proponent's supplier on page 570.

[68] Neither the ministry nor either of the proponents have made any detailed representations on how disclosure of the names of their companies alone would reveal underlying confidential information supplied by that proponent and how it therefore meets the supplied in confidence component of the three-part test to exempt the information pursuant to section 17(1).

[69] Previous orders have generally found that the names of entities doing business and seeking to do business with the government would not normally be considered to have been "supplied", simply because they appear on a record.[28] This includes situations whereby the names of proponents engaged in competitive bidding process appear in records that reveal the scores assigned to each one with respect to the

[28] Orders PO-1786-I, PO-1802, P-1574, PO-1816.

criteria under which they were evaluated.[29] In Order PO-1816, Adjudicator Laurel Cropley stated:

> In my view, "supplied" in the context of the exemption in section 17 implies the provision of something of substance. I find that the mere identification of a business entity in the context of entering into a business relationship with the government falls short of the meaning of this term under section 17. I accept that where a business' name is contained on a record and is inextricably tied to other information that was supplied, the principles underlying whether a commercial entity's name was supplied become less clear.

[70] I agree with Adjudicator Cropley's reasoning and adopt it for the purposes of this appeal. However, in the present circumstances, the great majority of the information in which the proponents' names appear was generated by the ministry and would not reveal information supplied by the proponents. In my view, the link between information generated by the ministry that identifies either of the proponents is not sufficiently or inextricably tied to information supplied by either of these third parties that it can be said to qualify as having been supplied to the ministry.

[71] As a result, I find that part two of the section 17(1) test has not been met with respect to the name of the unsuccessful proponent as it appears on pages 118, 120, 173, 175, 176, 188, 189, 190, 191, 192, 249, 250, 251, 253, 254, 467, 507, 541, 565, 586, 926, and 927, and wherever else it may have been severed in documents other than its proposal or other communication sent directly from it to the ministry. I also find that the name of the successful proponent, which has been severed on pages 580, 581, 608, 616, 619, 620, 624, 632, 636, and 637 (as well as the name of the successful proponent's supplier on page 570), does not qualify as having been "supplied" within the meaning of part two of the section 17(1) test. As all three parts of the test must be met for the exemption to apply, section 17(1) cannot apply to this information.

[72] It should be noted that pages 176 and 586 are duplicate copies of a letter from the ministry to the unsuccessful proponent. The unsuccessful proponent's name, address, contact information and the names of two of its employees have been severed. For the same reasons as those identified above, I find that none of this information qualifies as having been "supplied" to the ministry and part two of the test has not been met. Additionally, as will be discussed in further detail below, pursuant to section 2(3) of the *Act*, business identity information such as the name, title, contact information or designation of that individual that identifies the individuals in a business capacity does not qualify as personal information and the mandatory exemption at section 21(1) cannot apply.

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[29] Orders MO-1237, PO-1816.

[73] Finally, on pages 119 and 647, the ministry has severed the name of the supplier of the existing telephone system although in other portions of the record it has disclosed it. As the existing supplier of record, this name is already within the public realm and cannot be said to be information that should be exempt under section 17(1) of the *Act*. I will order that it be disclosed to the appellant.

The agreement

[74] The records include the agreement between the ministry and the successful proponent for the provision of the OTMS. The ministry has disclosed the majority of the agreement but has severed the commission percentage to be paid by the proponent to the ministry on page 674 (and again on a duplicate page, page 273), as well as Schedule 1 – Deliverables, in its entirety, pages 689 to 831, which incorporates the successful proposal into the agreement.

[75] As outlined above, the contents of a contract or agreement between an institution and a third party have been treated by this office as mutually generated, the product of a negotiation process, and will not normally qualify as having been "supplied" for the purpose of section 17(1) unless it meets either of the "inferred disclosure" or "immutability" exceptions. As previously noted, this approach has been upheld by the Divisional Court.

[76] The ministry argues that the information that it has severed from the agreement, including the successful proposal, which it accepted and incorporated as part of that agreement, "relates to a particular type of technology that fundamentally cannot change through negotiation." It submits:

> The ministry requires a phone system that must operate in a particular type of way, based on its users. Public safety dictates how the phone system must operate. Therefore, this information fits within the "immutability" exception described in Order PO-2453.

[77] Addressing the "in confidence" portion of part two of the section 17(1) test, the ministry submits that provisions in the RFP demonstrate that the proposals were supplied in confidence and those in the agreement stipulate that the ministry undertakes to hold the supplier's information in confidence.

[78] The successful proponent acknowledges that most of the terms and conditions in the agreement are a public document but takes the position that disclosure of the commission percentage in section 4.01 would prejudice its competitive position. It also submits that Schedule 1 of the agreement contains technical or commercial information, disclosure of which would prejudice its competitive position in the marketplace. It does not address whether some or any of the information that has been severed falls within either of the "inferred disclosure" or "immutability" exceptions.

[79] This office has consistently emphasized the need for transparency in government purchasing and has urged institutions to, at minimum, post the winning bids for contracts awarded by the provincial government in a manner accessible to the public. Although the ministry and the successful proponent have agreed to disclose the majority of the agreement, they take the position that the severed portions of the agreement should not be disclosed.

[80] On my review, the agreement between the ministry and the successful proponent is clearly a negotiated contract that, based on the reasoning in previous orders, will not normally qualify as having been "supplied." Accordingly, unless the severed portions fall within one of the two exceptions, the information cannot be considered to have been "supplied" to the ministry within the meaning of the section 17(1) test.

Percentage revenue

[81] Dealing first with the commission percentage revenue figure that is found on page 674, and duplicated on page 273, I find that the general rule that the contents of a contract are mutually generated applies and therefore the percentage revenue figure cannot be considered to have been supplied to the ministry within the meaning of part two of the test.

[82] Previous orders have established that monetary figures such as pricing information and per diem rates do not qualify as having been supplied to an institution unless they can be described as fixed underlying costs that the third party does not have control over. In Order PO-2384, Adjudicator Faughnan found that figures that appeared on a pricing sheet found in a schedule to a contract were negotiated, rather than "immutable." He stated:

> [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1) . . . The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

[83] Subsequently, in Order PO-2435, Assistant Commissioner Brian Beamish rejected the ministry's argument that per diem rates were non-negotiated information that was not susceptible to change. He stated:

> The ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by [the ministry], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into [an agreement] with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by [the ministry] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of [the ministry] process cannot then be relied upon by the ministry . . . to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of [these agreements], I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant, further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or immutability" exceptions.

[84] I adopt the approach set out in the orders referenced above and, in applying it to the circumstances of this appeal find that the percentage revenue figure found in section 4.01 of the agreement is not a fixed underlying cost that is not subject to change, and therefore, cannot be considered to be immutable. I also find that it does not fall within the inferred disclosure exception as its disclosure would not reveal underlying non-negotiated information. As a result, I find that the percentage revenue figure found on pages 674 and 273 does not meet part two of the test as it is not information that has been "supplied in confidence" by a third party. Accordingly, section 17(1) cannot apply.

Schedule 1 – Deliverables

[85] Dealing next with Schedule 1 – Deliverables, which is the other portion of the agreement that the ministry has severed, I have carefully reviewed this information. It consists of a copy of the successful proponent's proposal that has been incorporated into the agreement. Previous orders have found that while a bid proposal may have

been "supplied" by a third party during the tendering process, it may become "negotiated" if that bid is successful and is subsequently incorporated into or becomes the contract between the parties. Its presence in the contract has been found to signify that the other party agreed to its terms.[30]

[86] In the circumstances of this appeal, I accept that at the time that the successful proponent's proposal was provided to the ministry it may well have been "supplied" in confidence for the purpose of section 17(1). However, the parties subsequently chose to incorporate these records into the agreement entered into between them. The agreement clearly indicates that the proposal is now incorporated into Schedule 1 – Deliverables which is an essential component of the agreement itself. In my view, by incorporating the proposal into the agreement, and by having it form part of that agreement, barring the application of one of the two exceptions, the proposal cannot, in this context, be considered to have been "supplied" by the successful proponent but rather forms part of the negotiated and executed agreement.

[87] On my review of Schedule 1 – Deliverables, I find that the information in the following pages does not fit within either of the "inferred disclosure" or "immutability" exceptions as it cannot be described as information in which the disclosure of would reveal underlying non-negotiated confidential information supplied by the proponent, or information that is not susceptible to change, such as the operating philosophy of a business or a sample of its products:

- pages 689 to 693, table of contents, confidentiality notice, regulatory provisions, Appendix A to proposal;
- pages 708 to 747, successful proponent's response to the RFP;
- page 752, completed Appendix C to the RFP;
- page 808, completed Appendix G to the RFP;
- page 809, completed Appendix H to the RFP;
- page 810, list of proposal appendices; and
- pages 822 to 829, Appendix G to proposal.

[88] Accordingly, as I find that this information does not meet either of the two exceptions to the generally accepted principles that the contents of a contract are not normally considered to have been "supplied in confidence" within the meaning of the section 17(1) test, I find that it has not been "supplied in confidence" to the ministry by a third party. As all three parts of the three-part test must be met for the exemption to apply, I find that this information does not qualify for exemption under section 17(1). It is therefore not necessary for me to determine whether the harms component in part three of the test has been met for this information.

[30] Orders PO-2384, MO-2299.

[89] However, I find that the following pages contain information that falls within either the "inferred disclosure" or "immutability" exceptions because its disclosure would reveal underlying non-negotiated confidential information supplied by the proponent or information that is not susceptible to change such as the operating philosophy of a business or a sample of its products:

- pages 694 to 706, the proponent's "Executive Summary;"
- page 707, Appendix B to proposal;
- pages 748 to 751, completed Appendix B to the RFP;
- page 753, completed Appendix D to the RFP;
- pages 754 and 755, completed Appendix E to the RFP;
- pages 756 to 807 Appendix F to RFP (rated criteria);
- page 811, Appendix C to proposal;
- pages 812 to 813, Appendix D to proposal;
- page 814, Appendix E to proposal;
- page 815, cover letter;
- pages 816 to 821, Appendix F to the proposal; and
- pages 830 and 831, diagrams.

[90] These pages include information that were it disclosed would reveal underlying non-negotiated confidential information supplied by the proponent, information about the successful proponent's operating philosophy and technical information about the proposed OTMS, as well as technical diagrams. With respect to the pages containing technical diagrams that describe components of the proposed OTMS, having reviewed this information I find that it consists of specific technical details for components for the affected party's product and I accept the ministry's argument that this is technology that fundamentally cannot change through negotiation. Even if certain elements of the proposed components in the diagrams can be altered, I accept that the diagrams in these pages represent a sample of the successful proponent's products.

[91] I also find, because of the nature of the information in these pages and based on the representations of both the ministry and the successful proponent that describe how the information was treated, that both parties were under the assumption that this information was supplied in confidence. I find, therefore, that this information meets part two of the section 17(1) test and I will go on to consider whether any of the harms contemplated in part three of the test might apply.

The proposal and copies of pages of the proposals

[92] The ministry has severed, in their entirety, the proposal packages submitted by proponents in response to the RFP. The unsuccessful proponent's proposal is found on pages 469 to 506 and the successful proponent's proposal is found on pages 296 to 439. The ministry has also severed pages 542 and 543 which are copies of pages of the

unsuccessful proponent's proposal as well as pages 291 to 295, 544 to 546, and pages 184 and 290, which are copies of select pages of the successful proponent's proposal.

[93] The ministry submits that previous orders have established that proposals are supplied to the ministry directly by third party proponents and, in this particular case, provisions in the RFP demonstrate that the proposals were supplied in confidence. Specifically:

- confidentiality clause;
- requirement that the proposals be submitted in sealed packages; and
- proposals have been identified as confidential and proprietary by the proponents.

[94] Both proponents submit that they supplied the information in their proposals to the ministry in confidence. The unsuccessful proponent submits that it provided the information under the specific confidentiality provisions outlined in its response to the RFP and reasonably assumed that those provisions would be adhered to by the ministry. It also submits that the information contained in its proposal is known only to a small number of individuals within its organization who were assigned to work on it. The successful proponent also submits that each page of its response is marked as "confidential and proprietary" indicating the confidential and sensitive nature of the information.

[95] This office has previously held that information submitted in the form of proposals should be considered as "supplied in confidence" with respect to the section 17(1) three-part test.[31]

[96] Having reviewed the information, it is clear that the proposal packages were prepared by the third party proponents and supplied directly by them to the ministry in response to the RFP. The confidentiality provisions of the RFP indicate that information submitted in proposals will be kept in confidence, subject to the access provisions of the *Act*. While I accept that this is not necessarily determinative of the matter, in my view, this does not have the effect of removing the expectation of confidentiality on the part of the proponents. Additionally, both proposals contain confidentiality clauses and are marked confidential, demonstrating the intention by all parties to keep the information contained in them in confidence.

[97] Accordingly, I find that in the circumstances of this appeal, all of the information contained in the proposals submitted by the proponents (found on pages 296 to 439 and 469 to 506) was supplied to the ministry with a reasonably-held expectation of

[31] Orders MO-1706, MO-1889, MO-2072, MO-2164, MO-2283, MO-2591.

confidentiality. For the same reasons, I find that the copies of select pages of both proposals that are dispersed throughout the records were supplied to the ministry, in confidence, by the proponents. Specifically, this includes pages 184, 290 to 295, and 542 to 546. Therefore, I find that this information meets part two of the section 17(1) test and I will go on to determine whether disclosure of this information could reasonably be expected to result in the harms contemplated in part three of the test.

Requests for clarification

[98] Among the records are copies of Requests for Clarification that were sent out to and received by the ministry from the proponents. The ministry has severed all copies of the Requests for Clarification, as well as the copies sent back in response, in their entirety. They are found on pages 588 to 598, 945 to 955, 997 to 999.

[99] I have reviewed this information and although it was clearly prepared by the ministry, I find that the information that the ministry has prepared is inextricably linked to information that was supplied in confidence by the proponents in their proposals. I accept that its disclosure would reveal or permit the drawing of accurate inferences with respect to information that was supplied in confidence by the proponents in their proposals. Accordingly, I find that the copies of the Requests for Clarification contain information that qualifies as having been supplied in confidence within the meaning of part two of the section 17(1) test. I will therefore go on to determine whether its disclosure could reasonably be expected to result in the harms contemplated by part three of the section 17(1) test.

Briefing slides

[100] The ministry has severed portions of pages of slides that were used to brief the deputy minister on the OTMS contract award. Specifically, the ministry has severed, pursuant to section 17(1), portions of information found on pages 118, 119, and 120. Some of this information is the name of the unsuccessful proponent which I have already addressed above. The ministry has also severed information about the existing contract for the provision of telephone services, and generalized comments about the proposals received in response to the RFP.

[101] Having reviewed the severed information in these pages, I find that it does not qualify as having been "supplied" in confidence by any third party. These slides were clearly prepared by the ministry and the information contained within them was not directly supplied by either of the proponents. In my view, none of this information, were it disclosed, would reveal or permit the drawing of accurate inferences with respect to specific information supplied by a third party. Accordingly, I find that the information on pages 118, 119, and 120 does not meet the second part of the section 17(1) test. As all three parts of the section 17(1) test must be met, I find the exemption

does not apply. As the ministry has also claimed that section 18(c) or (d) applies to page 118, I will discuss the possible application of either of those sections below.

Evaluation information

[102] Page 608 of the records is entitled "OTMS Proposal Evaluation Summary" and page 541 is entitled "Mandatory Criteria Evaluation – Stage 1." The ministry has severed portions of both of these records pursuant to section 17(1).

[103] Page 541 names both proponents and identifies whether they have met the "mandatory requirement forms" and the "submission mandatory requirements." The ministry has severed the names of the proponents and the notation indicating whether or not the identified requirement has been met. It has also severed some written comments.

[104] For the reasons already outlined above, I find that the names of the proponents are not information that has been "supplied in confidence" within the meaning of part two of the section 17(1) test. As for the other severances, given that this form is one that has been prepared and completed by the ministry staff and the generalized notation about whether or not each proponent has met the identified requirements does not reveal or allow one to accurately infer information that was supplied by the proponents, I find that the generalized notations do not qualify as having been supplied in confidence by a third party within the meaning of section 17(1). However, I accept that the written comments on page 541 would either reveal information supplied in confidence in the proposals or would permit one to accurately infer information that was supplied in confidence in the proposals. Accordingly, I find that this information meets the requirements of part two of the section 17(1) test.

[105] On page 608, the ministry has severed the name of one of the proponents and the numerical scores attributed to its proposal given by three different evaluators as well as the total average of the score received. The information includes no written commentary, only numerical scores.

[106] Previous orders have found that the disclosure of scores from evaluations in competitive bidding processes does not reveal the information actually supplied by the proponents. Rather, they have characterized scoring information as information calculated or derived by institution staff based on a subjective evaluation of information that was supplied.[32]

[107] In keeping with the reasoning expressed in those orders, I find that disclosure of the numerical scores assigned to the proponent's proposal, along with its name, would not reveal the specific information that appears in its proposal that it supplied to the

[32] Orders MO-1237, PO-1816, PO-1818.

ministry. Having reviewed page 608, none of the information appears to have been directly supplied by a third party but instead was generated by ministry staff based on their evaluation of the proposal.

[108] Accordingly, I find that the evaluation information on page 608, specifically the name of the proponent and the numerical scores attributed to its proposal, does not qualify as information that was supplied in confidence to the ministry by a third party for the purposes of part two of the section 17(1) test. As a result, I find that section 17(1) does not apply to this information. However, as the ministry has also claimed section 13(1) to this information, I will address the possible application of that exemption to this information below.

[109] The ministry has also severed a block of incomplete information on the left side of page 608 that is taken directly from the first portion of Appendix F of the RFP. This information was prepared by the ministry and disclosed in the RFP. In my view, it is clearly not information that was supplied in confidence by a third party. Accordingly, I find that this information does not meet part two of the test and section 17(1) cannot apply to exempt it.

Electronic links representing attachments to emails

[110] In some circumstances, the ministry has severed, pursuant to section 17(1), either icons or electronic links that represent documents that have been attached to the emails. In its representations, the ministry has not made any specific reference to these severances to explain why the exemption claim has been made with respect to them. Having reviewed them, I find that some of them appear to have been "supplied in confidence" to the ministry within the meaning of part two of the section 17(1) test, while others have not.

[111] Some of the icons or electronic links that have been severed pursuant to section 17(1) represent documents that were created by the ministry itself including draft versions of the RFP and draft Requests for Clarification. In my view, this information has clearly been prepared by the ministry and, even if its contents (in the case of the Requests for Clarification), which are not accessible through the paper records, possibly contain information supplied by a third party, disclosure of the name given to the icons and electronic links on the paper copy of these records would not reveal or permit accurate inferences to be made with respect to any information supplied to the ministry by a third party. Accordingly, I do not accept that this type information can be said to have been "supplied" by a third party as required by part two of the section 17(1) test. Specifically, this includes the icons or electronic links found on pages 216, 538 (email dated Tuesday, October 21, 2008 8:57 AM), 557, 558, 644, 647, 971, 975, 986 (email dated Wednesday, October 29, 2008 2:26 PM), and 987. As all three parts of the section 17(1) test must be met for the exemption to apply, section 17(1) does not apply to the links to electronic documents found on these pages.

[112] Additionally, on page 288, the ministry has also severed icons representing various parts of the executed contract with the successful proponent. As noted above several times, the contents of a contract or agreement between an institution and a third party have been treated by this office as mutually generated, the product of a negotiation process, and will not normally qualify as having been "supplied" for the purpose of section 17(1) unless it meets either of the "inferred disclosure" or "immutability" exceptions. I do not accept that disclosure of the icons themselves and the names assigned to them would reveal information that meets either of those two exceptions. Accordingly, I find that the icons and links to electronic documents that have been severed on page 288 of the records do not qualify as having been "supplied in confidence" within the meaning of part two of the test. As all three parts of the section 17(1) test must be met for the exemption to apply, section 17(1) does not apply to the links to electronic documents severed on page 288.

[113] In one circumstance, however, I find that disclosure of the particular icon or icons that were severed together with information that has already been disclosed in the email would reveal or permit accurate inferences to be made with respect to information supplied by a third party. I also find that this information was supplied in confidence to the ministry as it relates to details provided in proposals or responses to clarification questions. Specifically, I find that the icons and electronic links to documents found on page 994 meet the supplied in confidence component of the section 17(1) test. Accordingly, I will go on to determine whether this information on page 994 meets the harms component of the section 17(1) test.

[114] It should be noted that where the electronic links and icons form part of an email that I have found to qualify as solicitor-client privileged, I find that the electronic link or icon also qualifies for exemption under section 19(a) as disclosure of the name of the specific link could reasonably be expected to reveal advice sought by or given to the ministry by its counsel. For example: pages 138, 141, 142, 210, 212, 215, 538, 539, 547, 599, 600, 928, 929, 942, 944, 959, 963, 970, 979, 981, 984, and 986.

Memorandum

[115] Page 153(a) is an internal memorandum prepared by ministry staff discussing details surrounding the procurement of the OTMS. The ministry has claimed section 17(1) applies to this information. However, as this memorandum has been prepared by ministry staff and does not contain any information that can be considered to have been supplied in confidence by a third party, I find that part two of the section 17(1) test has not been met and the exemption does not apply.

Letter to unsuccessful proponent

[116] Pages 176 and 586 are duplicate copies of a letter sent to the unsuccessful proponent. The ministry has severed the name of the unsuccessful proponent and the

contact information of the recipient employee which, previously in this order I have found does not qualify for exemption pursuant to section 17(1). The ministry has also severed the last portion of the last sentence of the letter. Having reviewed this information it cannot be considered to have been supplied in confidence to the ministry by a third party; rather, it appears to be information that originates from the ministry. As a result, part two of the section 17(1) test cannot apply to this information and the exemption does not apply.

Emails

Revenue figures- existing contract

[117] Pages 94, 95, 105, 106, 128, 129, 131, and 132 are duplicates of internal emails between public servants that discuss matters related to the existing contract for offender telephones as well as some specifics on the RFP for a new contract. Pages 130, 151, and 165 are different emails that contain similar information.

[118] On pages 94, 105, 128, and 131, the ministry has severed, pursuant to section 17(1), the dollar amounts that reflect the estimated revenue value of the contract term for the OTMS, based on the commission rate of the executed contract for the existing telephone system. The ministry has severed the estimated revenue figure for youth institutions as well as the global estimated revenue for all institutions. The emails on pages 95, 106, 129, 132, and 151 advise that the ministry has approval to issue an RFP for a specified estimated revenue value. The estimated revenue value has been severed pursuant to section 17(1). On pages 130 and 165, the ministry has severed figures and commentary on the amount of revenue the ministry receives based on the existing contract.

[119] I have not been provided with evidence by any of the parties to demonstrate that these figures (or information in the case of pages 130 and 165) were supplied by a third party and I therefore find that they were not. On my review, these are figures and commentary generated by the ministry based on the existing contract. As discussed above, 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) as they are treated as having been mutually generated. In my view, the percentage of revenue received by the ministry pursuant to an executed cost sharing agreement does not fall within either the "inferred disclosure" or "immutability" exceptions to that rule, as described above. I also find that general, non-specific references about the revenue received as a result of the cost sharing agreements for either the current contract for telephone services or that sought through the RFP does not qualify as having been "supplied" and does not meet either of the two exceptions. Therefore, I find that the severances on pages 94, 95, 105, 106, 128, 129, 130, 131, 132, 151, and 165 do not qualify as having been supplied to the ministry by a third party and part two of the section 17(1) test has not been met.

[120] It is perhaps possible to calculate, based on the figures given, the contract commission rate for the existing telephone system, however, as previously discussed, I find that the revenue sharing percentage of the contract for the existing telephone system cannot be considered to be supplied within the meaning of this exemption. Once again, 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) as they are treated as having been mutually generated. Also, I have found that the percentage of revenue received by the ministry pursuant to an executed cost sharing agreement does not fall within either the "inferred disclosure" or "immutability" exceptions to that rule, described above. Accordingly, even if the figures outlined in pages 94, 95, 105, 106, 129, 131, 132, and 151 could be said to reveal the percentage of revenue of the existing contract, I find that they cannot be said to have been supplied in confidence by a third party and do not meet part two of the section 17(1) test.

Revenue figures – specific percentages from proposals

[121] On pages 167 and 565 the ministry has severed information that discloses the revenue percentage proposed by one of the proponents, as well as that received by the ministry in the existing contract for telephone services. On pages 615, 616, 619, 620, 623, 624, 629, 630, 632, 635, 636, 637 and 642, the ministry has severed the specific revenue figures proposed by the proponents in their responses to the RFP as well as how that proposed revenue translates in global commission figures for the ministry.

[122] Having reviewed this information I find that specific references to the exact revenue percentage proposed by the proponents and any figures which would allow one to discern that exact revenue percentage qualify as having been "supplied in confidence" to the ministry as they are taken directly from the proponents proposals which I have already found to meet part two of the section 17(1) test. However, I find that the other information, including the specific revenue percentage of the existing contract, does not.

[123] Accordingly, I find that the only information on pages 167 and 565 that was "supplied in confidence" is the percentage figure proposed by the successful proponent as well as the global commission figure on pages 170 and 565 which may allow the percentage figure to be discerned. Additionally, I find that (with the exception of the proponent's name which I have discussed above) all the information that has been severed from pages 615, 616, 619, 620, 623, 624, 629, 630, 632, 635, 636, 637, and 642, meets the "supplied in confidence" requirement as it is either taken directly from or would allow one to accurately infer information that came from the proposals. Therefore, I will go on to determine whether disclosure of this information would give rise to any of the harms contemplated by part three of the section 17(1) test.

[124] Finally, I find that, for reasons previously enunciated above, the revenue percentage and other information that relates to the existing contract on pages 167, 565, 170 and 631 does not meet part two of the section 17(1) test.

Emails from employee of successful proponent

[125] The ministry has severed a portion of an email dated Monday, December 08, 2008, 12:00 PM sent by an employee of the successful proponent who appears to have been designated as the point person for the OTMS project. This email is duplicated on pages 453, 518, 527, and 530. Having reviewed the information that the ministry has severed, while I accept that it was supplied to it by a third party, I do not accept that it was supplied "in confidence" as required by part two of the section 17(1) test. In my view, the information is not of the type that would have been intended to have been kept confidential. Moreover, I have not been presented with evidence from any of the parties to support the contention that it was. Accordingly, I find that the information severed from this email pursuant to section 17(1) does not meet part two of the section 17(1) test and therefore, section 17(1) does not apply.

The remaining emails

[126] The ministry has severed, pursuant to section 17(1), select portions of internal emails between public servants that discuss matters related to the current contract for offender telephones, as well as matters related to the RFP and the proposals received in response. In my view, while some of this information qualifies as having been "supplied in confidence," some of it does not.

[127] With the exception of a small number of emails that have been prepared by an employee of the successful proponent (to be discussed below), these emails have been prepared by employees of the ministry and therefore do not amount to information that has been directly supplied by a third party. On my review, many of them also do not contain information that, were it disclosed, would reveal or permit the drawing of accurate inferences with respect to information that has been supplied by a third party. Some of this information is generalized information that relates to the existing contract for offender telephones, while some of it is ministry commentary and discussion about the OTMS RFP and the proposals it received in response. In my view this information is too general in nature to be said to reveal or permit the drawing of accurate inferences with respect to information that was supplied in a proposal or request for clarification. Specifically, I find that the remaining severances on the following pages do not contain information that qualifies as having been supplied for the purpose of part two of the section 17(1) test: pages 130, 163, 165, 170, 190, 559, and 647.

[128] However, I find that some emails do contain information that, were it disclosed, would reveal or permit the drawing of accurate inferences with respect to information that has been supplied by a third party. The majority of these emails contain discussion

and commentary that is either directly taken from the proposals or would allow one to infer the content of the proposals were it disclosed. I accept that this information was supplied by the proponents, and given that it is information that was supplied through their proposals, I accept that it was supplied in confidence. Other emails reveal information that was directly supplied by a third party in their proposals, responses to requests for clarification, discussions, meetings or other communications, and, given their subject matter I accept that they were supplied in confidence. Accordingly, I find that the severances on the following pages meet part two of the section 17(1) test: pages 136, 161, 186, and 229. Therefore, I will go on to determine whether disclosure of this information meets the harms component of the section 17(1) test.

[129] As noted above, in addition to the emails that have been prepared by ministry employees, there are a series of emails that originate from employees of the successful proponent's company. These emails discuss the implementation of the OTMS project.

[130] I accept that some information that has been severed from these emails qualifies as information that has been directly supplied by a third party. Based on the subject matter of these emails and the fact that they contain discussion of information that is taken from the successful proponent's proposal, I also accept that this information was supplied in confidence. Accordingly, I find that the severed information on the following pages qualifies as having been "supplied in confidence" within the meaning of part two of the section 17(1) test: pages 460, 462, 466, 512, 514, 515, 517, and 526.

[131] However, on pages 440 and 441, there is an email chain that has been severed in its entirety. This chain includes emails between ministry employees and an employee of the successful proponent discussing logistics regarding the OTMS. The chain originates with the ministry and, on my review, disclosure would not reveal any information that is contained in the successful proponent's proposal. Although I accept that the response from the successful proponent's employee can be said to have been directly supplied by the third party, given the nature of the information, I do not accept that it was sent "in confidence." As a result, I find that pages 440 and 441 do not meet part two of the section 17(1) test. As all three parts of the test must be met for the exemption to apply, I find that section 17(1) does not apply to this information.

[132] The ministry has severed the bulk of the email in page 125 which is duplicated on page 992. Having reviewed this information I find that the first paragraph of severed information qualifies as having been supplied in confidence within the meaning of part two of the section 17(1) test. This paragraph contains information contained in one of the proponent's proposals and their response to a request for clarification. However, the remainder of the information is not information that can be said to have been "supplied in confidence" to the ministry by a third party. Although it is information prepared by the ministry itself that speculates possible responses by third parties it does not reveal any information supplied by a third party. Accordingly, section 17(1) cannot apply to it.

Part 3: harms

[133] I have found that the following pages have met the first and second parts of the three-part section 17(1) test:

- portions of "Schedule 1-Deliverables" on pages 694 to 706, 707, 748 to 751, 753, 754 to 755, 756 to 807, 811, 812 to 813, 814, 815, 816 to 821, 822 to 829, 830 to 831;
- proposals and pages taken from proposals on pages 184, 290, 291 to 295, 296 to 439, 469 to 506, and 542 to 546;
- requests for clarification on 588 to 598, 945 to 955, 997 to 999;
- written evaluation comments on page 541;
- icon on page 994;
- proposed revenue percentage on pages 167 and 565;
- global commission figure on pages 170, 565, 615, 616, 619, 620, 623, 624, 629, 630, 632, 625, 636, 637, and 642;
- severances in emails on pages 136, 161, 186, 229, 460, 462, 466, 512, 514, 515, 517, 526; and,
- the first paragraph on pages 125 and 992.

[134] As all three parts of the section 17(1) test must be met for the third party commercial information exemption to apply, I must now determine whether the information that remains at issue, identified above, meets the harms component outlined in part three of the test.

[135] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[33]

[136] 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.[34]

[137] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[35]

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[33] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[34] Order PO-2020.
[35] Order PO-2435.

[138] 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*.[36]

Part 3: representations

[139] The ministry submits that in the competitive commercial environment in which the telecommunications industry operates, and given that this particular procurement is a revenue sharing agreement, disclosure of the information at issue "could allow competitors to undercut the affected parties' proposals in the future, especially as this is a recurrent contract." It submits that it is foreseeable that disclosure would result in prejudice to their competitive positions [section 17(1)(a)] thereby resulting in undue loss [section 17(1)(c)] because it would reveal sensitive financial information about how much revenue the successful proponent was expected to generate as a result of the RFP. The ministry further submits that it takes its role in managing its contracts with suppliers seriously and that a level of openness cannot be achieved if the records supplied are subject to the threat of constant disclosure.

[140] The unsuccessful proponent states that disclosure of its information would prejudice its competitive position because the information in its response contains its "unique approach, methodology to the design, development, implementation, maintenance and support of [its] products and services." It submits that its inmate technology is customized to the specific institution and jurisdictional needs. It takes the position that disclosure of the information at issue will prejudice its competitive position [section 17(1)(a)], and would result in undue gain to its competitors [section 17(1)(c)]. It further argues that disclosure would allow existing and potential competitors to formulate more effective responses to similar RFPs, thereby prejudicing its competitive position and its third party suppliers causing them direct harm and loss, resulting in undue financial benefit to such third parties.

[141] The successful proponent submits that disclosure of the information at issue could significantly harm its competitive position going forward. The successful proponent is particularly concerned about information relating to its previous customers provided as references and submits disclosure would cause its own company prejudice with respect to its position in the market place as well as cause its customers harm. It is also concerned with information that provides a detailed description of the processes used regarding inmate calling as well as the technical aspects of its solution and submits that disclosure of this information would cause it significant harm and prejudice to its competitive position as it reveals key components of the proposed system.

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[36] *Ibid.*

Part 3: Analysis and finding

[142] This office has dealt extensively with the treatment of information provided in response to RFP processes. Based on the evidence and submissions in each of those appeals, conclusions on whether certain types of information in a proposal in response to an RFP may be disclosed may differ. Regardless of the conclusion, as Adjudicator Faughnan stated in Order PO-1888:

> The decision whether to disclose information contained in a tender document must be approached in a careful way, applying the tests as developed over time by this office while appreciating the commercial realities of the tendering process and the nature of the industry in which the tender takes place.

[143] With this approach in mind, I have carefully considered the submissions and evidence provided by the parties and have reviewed the information remaining at issue closely. I am satisfied that disclosure of some of this information at issue could reasonably be expected to lead to the harms contemplated by sections 17(1)(a) or (c), while disclosure of other information could not reasonably be expected to lead to such harms.

[144] Specifically, I accept that I have been provided with sufficiently detailed and convincing evidence to find that disclosure of the following information could reasonably be expected to prejudice significantly a proponent's competitive position (section 17(1)(a)) or result in an undue loss for that proponent, and an undue gain to its competitor (section 17(1)(c)):

- portions of "Schedule 1 – Deliverables" on pages 707, 756 to 807, 830; and,
- portions and pages taken from proposals on pages 184, 290, 344 to 395, 418.

[145] This information primarily consists of information that was supplied by the successful proponent. I accept the ministry's position that the telecommunications industry operates in a competitive environment. Taking this environment into consideration, I also accept the successful proponent's position that disclosure of the information in the records that provides a detailed description of the technical aspects and processes that it proposes regarding the OTMS would reveal key components of its solution and consequently allow existing and potential competitors to modify its technological product and us that acquired knowledge to formulate more effective responses to similar RFPs. Having reviewed the specific information that remains at issue, I find that the harm that would come from disclosure is more than simply permitting competitors to undercut the successful proponent but risks disclosing the successful proponent's unique approach and methodology behind its proposed OTMS. I

accept that disclosure of the information identified above that was supplied by the successful proponent could reasonably be expected to prejudice significantly its competitive position [section 17(1)(a)], and result in an undue loss to it, and an undue gain to its competitors [section 17(1)(c)].

[146] Accordingly, I find that the third part of the section 17(1) test has been met for this information. As all three parts of the test have been met, I find that this information is exempt from disclosure under section 17(1).

[147] With regard to the remaining information, I find that neither the ministry, nor any of the third parties have provided sufficiently detailed and convincing evidence to demonstrate as to how disclosure of the specific information that has been severed could reasonably be expected to result in the harms contemplated by either sections 17(1)(a) or (c). Despite the fact that I accept that the telecommunications industry operates in a competitive environment, I find that the ministry's allegation that disclosure of the records could allow competitors to undercut the affected parties' proposals in the future lacks detail and is unconvincing.

[148] Previous orders and court decisions have discussed the quality of evidence required to satisfy part three of the section 17(1) test. In *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*[37] the Court of Appeal for Ontario, in upholding former Assistant Commissioner Tom Mitchinson's Order P-373, stated the following:

> [T]he use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.

[149] In Order PO-2435, Assistant Commissioner Beamish canvassed this office's approach to evaluating harms under section 17 of the *Act*. In that appeal, a request had been made for consultants' contracts with the Ministry of Health and Long-Term Care through the Smart Systems for Health Agency [SSHA]. He stated:

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example,

[37] *Supra,* note 33.

> nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

[150] The Assistant Commissioner also stated:

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

[151] In Order PO-2774, Adjudicator Daphne Loukidelis followed Assistant Commissioner Beamish's harms analysis in Order PO-2435 and stated that the section 17(1) exemption "was never intended to be wielded as a shield to protect third parties from competition in the market place, but rather, from a reasonable expectation of *significant* prejudice to the party's competitive position."

[152] The approach taken in these previous orders, which I find to be relevant and instructive to the current appeal, supports my finding that the ministry and the affected parties have not adduced sufficiently detailed and convincing evidence to demonstrate as to how disclosure of the severed information could reasonably be expected to result in the harms contemplated by either sections 17(1)(a) or (c). Their representations are general, vague and speculative and do not directly address the severed information or provide an evidentiary link to demonstrate how disclosure of this information could reasonably be expected to lead to such harms.

[153] Specifically, I find that the harms component of the section 17(1) test has not been established for the severances on the following pages:

- portions of "Schedule 1 – Deliverables" on pages 694 to 706, 748 to 751, 753, 754 to 755, 811 to 814, 815, 816 to 821, 822 to 829, and 831;
- portions of proposals on pages 291 to 295, 296 to 341, 342 to 343, 396 to 399, 400, 401 to 417, 419 to 439, 469 to 506, 542 to 546;

- Requests for Clarification 588 to 598, 945 to 955, and 997 to 999;
- written evaluation comments on page 541;
- the icon on page 994;
- proposed revenue percentage on pages 167 and 565;
- global commission figure on pages 170, 565, 615, 616, 619, 620, 623, 624 629, 630, 632, 635, 636, 637, and 642;
- severances in emails on pages 136, 460, 462, 466, 512, 514, 515, 517, and 526; and,
- the first paragraph on pages 125 and 992.

[154] Accordingly, as part three of the section 17(1) test has not been met, I find that the exemption does not apply to this information.

[155] It is worth noting that I have not accepted the unsuccessful proponent's submissions that disclosure of pages 469 to 506 of its proposal as well as pages 542 and 543 which were taken from its proposal would amount to the harms identified in section 17(1)(a) and/or (c). In my view, the information contained in these specific pages neither reveals its customized technology for inmate telephone service nor the proponent's "unique approach, methodology to the design, development implementation, maintenance and support of [it's] products and services" and its disclosure could not reasonably be expected to lead to any of the harms contemplated by sections 17(1)(a) or (c) of the *Act*.

Summary

[156] I find that sections 17(1)(c) and (d) apply to the following information:

- portions of "Schedule 1 – Deliverables" on pages 707, 756 to 807, 830; and
- portions and pages taken from proposals on pages 184, 290, 344 to 395, 418.

D. Does the discretionary exemption at section 13(1) apply to the records because disclosure of the information would reveal advice or recommendations?

[157] As I have already found that some portions of the records for which the ministry has claimed section 13(1) are exempt under either section 19(a) or section 17(1), it is not necessary for me to determine whether section 13(1) also applies to them. The ministry submits that portions of the following pages that remain at issue are exempt pursuant to the discretionary exemption at section 13(1) of the *Act*: 125, 170, 608, 941, 943, 958, 962, 967, 969, and 992.

[158] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[159] The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[38]

[160] Previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information.[39]

[161] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.[40]

[162] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.[41]

[163] Examples of the types of information that have been found not to qualify as advice or recommendations include:

- factual or background information;
- analytical information;
- evaluative information;

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[38] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).
[39] Order PO-2681.
[40] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[41] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (*ibid.*); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (*ibid*).

- notifications or cautions;
- views and opinions;
- draft documents; and,
- a supervisor's direction to staff on how to conduct an investigation.[42]

Representations

[164] The ministry submits that in a complex procurement such as the one at issue it is foreseeable that there would be many records that contain advice and recommendations for several reasons:

- different types of expertise are required;
- the process for developing and issuing the RFP and evaluating the proposals is lengthy; and
- there is a good deal of collaboration and deliberation required in order to execute a contract.

[165] It submits that the section 13(1) exemption applies to the specific pages or portions of pages that it has identified because:

- they are mostly emails to and from ministry staff or staff from other ministries;
- they contain the advice of program staff, information technology and procurement advisors, all of whose input is required to develop the RFP and to provide advice on assessing the proposals; and
- they expressly or implicitly recommend a next step or course of action to move the procurement forward.

[166] In its representations, the ministry has also provided a page-by-page explanation of why disclosure of the specific portions of records for which section 13(1) was claimed would reveal advice or recommendations.

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[42] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (*supra,* 40); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (*supra* note 40).

[167] The appellant made no specific representations on the possible application of section 13(1).

Analysis and findings

[168] As noted above, only the following pages contain information that remains for me to determine whether the ministry's exemption claim of section 13(1) applies: pages 125, 170, 608, 941, 943, 958, 962, 967, 969, and 992.

[169] Pages 125 and 992 are duplicates of an email dated October 30, 2008. The ministry submits that this email "sets up the next steps in the procurement process, including different scenarios, issued by a program area staff person to a senior ministry official." Having reviewed the email, which indicates at the outset in the disclosed portion, that it is an "update on the status of the OTMS RFP," I find that the withheld portions contain factual information and do not reveal advice or recommendations of a public servant, as required by section 13(1). Specifically, the email does not suggest, and the ministry has not provided evidence to demonstrate, that the scenarios listed amount to a particular course of action to be accepted or rejected by a decision-maker. As a result, I find that the information in these emails does not qualify for exemption under section 13(1).

[170] Page 170 is an email from the project manager to other public servants. The ministry submits that the portions of the email that have been severed pursuant to section 13(1) describe questions asked by a senior ministry official concerning the procurement process, as well as how those questions were answered. It submits that these answers would have been used to "inform advice and recommendations." I find that this information does not qualify as actual advice and recommendations nor would its disclosure allow one to accurately infer advice or recommendations that may have been given. More specifically, the information does not reveal a suggested course of action to be accepted or rejected but is factual in nature, detailing questions that were asked and a brief description of how they were answered. Accordingly, the portions of page 170 for which section 13(1) has been claimed do not qualify for exemption under that section. However, as section 18(1) was also claimed for page 170, I will go on to determine whether those sections apply.

[171] Page 608 is a "Proposal Evaluation Summary" and the information that has been severed pursuant to section 13(1) is the breakdown of scores given by each of the three evaluators as well as the average of those scores. The ministry submits that scores of RFP proposals by employees inherently contain advice and recommendations which are used for the purpose of selecting the winning proposal. Having reviewed this information, I do not accept that it qualifies for exemption pursuant to section 13(1). In my view, this information qualifies as factual, evaluative information and although it may be used to develop advice or recommendations it does not, in and of itself, qualify as advice or recommendations. In my view, this information is similar to "scoring

sheets" which were found not to qualify for exemption under section 13(1) by Adjudicator Laurel Cropley in Order PO-1993.[43]

[172] In that order, the records at issue were used by Ministry of Transportation staff as part of a "Consultant Evaluation Process," in which staff evaluated and assigned scores for each consultant. Adjudicator Cropley stated:

> I do not accept the ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed. Broadly viewed, the ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue.
>
> …
>
> According to the ministry, its evaluators are "ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the consultants' proposals." In conducting their review of the proposals submitted to the ministry pursuant to RFPs, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made. Moreover, in this case, the entire exercise may be even further removed from the deliberative process through its very design.

[173] I adopt the approach taken by Adjudicator Cropley in Order PO-1993 as set out in the excerpt reproduced above. In my view, the information on page 608 does not contain information which suggests a course of action that will ultimately be accepted or rejected by the person being advised but rather contains the factual basis and scoring upon which subsequent advice and/or recommendations may be based. There is no discretionary decision in reaching the scores. Rather, the numerical conclusions reached in the records reflect the outcome of the application of the evaluation criteria. I do not accept that these scores "advise" or "recommend" anything, or are predictive of any advice of recommendations that may ultimately be given. Accordingly, I find that the portions at issue on page 608 for which section 13(1) has been claimed do not qualify as "advice or recommendations" for the purpose of that section.

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[43] Upheld on judicial review in *Ontario (Minister of Transportation) v. Ontario (Assistant Information and Privacy Commissioner),* (*supra* note 40).

[174] The information for which section 13(1) has been claimed on pages 941, 943, 958, 962, 967 and 969 is contained in the email dated Monday, October 20, 2008 5:48 PM which is duplicated on all six pages. The ministry has claimed section 13(1) applies to text that is duplicated in pages 941, 943, 958, 962 and 967. Having reviewed the content of this text, I find that this information does not qualify as advice or recommendations. I do not accept that it suggests a course of action that will ultimately be accepted or rejected by its recipient. In the text, the writer expresses his "belief" and "opinion." In my view, this makes it clear that he is expressing his views or opinions which, as noted above, this office has found does not qualify as advice or recommendations. Accordingly, I do not accept that section 13(1) applies to any of the text for which it has been claimed on pages 941, 943, 958, 962, and 967.

[175] It should also be noted that on pages 941, 943, 958, 962 and 967 the ministry has severed only the last two and a half sentences of the email, however, on page 969 the ministry has severed the content of the email in its entirety. Given that the appellant is already aware of information in the first portion of the email that has been severed, in my view, it would be absurd to withhold it. However, as the emails are duplicates and the appellant already has copies of the exact same email where the information has not been severed, I will not order the ministry to disclose it.

[176] Additionally, it should be noted that in some instances the ministry has not been consistent with the severances it has made to duplicate records. For example:

- in the email dated Monday, October 20, 2008 at 5:48 PM on pages 941, 943, 958, 962, 967 and 969 the ministry has severed the entire email on page 969 but disclosed portions of it on pages 958, 962 and 967.

[177] Given that, in these specific instances, the appellant is already aware of information that has been severed, in my view, it would be absurd to withhold it. However, as the emails are duplicates and the appellant already has at least one copy of each email where the exact same information has not been severed, I will not order the ministry to disclose it.

E. Do the discretionary law enforcement exemptions at sections 14(1)(i), (k) and (l) apply to the records?

[178] The law enforcement exemptions at sections 14(1)(i), (k), and (l) read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure

established for the protection of items, for which protection is reasonably required;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[179] The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or

(c) the conduct of proceedings referred to in clause (b)

[180] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[44]

[181] Where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[45]

[182] It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[46]

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[44] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[45] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (*supra,* 33.).
[46] *Ontario (Attorney General) v. Fineberg*, (*supra* note 44).

Representations

[183] The ministry claims that one or more of the law enforcement exemptions at sections 14(1)(i), (k), and/or (l) apply to pages 290, 296 to 426, 689 to 831 and 997 to 999. It specifies that these pages make up portions of the successful proponent's proposal, its response to the ministry's request for clarification, and Schedule 1 of the agreement setting out the deliverables that it was to provide.

[184] The ministry explains that the Request for Proposal includes the following policy objectives for the OTMS:

- to "protect victims of crime, witnesses and other members of the public from harassment; and intimidation by offenders while in provincial institutions;" and,

- to "restrict the ability of offenders to conduct criminal activity while in the care and custody of the ministry."

[185] The ministry states that in order to meet these policy objectives, the OTMS is required to include enhanced safety features, such as call blocking, the prevention of three-way calling, and time limits on phone calls, to address the problem of telephone fraud perpetrated by inmates. It submits that disclosure of the information about the specific features of the OTMS contained in the identified pages could sufficiently explain how they work so that their very purpose may be defeated.

[186] The appellant does not specifically address the ministry's submissions on the possible application of the law enforcement exemption in his representations.

Analysis and findings

[187] I have already found that the pages 290, 344 to 395, 418, 707, 756 to 807 and 830 are exempt from disclosure under section 17(1). Consequently, it is not necessary to consider whether the law enforcement exemptions in section 14(1) also apply to these records. However, I found that section 17(1) does not apply to other records. I will now determine whether the exemption at sections 14(1)(i), (k), or (l) applies to these records, which are found on pages 296 to 343, 396 to 417, 419 to 426, 689 to 706, 708 to 755, 808 to 829, 831, and 997 to 999.

[188] Having reviewed this information closely and considered the ministry's representations, I accept that the ministry has adduced sufficient evidence to establish that the majority is exempt pursuant to the claimed law enforcement exemptions. Much of this information describes in precise detail how the specific features of the OTMS proposed by the successful proponent actually work. I accept that this level of detail is not in the public realm and that the disclosure of such detailed information about the

workings of the telephone system, including the presence or absence of certain elements, could reveal potential security vulnerabilities. I therefore accept that even information that might appear innocuous could ultimately be used by some people to draw accurate inferences of the OTMS security features in a manner that could reasonably be expected to either jeopardize the security of the OTMS [section 14(1)(i)], the correctional facility itself [section 14(1)(k)], and/or result in the commission of an unlawful act or hamper the control of crime [section 14(1)(l)]. Specifically, I find that pages 342 to 343, 401 to 417, 754 to 755, 811 to 814, and 816 to 829 are exempt from disclosure pursuant to sections 14(1)(i), (k), and (l).

[189] I note that the ministry has not claimed the exemptions at section 14(1)(i), (k), and (l) to pages 291 to 295. However, I have found that they apply to duplicate copies at pages 826 to 829. Accordingly, I accept that pages 291 and 295 are exempt from disclosure pursuant to sections 14(1)(i), (k), and (l).

[190] However, I do not accept that the remaining records contain details about the OTMS that could reasonably be expected to jeopardize the security of the OTMS, the correctional facility itself, and/or result in the commission of an unlawful act or hamper the control of crime. These records include general information about the successful proponent company and the service it is prepared to offer as well as information that was described in the RFP published by the ministry. Any information that relates to system security features is clearly set out as requirements in the RFP and is described in very general terms. I have not been provided with sufficient evidence to establish that the disclosure of this specific information in the records could reasonably be expected to lead to the harms contemplated by the applicable law enforcement exemptions. Accordingly, I find that sections 14(1)(i), (k), and (l) do not apply to pages 296 to 341, 396 to 400, 419 to 426, 689 to 706, 708 to 753, 808 to 810, 815, 831 and 997 to 999.

F. Does the discretionary exemption at section 15(b) apply to the records because disclosure of the information would reveal information received in confidence from another government?

[191] Section 15(b) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal information received in confidence from another government or its agencies by an institution,
>
> and shall not disclose any such record without the prior approval of the Executive Council.

[192] Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. The purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern.[47]

[193] For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[48]

[194] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received.[49]

[195] For a record to qualify for exemption under subsection 15(b), the institution must establish that:

1. the records must reveal information received from another government or its agencies; and

2. the information must have been received by an institution; and

3. the information must have been received in confidence [Order P-210].

Representations

[196] The ministry claims that the information contained in pages 179 and 181, which are duplicate copies of an email describing a meeting between representatives of the provincial and federal governments, is subject to the exemption at section 15(b) because it could reasonably be expected to reveal information received in confidence from the federal government. The ministry makes the following submissions in support of its exemption claim:

- the meeting was closed to the public and what was discussed was never intended to be, and has never been, publicly disseminated;

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[47] Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

[48] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (*supra* note 33*);* see also Order PO-2439.

[49] Order P-1552.

- the records describes sensitive and confidential information that the province received at the meeting and disclosing the record would reveal a significant part of the discussions that took place between the federal and provincial governments, including the position of the federal government with respect to one issue; and

- the agreement has not been finalized and disclosure of the information could prejudice ongoing negotiations and inhibit ongoing discussions between the province and the federal government which are required as they have shared jurisdiction over the correctional system.

[197] The appellant does not make specific representations on the possible application of section 15(b) to pages 179 and 181.

Analysis and finding

[198] Having reviewed the portions of pages 179 and 181 that the ministry has severed pursuant to section 15(b), I agree with its position that the exemption applies to the majority of that information.

[199] Specifically, the bulk of the email refers to a meeting between staff from the ministry and the federal government agency from which the ministry received information. The ministry submits that this information was received in confidence in a meeting that was closed to the public and what was discussed at that meeting was never intended to be and has never been publicly disseminated. Additionally, the email is marked confidential. Although being marked confidential is not necessarily determinative as to whether the information it contains is, in fact, confidential, based on the ministry's representations and the nature of the information I accept that the information was received in confidence by the ministry from an agency of another government. Accordingly, I find that this information fits squarely within section 15(b) of the *Act* and is exempt under that section.

[200] The information that I find does not qualify for exemption under section 15(b) amounts to the last three lines of the email. In my view, it does not reveal confidential information received by the ministry from the agency of another government and section 15(b) of the *Act* does not apply.

[201] Although the portions at issue in pages 179 and 181 are duplicates of the same email, the ministry has not been consistent with its severing with respect to the last three lines. On page 179 the entire content of the email has been severed, while for page 181 the last three lines have been disclosed, with the exception of the name of an individual. Not only do I find that section 15(b) does not apply to the last three lines of the email, the majority of it (with the exception of the name) has already been disclosed to the appellant. In principle, the appellant is entitled to have access to the

portions of pages 179 that the ministry has already disclosed on page 181. However, as the appellant has already been granted access to the identical information in page 181, I will not order that page 179 be disclosed.

[202] With respect to the name that has been severed in the last three lines of page 181, the ministry has not made it clear as to why this severance was made. In my view, not only does the name not qualify for exemption under section 15(b) but it refers to an individual acting in a business capacity. Therefore, pursuant to section 2(3) of the *Act* it does not qualify as personal information and therefore cannot be withheld under the personal privacy exemption in section 21(1) of the *Act* either, because that exemption only applies to personal information.

[203] The ministry has been inconsistent with its other claims for these records. In addition to section 15(b), according to its index of records and the notations on the records themselves, it also claims that section 18(c) applies to both pages and section 17(1) applies to page 181. However, it makes no specific reference to these pages in its representations on either of these exemptions. In my view, as further elaborated below, disclosure of the last three lines, including the name, cannot be said to result in any of the harms contemplated by either of these sections and neither of those exemptions could reasonably be said to have any application to this information.

[204] As noted above, the last three lines of the email, with the exception of the name, have been already disclosed to the appellant in page 181. Accordingly, I will order the ministry to disclose to the appellant the information that he does not have access to, specifically the name that has been severed in the last three lines of the email at issue on page 181.

G. Do the discretionary exemptions at sections 18(1)(c) or (d) apply to the records because disclosure of the information could reasonably be expected to prejudice the ministry's economic interests or competitive position or be injurious to the Government of Ontario's financial interests or its ability to manage the economy?

Section 18(1)

[205] Sections 18(1)(c) and (d) 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;

[206] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (The Williams Commission Report)[50] explains the rationale for including a "valuable government information" exemption in the *Act*:

> 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 . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[207] For sections 18(1)(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[51]

[208] 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.[52] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[53]

Section 18(1)(c): prejudice to economic interests

[209] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a

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[50] Toronto: Queen's Printer, 1980.
[51] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner),* (*supra* note *33*).
[52] Orders MO-1947 and MO-2363.
[53] Order MO-2363.

reasonable expectation of prejudice to these economic interests or competitive positions.[54]

[210] This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[55]

Section 18(1)(d): injury to financial interests

[211] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[56]

Representations

[212] The ministry's representations on the application of the exemption at sections 18(c) and (d) are largely based on the nature of the sharing agreement for revenues generated by the OTMS. Early in its representations, the ministry explains:

> Rather than having the ministry pay the supplier a fee for providing the service, the opposite is true: the supplier pays the ministry a percentage of its gross revenue. What this means is that the successful proponent is not the supplier to who offers to pay the least amount to the ministry, but instead, the supplier who offers to pay the ministry the higher percentage of its gross revenue, in addition to meeting other technical and operational requirements. What the supplier pays to the ministry is therefore not just a cost, but it also reveals sensitive financial information about how much the supplier and the ministry will earn from the supplier providing the goods and service.

[213] The ministry submits that sections 18(c) and (d) apply to exempt the references to financial figures or percentages in pages 94, 95, 105, 106, 128, 129, 130, 131, 132, 151, 153(a), 170, 273, 615, 616, 619, 620, 623, 624, 629, 630, 631, 632, 635, 636, 637, 642, and 674. It submits that these pages describe the amount that the ministry is being paid by the successful proponent as part of the revenue sharing agreement that it executed and if it releases this information, it is concerned that in the future, it will no

[54] Orders P-1190 and MO-2233.
[55] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[56] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, (*supra* note 47); Order MO-2233.

longer be able to secure the best possible arrangement. It submits: "Future proponents will base their proposals on the existing amount the ministry is being paid and may not want to pay more, thereby defeating the purpose of a competitive bidding process."

[214] The ministry also submits that sections 18(c) and (d) apply to portions of records which compare the revenues the ministry received from an earlier contract with a supplier. Specifically, portions of pages 118, 165 and 170.

[215] Finally, the ministry also claims sections 18(1)(c) and (d) to page 136 which is an internal email describing transition planning between the two contracts and sensitive information about each of the suppliers. It submits that the disclosure of this information would be injurious to Ontario's financial and economic interests because it contains frank discussions. The ministry submits that the concern is that if ministry staff are aware that these types of discussions are likely to result in records being disclosed, they will not communicate, and if suppliers know that internal records are susceptible to being disclosed, they will not want to contract with the ministry.

[216] The appellant did not make representations that specifically addressed the possible application of sections 18(1)(c) and (d).

Analysis and finding

[217] I find that the ministry has failed to make the necessary evidentiary link between the disclosure of the portions of the records remaining at issue for which sections 18(1)(c) and (d) have been claimed and the harm envisioned by those exemptions.

[218] As noted above, the ministry submits that disclosure of any information about the payments it receives through its revenue sharing agreement with the successful proponent as well as the previous provider will prevent it from securing the best possible arrangement because future proponents bidding on the project will not want to pay more than the ministry is already receiving. In my view, the ministry's argument fails to acknowledge the reality of the competitive bidding process. Presumably, if a new service provider who wishes to be awarded the project is aware of financial terms of the current revenue sharing agreement and how much the ministry is being paid, it may attempt to better that arrangement in order to secure the contract. Conversely, if the original service provider is aware that the amount it is paying the ministry is available to its competitors, when it attempts to be re-awarded the project it will strive to provide the ministry with the best rate sharing agreement possible. In my view, disclosure of this information could possibly lead to benefiting the ministry's economic interests as well as the broader economic interests of Ontarians.

[219] My analysis is in keeping with the reasoning expressed in previous orders of this office which have found that the fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of

the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[57]

[220] Assistant Commissioner Beamish examined whether section 18(1)(c) applied to the financial terms of a contract between a university and a company relating to parking fine debt collection services. The university argued that if certain terms of the agreement were released and it subsequently attempted to negotiate a new agreement with a competitor, it would be prejudiced in attempting to negotiate the most favourable terms because the competitor would be aware of the current terms and a precedent of a "floor" or "ceiling" for pricing would be established.

[221] In Order PO-2843, Assistant Commissioner Beamish did not accept the university's argument and stated that, in his view, the university's position ignored the reality of how a competitive marketplace functions. He stated: "In such a marketplace, the disclosure of the rates of an existing service provider would more likely lead to a competitor lowering its rates in order to secure a new agreement. The new lower cost would then be an economic benefit to the university."

[222] Assistant Commissioner Beamish referenced Order PO-2758, in which Senior Adjudicator John Higgins addressed a similar argument by the university:

> [The university's] arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with [the university], it will do so by charging lower fees to [the university] than its competitor, resulting in a net saving to [the university]. Similarly, in the circumstances where [the university] is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for [the university]. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

[223] Moreover, some information that could be said to compare the revenues the ministry received from an earlier contract with a supplier against potential revenue from the successful proponent (including portions of pages 118, 165 and 170) is, in my view, too general in nature to attract the harms envisioned by sections 18(1)(c) and (d) and I find that the ministry has not provided the detailed and convincing evidence required to establish that those exemptions apply to this information.

[224] With respect to the ministry's argument that disclosing information about transition planning would result in staff not being willing to communicate, I find that the ministry has not provided me with sufficient evidence to make such a finding. Moreover,

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[57] Orders MO-2363, PO-2758 and PO-2843.

I do not accept that disclosing this information could reasonably be expected to lead to the harms contemplated by section 18(1)(c) or (d).

[225] Additionally, in my view, the ministry's position that if suppliers know that internal records are susceptible to being disclosed they will not want to contract with the ministry is not credible. I have reviewed the information for which this argument is being made and find that it does not amount to sensitive information about the suppliers, as claimed by the ministry. Moreover, government contracts are lucrative and I do not accept that disclosure of the specific type of information at issue would discourage suppliers from bidding on ministry contracts.

[226] Finally, although the ministry has not made any representations on pages 609 to 614, in its index and on the records themselves, it claims these records are exempt pursuant to section 18(1)(c). These pages appear to be an evaluation tool to be used as a guide by proposal evaluators. The ministry has severed the portions that detail the "desired response" and the points to be awarded for each criteria. From my review, much of the information under the heading "desired response" either comes directly from the RFP itself or is substantially similar to that information and, in my view, would be obvious to any reasonably informed company planning to submit a proposal. In the absence of representations from the ministry, I am not persuaded that revealing the information that has been severed from these pages could reasonably be expected to prejudice the ministry's economic interests or competitive position. Therefore, I find that the ministry has not provided the requisite detailed and convincing evidence to establish that section 18(1)(c) applies to the severed information on pages 609 to 614.

[227] The ministry has also claimed section 18(1)(c) and/or (d) for the following pages that it does not address specifically in its representations: pages 176, 179, 181, 188 to 191, 207 to 209, 211, 290, 291 to 295, 296 to 439, 469 to 506, 586, 609 to 614, 689 to 831. I have found some of this information exempt pursuant to other exemption claims, specifically, sections 19(a), 17(1), 14(i), (k), and (l), and 15(b). However, with respect to the information that remains at issue and for which no other exemption claims apply, having reviewed the information closely and in the absence of representations from the ministry I do not accept that the disclosure of this specific information could reasonably be expected to result in the harms outlined in section 18(1)(c) and/or (d).

[228] In sum, I find that the ministry has failed to provide the detailed and convincing evidence required to show that disclosure of any of these records could reasonably be expected to prejudice its economic interests or competitive position, as contemplated by section 18(1)(c). Similarly, I find that it has failed to establish that disclosure of these records could reasonably be expected to be injurious to the Government of Ontario's financial interests or its ability to manage the economy, as contemplated by section 18(1)(d). Therefore, I find that none of the records qualify for exemption under either section 18(1)(c) or section 18(1)(d).

H. Is some of the information in the records not responsive to the request?

[229] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[230] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[58]

[231] To be considered responsive to the request, records must "reasonably relate" to the request.[59]

[232] The ministry takes the view that some portions of the records contain information that is not responsive to the request. Additionally, it submits that all cell phone numbers and personal email addresses are not responsive to the request. The ministry does not make more detailed submissions on the information that it identifies as not responsive.

[233] Having closely reviewed the information that the ministry has identified as not responsive, I find that some of it can accurately be described as not responsive to the appellant's request. Specifically, the ministry has made severances to a number of emails that contain information that clearly does not fall within the scope of the information sought by the appellant or does not relate in any way to the OTMS RFP process. I agree with the ministry's position that the severances made to the following

[58] Orders P-134 and P-880.
[59] Orders P-880 and PO-2661.

emails are not responsive to the request as the information falls outside of the scope of information sought by the appellant or does not relate to the OTMS or the RFP process and I uphold the ministry's decision not to disclose this information to the appellant:

- on page 153, the bottom portion of the email dated October 23, 2008;
- on page 565, the email dated Thursday, November 13, 2008 11:00 AM;
- on page 578, the email dated November 5, 2008 10:59 AM;
- on page 599, the email dated Monday, October 20, 2008 9:15 AM; and,
- on page 960, the emails dated Tuesday, October 21, 2008 at 8:12AM and 8:22AM.

[234] On page 601 however, the ministry has severed the last portion of the email dated October 14, 2008 10:18 AM. Although it is not particularly meaningful, as this information relates to the proposals received in response to the OTMS RFP, I do not accept that this information is not responsive to the appellant's request. Moreover, this information previously appeared on pages 139 and 143, both which have already been disclosed to the appellant. Accordingly, I find this information responsive. However, as the appellant already has an unsevered version of this email I will not order it disclosed.

[235] The ministry has severed the cell phone numbers of ministry staff and employees of the successful proponent as well as the personal email addresses of one ministry staff member in particular. The ministry has also severed an unidentified telephone number on page 112. The ministry originally claimed that this information was exempt under the section 21(1) mandatory exemption for personal information but withdrew this claim and subsequently took the position that it was not responsive to the request. I do not agree with the ministry's characterization of this information as not responsive and find that given that it is part and parcel of emails dealing with the OTMS RFP process that it is responsive to the appellant's request and subject to the *Act*. However, as this information may qualify as personal information and the exemption for personal information at section 21(1) is a mandatory one, I will address the ministry's severing of cell phone numbers, personal email addresses, and the unidentified telephone number on pages 112 and 552, in that context, below.

I. Do the records contain "personal information" as defined in section 2(1), and if so, to whom does it relate?

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

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[237] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[60]

[60] Order 11.

[238] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (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.

[239] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[61]

[240] 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.[62]

[241] In the circumstances of this appeal, the ministry has claimed that the cell phone numbers and personal email addresses as they appear in the records are not responsive to the request. On pages 112 and 552, the ministry has also severed an unidentified telephone number. It appears that they have also claimed that this number is not responsive to the request. In my view, this information is better addressed in the context of personal information and as the section 21(1) exemption for personal information is a mandatory one, I will address its potential application to this information now.

[242] I will first address the severances made to the cell phone numbers of ministry staff and employees of the successful proponent as they appear at the bottom of various emails. In my view, in the context of this appeal, these cell phone numbers do not qualify as personal information but are better described as professional or business information.

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[61] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[62] Orders P-1409, R-980015, PO-2225 and MO-2344.

[243] In all of the records where cell phone numbers have been severed they appear at the bottom of emails in the signature of the drafter. Generally, the signature is set up to contain all or some of the following information: the individual's name, their professional title, their employer's name, their employer's address, their business telephone number, their business fax number, their business email address and their cell phone number. Unlike business phone numbers or home phone numbers, cell phone numbers can be ambiguous as to whether they represent the individual in their personal or professional capacity. In some circumstances, an individual can use a cell phone number in both contexts.

[244] In my view, where a cell phone number appears in a business context, together with an individual's professional information, inviting one to contact the individual in a professional capacity as they do in the current appeal, it cannot be said to qualify as personal information within the meaning of that definition in section 2(1) of the *Act*. Rather, the cell phone numbers, as they appear in the records at issue, are more accurately described as professional or business information as contemplated by section 2(3) of the *Act*.

[245] Accordingly, I find that in the context of the current appeal, the cell phone numbers as they appear in the individuals' professional signatures do not qualify as personal information. As I have previously found them to be responsive to the appellant's request and no other exemptions have been claimed for them, I will order that the ministry disclose them to the appellant.

[246] On pages 112 and 522, the ministry has severed an unidentified telephone number. However, elsewhere in the records, including pages 185, 188, 189, 192, 250, 288, and 442 for example, this number appears as a ministry employee's business telephone number. For the reasons outlined above I find that this information qualifies as professional information as contemplated by section 2(3) of the *Act*. As it does not qualify as personal information and no other exemption has been claimed of it, I will order that it be disclosed to the appellant.

[247] The ministry has also severed a non-ministry email address of one ministry staff member, which appears in a number of emails. From my review, it appears that the ministry staff member has prepared or worked on material related to the OTMS RFP from a remote location and then, subsequently forwarded, via an independent email address, the work that they have done to the email account that has been assigned to them as a result of their employment with the ministry. In my view, the email address that has been severed is an email account that is used by the ministry staff member in their personal and not their professional capacity and therefore qualifies as their personal information within in the meaning of paragraph (c) of the definition at section 2(1) of the *Act*. Accordingly, I must now go on to determine whether disclosure of this information would amount to an unjustified invasion of personal privacy of the

individual to whom it relates as contemplated by the mandatory exemption at section 21(1).

[248] Finally, as mentioned above, on pages 176 and 586, which are duplicate copies of a letter from the ministry to the unsuccessful proponent, the ministry has severed the proponent's name, address, contact information and the names of two of its employees. As this information clearly falls within the parameters of professional or business information as outlined in section 2(3) I find that it does not qualify as personal information and the mandatory exemption. Accordingly, the mandatory exemption at section 21(1) cannot apply and I will order that this information be disclosed to the appellant.

J. Does the mandatory exemption at section 21(1) apply to the records because disclosure of the information would constitute an unjustified invasion of an individual's personal privacy?

[249] I have found that the email address belonging to a ministry employee that the ministry has severed qualifies as personal information. I must now determine whether the disclosure of this email address would constitute an unjustified invasion of the personal privacy of the individual to whom it relates pursuant to the mandatory exemption at section 21(1) of the *Act*.

[250] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[251] The only exception which may apply in the present appeal is that set out in section 21(1)(f), which reads:

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

[252] In order to establish that section 21(1)(f) applies, it must be shown that disclosure of the personal information would not constitute an unjustified invasion of personal privacy of the individual to whom the information relates.

[253] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is *not* an unjustified invasion of personal privacy and the information is not

exempt under section 21. None of the paragraphs in section 21(4) have any application in the present appeal.

[254] If any of the paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. In this appeal, none of the presumptions in section 21(3) apply.

[255] As section 21(3) does not apply, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[63] The list of factors under section 21(2) is not exhaustive.

[256] Based on the circumstances of this appeal I find that none of the considerations in section 21(2), listed or otherwise, favour the disclosure of the personal email address of the ministry employee.

[257] As identified above, in order to establish that section 21(1)(f) applies, it must be shown that disclosure of the personal information would *not* constitute an unjustified invasion of personal privacy. Since no factors favour the release of the personal email address, I find that its disclosure would constitute an unjustified invasion of the personal privacy of the ministry employee. Therefore, I find that the personal email address is exempt under the mandatory personal privacy exemption in section 21(1) of the *Act.*

K. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions at sections 13(1), 15, 17(1), and 21(1)?

[258] The appellant submits that pursuant to section 23 of the *Act*, there exists a public interest in the disclosure of the records that operates to "override" the operation of the exemptions at sections 15, 17(1) and 21(1) that I have found apply to portions of the records at issue. Section 23 reads:

> 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.

[259] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

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[63] Order P-239.

Compelling public interest

[260] 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.[64] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[65]

[261] A public interest does not exist where the interests being advanced are essentially private in nature.[66] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[67]

[262] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[68]

[263] Any public interest in *non*-disclosure that may exist also must be considered. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[69]

Purpose of the exemption

[264] 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.

[265] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[70]

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[64] Orders P-984, PO-2607.
[65] Orders P-984 and PO-2556.
[66] Orders P-12, P-347 and P-1439.
[67] Order MO-1564.
[68] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.), Order P-984.
[69] Orders PO-2072-F and PO-2098-R.
[70] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, (*supra* note 47).

Representations

[266] The appellant submits that he is an individual who wishes to research, through review of original documents, the tendering process employed by public institutions in Ontario, and how, on a practical level, the process really functions. He submits the goal is twofold:

- to ensure that RFP processes are conducted in a fair and unbiased manner, in a way that meets all government bid award requirement; and

- that the winning bidder in this particular process complied with all mandatory requirements.

[267] The appellant explains that with respect to the first goal, vast sums of money are spent each year through government tenders. He submits that the goal of the tendering process as one would assume, is to obtain value for the taxpayer, and as a result, accountability for public purchasing decisions is critical.

[268] With regard to the second goal, the appellant submits that there is reason to believe in the particular case at issue, the ministry did not proceed with the tender in the manner contemplated by the RFP. The appellant submits that it appears that the ministry either applied the RFP criteria unevenly, or alternatively, turned a blind eye as to whether the criteria were met by simply asking the winning bidder whether its proposal met what was set out in the RFP.

[269] The ministry submits that "there is a disconnect between the public interest that the appellant asserts (researching "the tendering process employed by public institutions in Ontario") and the fact that all of the appellant's subsequent submissions relate to one particular procurement." It suggests that the appellant's interest is private in nature because while he is entitled to have an opinion and be critical in the way the ministry proceeded with this tender and awarded of the contract, his position is little more than a subjective viewpoint. The ministry submits that there is nothing "compelling" in nature about the appellant's interest in the records and therefore does not meet the requirements for section 23 of the *Act* to apply.

Analysis and findings

[270] It should be noted that although I have upheld some of the ministry's exemption claims, I have found that the majority of that information is exempt pursuant to sections 14(1) and 19(a) of the *Act*. Information that has been withheld under those two sections is not subject to the override provision at section 23. Accordingly, my determination on the presence of a compelling public interest relates only to the information that I have found exempt pursuant to sections 15, 17(1), and 21(1).

[271] As mentioned above, this office has consistently emphasized the need for transparency in government purchasing and has urged that contracts awarded by the provincial government should be accessible to the public. In this office's 2006 Annual Report, the Commissioner urged the government to also publish unsuccessful bids alongside the successful bids to further ensure that the entire process is transparent.

[272] Accordingly, I accept the importance of government accountability for purchasing decisions and, as a result, I agree that a public interest exists in the disclosure of information related to government RFP processes to ensure that they are conducted in a fair and unbiased manner. However, I do not accept the appellant's position that, in this particular case, that public interest is compelling in nature.

[273] As noted above, the word "compelling" has been defined in previous orders as "rousing strong interest or attention."[71] In Order P-984 Adjudicator Holly Big Canoe discussed this requirement:

> "Compelling" is defined as 'rousing strong interest or attention'. In my view, the public interest in disclosure of a record should be measure in terms of the relationship of the record to the *Act*'s general purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a 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.

[274] In the present case, the appellant has expressed his own concerns with the propriety of the awarding of the OTMS contract. He submits generally that he has reason to believe that the ministry did not proceed with the tender in the manner contemplated by the RFP. Based on information that has been disclosed to him, it is his opinion that the ministry may have applied the RFP criteria unevenly. In my view, this evidence is not sufficient to establish that there exists the requisite "public interest" in the disclosure of the information that remains at issue in this appeal. The appellant's evidence is general in nature and does not substantiate his contention that there is a publicly held concern, "rousing strong interest or attention," in the way in which this contract was awarded.

[275] Additionally, I do not accept that the disclosure of the specific information that is subject to the section 23 override provision will "serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the

[71] Order P-984, *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

means of expressing public opinion or to make political choices."[72] Therefore, I find that a public interest that is compelling in nature does not exist in the disclosure of the information that remains at issue.

[276] Even if a compelling public interest were to be established in the circumstances of this case, it must then be balanced against the purpose of any exemptions which have been found to apply. Having reviewed the specific information that is exempt, I find that its disclosure would not outweigh the purpose of any of the exemptions at sections 15, 17(1), and 21(1), which have been outlined earlier in this order. In all of the instances where I have upheld the application of these exemptions, even if a compelling public interest were to exist, I find that the substance and nature of the snippets of exempt information would not warrant them being overridden.

[277] In sum, I do not accept that there exists a compelling public interest in the disclosure of the information that remains at issue that would outweigh the purpose of the exemptions at sections 15, 17(1), and 21(1). Accordingly, I find that the "public interest override" provision in section 23 has no application in the present appeal.

L. Should the ministry's exercise of discretion to deny access to some records under sections 14(1), 15, and 19 be upheld?

[278] Discretionary exemptions permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[279] In this order, I have found that some records and parts of records qualify for exemption under the discretionary exemptions at sections 14(1), 15, and 19. Consequently, I will assess whether the ministry exercised its discretion properly in applying these exemption to those withheld records and parts of records.

[280] This office may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

[281] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[73] This office may not, however, substitute its own discretion for that of the institution.[74]

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[72] *Ibid.*

[282] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confident in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.[75]

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[73] Order MO-1573.
[74] Section 43(2) of the *Act*
[75] Orders P-344 and MO-1573.

Representations

[283] The ministry submits that it has exercised its discretion appropriately in the particular circumstances of this appeal. It submits that it is concerned that any further disclosure of records would interfere with ministry procurement processes, including program staff seeking advice from ministry procurement advisors and legal counsel. Also, the ministry submits that it is very concerned about maintaining the relationships it has with its suppliers who expect the ministry to protect proprietary information that it receives from them and that disclosure of any pricing information could interfere with future revenue sharing agreements. It also is concerned that disclosure of some of the information could jeopardize public safety.

[284] The appellant does not specifically respond to the ministry's representations on its exercise of discretion, however, he submits that the ministry has employed a "cavalier approach to applying statutory exemptions to the rule that government information should be open."

Analysis and finding

[285] As noted above, this office has emphasized the need for transparency in government purchasing and has repeatedly taken the position that disclosure of matters related to how the government conducts its RFP processes and awards contracts is important in achieving that goal. Moreover, section 4(2) of the *Act* states:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under 6 to 15, the head shall disclose as much of the record as can *reasonably* be severed without disclosing the information that falls under one of the exemptions [emphasis added].

[286] Therefore, in reviewing an institution's exercise of discretion in such situations, I must be satisfied by the evidence as a whole that the institution considered the guiding principle that such information should be available to the public barring the proper application of one or more exemptions. However, there can also be co-existing concerns for the protection of information based on the principles outlined in the various exemptions that must be considered along with the right of access to government-held information.

[287] In the present appeal, the evidence before me supports a finding that the ministry considered relevant factors and appropriately balanced the considerations inherent in the *Act* in its exercise of discretion in the disclosure of the information that remains at issue. I am satisfied that the ministry appropriately exercised its discretion to withhold the information that I have upheld as exempt pursuant to sections 14(1), 15,

and 19(a). Accordingly, I find that the ministry's exercise of discretion was proper and I will not disturb it on appeal.

ORDER:

1. I order the ministry to disclose the portions of the records for which I have found the exemptions do not apply by **April 2, 2012** but not before **March 26, 2012**. For the sake of clarity, I have provided the ministry with a copy of the records that are to be disclosed. Where severances have been made on a page, I have highlighted the portions to be disclosed in green.

2. I uphold the ministry's decision to withhold the remaining portions of the records. Where I have upheld all of the severances made to one page and nothing is to be disclosed I have not provided the ministry with a copy of that page. Where I have upheld only portions of the severances made to one page, for the sake of clarity, I have highlighted the portions that are not to be disclosed in pink.

3. In order to verify compliance with the terms of this order, I reserve the right to require the ministry to send me a copy of the records that are provided to the appellant pursuant to order provision 1.

Original Signed by: February 24, 2012
Catherine Corban
Adjudicator