

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-2801

Appeals MA11-154 and MA11-312

Regional Municipality of Peel

October 17, 2012

**Summary:** The requester sought records related to the region's contract for a Contact Management System. The region denied access in accordance with the mandatory third party information exemption in section 10(1) and the discretionary exemption in section 11. Both the requester and the affected party appealed the region's decision on access. The requester also appealed the region's fee. This order partly upholds the region's decision under section 10(1) and its fee decision.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 10(1)(a), 11(a), 11(c), 11(e), 11(g), 45(1).

**Orders and Investigation Reports Considered:** Orders MO-2070, MO-2103-I, MO-2299, MO-2403, MO-2435, PO-2522, PO-1834, PO-2620.

### OVERVIEW:

[1] The Regional Municipality of Peel (Peel or the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) as follows:

In reference to RFP [#] for a Contact Management System Technology Solution. [The requester] is hereby requesting any and all submissions

from [the company that submitted the winning bid] in connection with the RFP including all product and pricing information. We are also requesting copies of any and all evaluation sheets and recommendation letter(s) from the evaluation committee.

[2] Prior to issuing a decision, Peel advised the requester that it would be notifying the identified company (the affected party) of the request since disclosure of the information requested could affect its interests.<sup>1</sup>

[3] Following third party notification, Peel issued a decision to the requester, deciding to grant complete access to approximately 431 pages of records while withholding an additional 666 pages, in whole or in part, in accordance with the exemptions in sections 14(1), 38(b) (personal privacy), 11(a) (economic and other interests) and 10(1)(a) (third party information) of the *Act*. In the decision sent to the affected party, Peel advised that 1421 pages had been reviewed and that 462 pages had been deemed non-responsive to the request. Access was to be granted to 428 pages, 531 pages were withheld in full, and several pages were severed, in part, in accordance with sections 14(1), 38(b), 11(a) and 10(1)(a) of the *Act*.<sup>2</sup>

[4] Both the affected party and the requester appealed Peel's decision respecting access and this office opened Appeals MA11-154 and MA11-312 to address their respective appeals.<sup>3</sup> This office appointed a mediator who dealt with both appeals jointly. During mediation discussions, the mediator asked Peel to explain the records marked as not responsive because these had not been identified in the requester's decision letter. Peel advised that these records contain information about contract negotiations, which the requester maintains are responsive to the request.

[5] The requester advised that he was not seeking access to any of the records that were withheld pursuant to the personal privacy exemptions in sections 14(1) or 38(b). Peel confirmed that section 38(b) was cited erroneously. Accordingly, sections 14(1) and section 38(b) and the information to which they were applied are not at issue in these appeals.

[6] Peel reconsidered its position regarding the responsiveness of the contract negotiation records, and sought representations from the affected party on disclosure of this information. In its August 18, 2011 decision letter to the affected party, Peel advised that a review of 478 pages initially deemed not responsive to the request had

---

<sup>1</sup> Section 21(1)(a) states: "A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record...that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information."

<sup>2</sup> These differing numbers appear to have been reconciled by the August 18, 2011 revised decision, which represents that number of pages respecting which this inquiry is conducted.

<sup>3</sup> Although both are appellants, these parties will be referred to as the requester and affected party in this order.

resulted in a revised decision, with partial access to be granted to 219 pages and 259 pages withheld in their entirety. Peel cited its reliance on the exemptions in sections 10(1)(a), 11(a), (c), (e) and (g) of the *Act*. Peel also noted that it had modified its decision respecting disclosure of unit pricing in response to the submissions of the affected party. Peel provided the affected party with a CD containing the records identified for disclosure, along with an index of all of the identified records.

[7] Peel also issued a revised decision to the requester on the same date, providing the same information regarding access to the contract negotiation records. The revised decision to the requester also included an index of records along with a fee estimate for processing the request.

[8] The requester advised the mediator that it wished to pursue full access to all records and also advised that it disputes the amount of the fee estimate provided. The affected party appealed Peel's decision to grant partial access to the responsive records. As a mediated resolution was not possible, the appeals were transferred to the adjudication stage of the appeals process together, where they were assigned to an adjudicator to conduct an inquiry.

[9] The adjudicator assigned to conduct the inquiry in this appeal began her inquiry by sending a single Notice of Inquiry outlining the facts and issues in both appeals to Peel, initially, seeking its representations. Peel responded with representations and a revised index of records, following which the assigned adjudicator sent modified Notices of Inquiry to the requester/appellant in Appeal MA11-312 and to the affected party/appellant in Appeal MA11-154. The Notice of Inquiry relating to Appeal MA11-312 addressed all of the issues raised in that appeal, including the denial of access under sections 10(1) and 11, along with the fee issue. The Notice of Inquiry for Appeal MA11-154 addressed only the basis of the third party appeal, which is the possible application of section 10(1) to the records.

[10] Peel disputed the inclusion of the contract negotiation records in the scope of this request. Accordingly, the issue of scope was added to the Notice of Inquiry in Appeal MA11-312.

[11] Only portions of Peel's representations were shared with the requester and the affected party. Other parts were found to be not relevant to a determination of the exemption claims, or were confidential for another reason under the confidentiality criteria set out in *Practice Direction 7* and section 7 of the IPC's *Code of Procedure*. Both the requester and the affected party appellants provided representations in response to the Notices of Inquiry.

[12] In addition, Peel revised its index of records to indicate that all records listed therein were responsive to the request. Accordingly, the responsiveness of the records is no longer at issue. Furthermore, as the requester is not interested in receiving

information for which the mandatory personal privacy exemption in section 14(1) has been claimed, the employee resumes at pages 318 to 338 of the records are also no longer at issue.

[13] The affected party's representations in response to the Notice of Inquiry are dated January 6, 2012. In these representations, the affected party asks whether the representations previously made by it were before the IPC. Upon transfer of this file to me, I reviewed a CD sent to the mediator on September 12, 2011 by the affected party, which contained certain pages of the records only. I had a staff member advise the affected party that I required in hard copy one complete set of all of the affected party's representations. The affected party did not provide any further representations,<sup>4</sup> despite being provided with several opportunities to do so. Therefore, concerning the affected party, in this order I am relying only on its January 6, 2012 representations which are the only set of representations provided by the affected party in hard copy.

[14] In this order, I partly uphold Peel's application of section 10(1)(a) and its fee to process the request.

## **RECORDS:**

[15] The records at issue in these appeals are described in the following chart:

<b>Description of Record</b>	<b>Page #s</b>	<b>Peel's Decision</b>
Excerpts from RFP Bid of the affected party	1-230	1-22 Full Access Executive Summary/Introduction to Submission  23-199 Withheld in Full Detailed Product Layout  200 Full Access Company Contact Information  201-202 Withheld in Part Company Revenue Information

---

<sup>4</sup> Other than providing me with another copy of its January 6, 2012 representations by letter dated July 27, 2012.

		<p>203-211 Full Access Subcontractor Revenue Information (Blank)</p> <p>212 Withheld in Part GST Registration Information</p> <p>213-214 Full Access Conflict of Interest Statement</p> <p>215 Withheld in Part Financial &amp; Business Viability Information</p> <p>216 Full Access    Blank Page</p> <p>217-229 Withheld in Part Sample Agreement Compliance Form</p> <p>230 Full Access    Blank Page</p>
Cheque for Bid Deposit	231	Withheld in Part
System Installation Requirements	232- 263	Withheld in Full
Training Brochure	264- 302	Full Access
Internal Task List	303- 317	Withheld in Full
Affected party Standard Form Contract	339- 351	Withheld in Full
	801- 812	Withheld in Part
	813	Withheld in Full
	932	Withheld in Full
Brochure	352-	Full Access

	355	
System Functionality Self-Assessment	356-368	Withheld in Part
	1159-1176	Withheld in Part
White Paper	369-391	Withheld in Full
NCC Group Report	392-412	Full Access
Product Description Reports	413-453	Withheld in Full
	478-503	
	553-570	
Sample Disaster Recovery Report	504-513	Withheld in Full
Security Guide	514-552	Withheld in Full
Product Processes & Policies	571-609	Withheld in Full
Presentation Slides	454-477	611-616, 618, 620-622, 624-625, 629-635, 639-641, 647-653, 656-659, 662-664, 669-670, 672-673, 675, 678-690, 698-704, 712-715, 719, 720, 722, 725-728, 730, 759, 761-764, 769-772, 776, 792-794
	610-730	
	758-794	Withheld in Part
		454-477, 610, 617, 619, 623, 626-628, 636-638, 642-646, 654-655, 660-661, 665-668, 671, 674, 676-677, 691-697, 705-711, 716-718, 720-721, 723-724, 729, 758, 760, 765-768, 773-775, 777-791
		Full access
		814-845
		Withheld in Full
Report on Local Government CRM	731-	Full Access

Products	750	
Case Study	751-757	Full Access
Statement of Work (Unit Pricing Lists)	795-796	Withheld in Part
Statement of Work email correspondence Q&A (regarding software configuration)	797-800	Withheld in Part
Draft Master Agreement (negotiated terms)	846-932	Withheld in Full
Product Prototype Scope	933-934	Withheld in Part
	963-967	Withheld in Full
Post Installation Tests	935-944	Withheld in Full
Product Functionality Self-Assessment	945-962	Withheld in Part
Affected Party's description of goods and specifications	968-986	Withheld in Full
Responses to Peel's post-clarification questions	987-988	Withheld in Part
	1052-1057	
	1336-1337	
	1384-1387	
RFP Bid Pricing Tables	989-991	989-991, 1397-1399, 1401-1417, 1419-1421 Withheld in Part
	1397-1421	1400, 1418 Full Access
RFP Bid Pricing Package Explanations	993-995	Full Access
RFP Bid Pricing Package Info	996-999	996-99, 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, 1033-1044
	1002-	Withheld in Part

	1003 1005-1021 1023-1025 1027-1031 1033-1044	1018, 1021 Full Access
RFP Bid Pricing Package Information (General Instructions)	1000-1001	Full Access
RFP Bid Pricing Package Information (Comments)	1004 1022 1032	Full Access Full Access Full Access
RFP Bid Pricing Package Information (Blank Page)	1026	Full Access
Email correspondence	1045-1051 1140-1141 1347-1366	1045, 1049-151, 1140-1141, 1349-1350, 1352 Full Access 1046-1048, 1353-1366 Withheld in Part
Draft Statement of Work One Prototype	968-986 1058-1123	Withheld in Full Withheld in Full
CMS Prototype Gaps	1124	Withheld in Full
Post Clarification Addendum	1125-1126	1125 Withheld in Part 1126 Full Access
Peel's Questions re: Project Plan	1127-1131	1127 Full Access



		1128-1131 Withheld in Part
Post Installation Tests	1132-1139	Withheld in Full
Phase One Training Course Description	1142-1158	Withheld in Full
Master Agreement	1178-1262	1178-1208, 1211-1222, 1224-1254, 1260-1262 Full Access  1209-1210, 1223, Withheld in Part  1255-1259 Withheld in Full
Statement of Work (Executed Copy)	1263-1325	Withheld in Full
WSIB Letter	1326	Withheld in Full
WSIB Clearance Certificate	1327	Withheld in Part
Peel's Pricing Tables	1328-1334	Withheld in Part
Fax Transmission Cover Sheet	1335	Full Access
Letters from Peel to Affected Party	1338  1345-1346	Full Access
Mutual Non-Disclosure Agreement	1339-1344	Full Access
Email re: Statement of Work negotiations	1348	Withheld in Part
Email correspondence re: negotiations meetings	1353-1366	Withheld in Part
Research Analysis	1367-1383	Full Access
Affected Party Relationship document	1384-1387	Withheld in Part
Affected Party's submission package - title page	1388-1389	Full Access
Affected Party's submission package (pricing and software)	1390-1394	Withheld in Part
Affected Party's submission package - Peel template	1395-1396	Full Access

[16] Peel is claiming the application of the third party information mandatory exemption in section 10(1)(a) and the discretionary exemption in section 11(a) (information that belongs to government) to the severed pages or portions of the withheld records, except for pages 339-351, 797-813, 932, 989-991, 996-99, 1046-1048, 1124-1125, 1255-1259, 1336-1337, 1384-1387, 1390-1394, 1397-1399, 1401-1417 and 1419-1421 where it has not claimed the application of section 11(a).

[17] Peel has not claimed the application of section 10(1)(a) for pages 1124, 1209-1210, 1348, and 1351.

[18] Peel has claimed the application of section 11(c) for pages 795-796, 968-988, 1058-1123, 1128-1131, 1209-1210, 1223, 1263-1325, 1328-1334, 1348, 1351, and 1353.

[19] Peel has claimed the application of sections 11(e) (positions, plans, procedures, criteria or instructions) and 11(g) (proposed plans, policies or projects) for pages 968-986, 1058-1123, and 1263-1325.

[20] The affected party is claiming the application of section 10(1)(a) to all of the records.

## **ISSUES:**

- A. Does the mandatory third party information exemption at section 10(1)(a) apply to the records?
- B. Does the discretionary exemption at section 11 apply to the records?
- C. Should the fee be upheld?

## **DISCUSSION:**

### **A. Does the mandatory third party information exemption at section 10(1)(a) apply to the records?**

[21] Peel and the affected party claim that section 10(1)(a) applies to the withheld records, or portions of records. Section 10(1)(a) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[22] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>5</sup> Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.<sup>6</sup>

[23] For section 10(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
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[24] Peel states that in 2009 the Contact Management System (CMS) technology acquisition project was launched. Peel issued a Request for Proposal (RFP) for this project on March 23, 2010 and the evaluation team selected the affected party's proposal as the best overall value for CMS. The affected party was awarded a six year Agreement with Peel. Peel states that it is continuing to work with the affected party towards implementation and currently undergoing negotiations on the Statements of Work (SOW).

### ***Part 1: type of information***

[25] Peel submits that the records contain the affected party's confidential business information that was provided to it through an agreement for a CMS technology. According to Peel, the records contain:

...trade secrets that are not generally known in this type of business and allows [the affected party] to stay competitive i.e. standard forms used for contract negotiations with the purchaser.

---

<sup>5</sup> *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.).

<sup>6</sup> Orders PO-1805, PO-2018, PO-2184, and MO-1706.

Technical information on electronic systems and software configuration to be used during implementation.

Financial information on per unit pricing for products and services.

[26] The affected party states that the information at issue is a trade secret or scientific, technical, commercial, financial or labour relations information.

[27] The requester did not provide representations on the types of information stating that the index of records did not provide sufficient information for it to do so.

*Analysis/Findings re: part 1*

[28] The types of information listed in section 10(1) have been discussed in prior orders:

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

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

*Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction,

operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

*Labour relations information* has been found to include:

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

[29] The records consist of 1421 pages and, as described above, include a varied assortment of records related to the RFP and contract. Based on my review of the records, I find that, other than the blank pages, they contain technical, commercial and financial information related to the provision of a contact management technology system to Peel by the affected party. As such, part 1 of the test under section 10(1) has been satisfied for all of the records at issue except for the blank pages. As section 10(1)(a) does not apply to the blank pages, I will order them disclosed.

### ***Part 2: supplied in confidence***

[30] None of the parties provided specific representations on particular pages or portions of the records. The parties did provide general representations concerning whether the records were supplied in confidence.

[31] Peel states that the information in the records was supplied by the affected party in confidence through executed confidentiality agreements contained within the RFP form document. Peel states that it has decided to disclose the Master Agreement, as the provisions in the agreement were negotiated by the two parties. It also states that

the SOW was withheld as inferences may be made with respect to non-negotiated confidential information.

[32] Concerning part 2 of the test under section 10(1)(a), the affected party submits that it provided the documentation to Peel in confidence both implicitly and explicitly. It states that:

Certain papers were marked as being confidential whilst others which contain trade secrets, scientific, technical, commercial, financial or labour relations information are held to be confidential by their nature.

All of the information which was provided by [the affected party] was provided in confidence. [The affected party] signed up to a confidentiality agreement with the understanding that all documents would be held in confidence and not released to anyone other than to those whom they were intended.

[33] The requester states that the claim by Peel that the "inferred disclosure" exception applies in this case is not a valid claim as it would be extremely difficult if not impossible to make inferences to some of the non-negotiated confidential information based on access to the requested records. It states that:

...contracts of this nature are not "supplied" but rather are bid, and then negotiations take place on everything from the terms and conditions, statement of work, scope and costs prior to the contract being finalized and agreed upon by both parties... This specific contract is a mutually agreed upon contract which was ratified by the Region of Peel's elected officials and as such should be publicly available under the scope of this request.

It is standard commercial practice for contracts of this nature to include a Non-Disclosure Agreement (NDA) to prevent the "customer" from disclosing certain types of information to other parties however it is our opinion these NDA's are not intended to allow a public institution to prevent access to records that would otherwise be accessible under the *Act*.

### *Supplied*

[34] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>7</sup>

---

<sup>7</sup> Order MO-1706.

[35] 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.<sup>8</sup>

[36] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.<sup>9</sup>

[37] 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.<sup>10</sup>

#### *In confidence*

[38] 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.<sup>11</sup>

[39] 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

---

<sup>8</sup> Orders PO-2020 and PO-2043.

<sup>9</sup> See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

<sup>10</sup> Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

<sup>11</sup> Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure<sup>12</sup>

### *Analysis/Findings*

[40] I will now consider whether individual categories of records were supplied in confidence.

#### Document Execution Record

[41] Page 1177 is Peel's Document Execution Record. It is a form attaching the affected party's signed Master Agreement and Statement of Work agreement for signing by Peel's authorized signing officer. Both of these agreements contain the document execution reference number from page 1177, indicating that Peel signed them in accordance with this Document Execution Record. This record was created by Peel for internal circulation. I find that disclosure would not reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party. Therefore, part 2 of the test has not been met. As no other exemptions have been claimed for this record, I will order it disclosed.

#### The Master Agreement

[42] The records contain information provided by the affected party in its winning bid submitted in response to a RFP to provide contact management services to Peel. This bid resulted in two agreements being executed by Peel, the Master Agreement and the Statement of Work agreement. The Master Agreement is found at pages 1178-1262 of the records and was signed by both Peel and the affected party. Peel states in its representations that it has decided to disclose this document in full to the appellant. In its index of records Peel indicates that it has applied section 10(1)(a) to page 1223, the Rates for Service, and pages 1255-1259, the affected party's licensing terms.

[43] Adopting the reasoning set out above in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*<sup>13</sup> that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1) and taking into consideration the "inferred disclosure" and "immutability" exceptions, I find that the executed Master Agreement between Peel and the affected party found at pages 1178-1262 of the records was not supplied in confidence.

---

<sup>12</sup> Orders PO-2043, PO-2371 and PO-2497.

<sup>13</sup> Cited above.



[44] I have specifically reviewed the Rates for Service at page 1223 of the Master Agreement. I do not have any representations as to how these rates were decided upon. I note that these rates are subject to numerous preconditions and may be increased to other amounts which are not set out in the Master Agreement. I find that the inferred disclosure and immutability exceptions do not apply to page 1223 to this type of variable information.

[45] I have also reviewed the licensing terms at pages 1255-1259. A website is listed on page 1255. This website appears to contain the information set out in pages 1255-1259. As this information is available from sources to which the public has access, I find that it also was not supplied in confidence.

[46] I will therefore, order disclosure of the Master Agreement at pages 1178-1262, except for the pages that Peel has claimed the application of section 11. In particular, I will consider below the application of sections 11(a) and (c) to pages 1209-1210, and page 1223.

#### Draft Master Agreement (negotiated terms)

[47] Pages 846-932 contain the Draft Master Agreement (negotiated terms). The form of the Master Agreement is part of the RFP. The signed Master Agreement that constitutes the contract between the affected party and Peel is at pages 1178-1208. I find that pages 846-932 were supplied in confidence as disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party, including the affected party's additions and deletions to this draft agreement. As part 2 of the test is met, I will consider below whether part 3 of the test applies to pages 846-932.

#### Statement of Work (Executed Copy)

[48] Pages 1263-1325 contain the executed copy of the SOW agreement. Peel states that it is continuing to work with the affected party towards implementation and is currently undergoing negotiations on the SOW. Peel also states that the SOW was withheld as inferences may be made with respect to non-negotiated confidential information.

[49] The form for the SOW agreement is part of the Master Agreement and can be found at pages 191-194 of the RFP form.<sup>14</sup> The RFP indicates that the SOW agreement is made pursuant to the Master Agreement. It also states that the definitions of certain terms in the SOW agreement are to be found in the Master Agreement.

---

<sup>14</sup> At Schedule G to Attachment L of the Sample Master Agreement which is part of the RFP.

[50] Neither Peel nor the affected party indicated which portions of the executed SOW agreement contain non-negotiated confidential information of the affected party. Nor is it apparent to me that this record contains non-negotiated confidential terms of the affected party.

[51] Taking into consideration the "inferred disclosure" and "immutability" exceptions, I find that the executed SOW agreement between Peel and the affected party found at pages 1263-1325 of the records was not supplied in confidence and section 10(1)(a) does not apply to this record. I will consider below the application of sections 11(a), (c), (e) and (g) to pages 1263-1325.

#### Statement of Work (Unit Pricing Lists)

[52] Pages 795-796 are described as the Statement of Work (Unit Pricing Lists). Peel withheld one monetary amount from this record. Both pages of this record appear identical to each other.

[53] This record contains only one monetary amount. This monetary amount severed by Peel is the same amount that is part of the executed SOW agreement forming part of the Master Agreement.<sup>15</sup> As this figure is part of the negotiated executed agreement, I find that it was not supplied in confidence to Peel. I also find that the remaining information in this record was not supplied by the affected party as this record was prepared by Peel and concerns Peel's information. I will consider below the application of sections 11(a) and (c) to the monetary amount at issue in pages 795-796.

#### Statement of Work Email Correspondence Q&A (regarding software configuration)

[54] Pages 797-800 are described as Statement of Work email correspondence Q&A (Questions and Answers) regarding software configuration. Peel withheld the affected party's responses under the Resource Management and Proposed Plan sections in this record.

[55] I find that the responses severed from these pages were supplied in confidence. These pages are marked confidential. The remaining information in these pages, pages 797-800 was not supplied in confidence by the affected party as they consist of information supplied by Peel.

[56] I will consider below whether part 3 of the test applies to the information severed by Peel from pages 797-800. I will order the remainder of the information in these pages disclosed as no other exemptions have been claimed for the unsevered information.

---

<sup>15</sup> At page 1269 of the records.

Statement of Work One Prototype agreement

[57] Pages 968-986 and pages 1058-1123 are two drafts of the SOW One Prototype agreement. Peel withheld all of these records. These records are a draft of the executed SOW agreement that forms part of the executed Master Agreement entered into between the affected party and Peel.<sup>16</sup>

[58] The uncompleted SOW form is contained in Schedule G to Attachment L of the Sample Master Agreement which is part of the RFP. I find that the draft SOWs at pages 968-986 and pages 1058-1123 were supplied in confidence as disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party, including the affected party's additions and deletions to this form.

[59] I will consider below whether part 3 of the test applies to the information in pages 968-986 and pages 1058-1123.

Excerpts from RFP Bid of the Affected Party

[60] Pages 1-230 contain excerpts from the affected party's RFP bid submitted in response to the RFP. The Master Agreement includes the RFP form and the affected party's bid made in response to the RFP, as follows:

Schedule I  
Provider's Proposal

This schedule is incorporated in and forms part of a Master Agreement for Enterprise Wide Contact Management System made between The Regional Municipality of Peel ("Region") and [name of affected party] (the "Provider") dated October 26, 2012.

[61] Schedule J incorporates into the Master Agreement any amendments made to the affected party's proposal.

[62] Schedule K incorporates the RFP into the Master Agreement.

[63] The Master Agreement and the RFP form specifically refer to *MFIPPA* and contain specific provisions concerning access to third party information. The Master Agreement states:

7.3 Municipal Freedom of Information and Protection of Privacy Act

---

<sup>16</sup> At pages 1263-1325.

(a) Scope. All information that is in the custody or control of Region is subject to the access provisions of MFIPPA.

(b) FOI [Freedom of Information] Requests. Region cannot guarantee that the confidentiality of any information that is in the custody or control of Region will be preserved if a request for access to it is made under MFIPPA. To the extent permitted under MFIPPA, Region will inform Provider of any request made of Region under MFIPPA for any records related to the Agreement that may reveal a trade secret or scientific, technical, commercial, financial or labour relations information supplied in confidence by Provider to Region so that Provider will have an opportunity to make representations to Region with respect to the proposed disclosure. [emphasis added]

(c) Assistance. If a request is made to Region under MFIPPA (or such other applicable legislation) for access to records relating to the Agreement, Region shall inform Provider in writing of such request and Provider will assist Region with its response to that request.

[64] Appendix 1 to Peel's representations contains an excerpt from the RFP form which was provided to the affected party. This form states that:

Request for Proposal:  
Contact Management System Technology, Solution, Professional Services  
and Support

### 13.3 Municipal Freedom of Information and Protection of Privacy Act

All Proposals submitted to the Region are subject to the access provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. MFIPPA provides all persons with a legal right of access to information in the custody and/or control of the Region subject to a limited set of exemptions. One such exemption is information that reveals a trade secret or scientific, technical, commercial, financial or labour relations information supplied to the Region in confidence by a third party, where disclosure could reasonably be expected to result in specified types of harm to the third party or undue gain to others.

The Region cannot guarantee that the confidentiality of any Proposal will be preserved if a request for access is made under MFIPPA. The Region is inviting all Potential Proponents to submit any Proposals in response to this RFP in confidence, and if the Region receives a request for information in connection with any Proposal, the Region will, subject to the provisions of the following section, take account of the confidential

treatment accorded to Proposals when making its decision about disclosure. [emphasis added]

Despite the above, submission by the Proponents of a Proposal shall be deemed to be consent by the Proponent:

(a) to the disclosure of the Proposal or any part thereof, to individuals in the Region and to other persons, as may be necessary for the purpose of reviewing and evaluating the Proposal, and if applicable, negotiating the Agreement to be made between the Region and the Proponent;

(b) to the Region making of copies of the Proposal for the purpose of reviewing and evaluating the Proposal;

(c) to the retention of the Proposal by the Region;

(d) to the public disclosure of the name of the Proponent;  
and

(e) to the public disclosure of any clarification questions submitted by the Proponent in accordance with section 4.2.

[65] Adjudicator Colin Bhattacharjee in Order MO-2435 considered the issue of "supplied" concerning a proposal that later formed part of an agreement between the institution and two affected parties. Relying on Orders PO-2018, MO-1706, PO-2371 and PO-2435, Adjudicator Bhattacharjee stated that:

[The Region] submits that the information in the contracts that were executed between itself and the two companies was not negotiated and "simply directly copied from the Proposal into the contract document." Consequently, it appears to be suggesting that the two companies "supplied" the information in the contracts to the Region, for the purposes of section 10(1)...

Although the Region submits that the information in the contracts was "simply directly copied from the Proposal," this does not mean that the information in the contracts was not subject to any negotiation...

In my view, if the Region had judged the two companies' joint bid to be too high in terms of price or otherwise unacceptable, it had the option of not selecting that bid and not executing contracts with the two companies. In other words, the Region had the opportunity to accept or reject the bid, which is a form of negotiation. In such circumstances, I

find that the information in each contract, including the pricing information, was mutually generated rather than "supplied" by the two companies...

In my view, none of the information in the contracts falls within the scope of these two exceptions. In short, I find that the information in the contracts was the product of a mutual negotiation process between the Region and the two companies. It cannot be said that these companies "supplied" the information in these contracts to the Region. Part 2 of the section 10(1) test has, therefore, not been satisfied with respect to this information.

[66] In Order MO-2299, Adjudicator Frank DeVries considered whether a proposal, which was appended as a series of schedules to an agreement, was supplied. He stated:

...the parties subsequently chose to incorporate these records into the agreement entered into between them. The agreement clearly refers to these three schedules as forming part of the agreement, and as containing certain terms of the agreement.

In my view, by incorporating these documents in to the agreement, and by having them form part of the agreement, these documents can no longer be considered to have been "supplied" by the third party. Rather, these documents constitute the agreed, negotiated terms of the agreement.

Again, I have also carefully reviewed these records to determine whether any portions of them fit within the situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply (the "inferred disclosure" and "immutability" exceptions). On my careful review of these records, I find that the exceptions do not apply to any of the information contained in them. These three schedules, which form part of the agreement, do contain some "background" information as to why these records were provided, and the basis upon which some of the information in them is provided. I consider this information to be in the nature of the type of information found in a "preamble" to a contract, which essentially sets the framework for why the clauses in the contract were negotiated. I do not consider these portions of the schedules to fit within the "inferred disclosure" and "immutability" exceptions.

I have also carefully examined the table which forms part of Schedule F, as well as various references to amounts set out in some portions of the schedules (particularly Schedule F). As identified above, if a third party

has certain fixed costs that determine a floor for a financial term in the contract, the information setting out the fixed or "overhead" cost may be found to be "supplied" for the purpose of section 10(1). Accordingly, I carefully considered whether the various amounts referred to in the schedules (including identified "base amounts" and other references to various costs) identified any such "fixed" costs. However, on my review of this information, including a reference to an amount in Schedule F which suggests that the "base amounts" are not fixed costs but calculated estimates, and in the absence of any other specific evidence on this issue from the parties, I find that none of the information fits within the exceptions. In addition, although there is a reference to certain identified costs in Schedule F, and the proposed methods of resolving issues surrounding those costs, by incorporating Schedule F and its terms into the contract, the parties have negotiated these amounts and issues. In my view, the exceptions identified above do not apply to the information in Schedules F, G and H, and I find that they were not "supplied" by the third party for the purpose of section 10(1).

[67] Peel provided me with a copy of the RFP form for this project. The affected party and other bidders would have had to respond to this form to submit their proposals. The RFP form includes information requiring proponents to identify confidential information in their RFP bid. This form states :

Confidential Information/Ownership and Disclosure of Vendor Submissions

(a) The vendor shall not divulge or disclose any information, documents or data communicated to or acquired by the vendor in the course of performing the Work without the prior written consent of the Agency, which consent may be unreasonably withheld. No such information, documents or data shall be used by the vendor for any purpose other than for the purpose of performing the Work, without the prior written consent of the Agency, which consent may be unreasonably withheld.

(b) The Vendor Submissions, along with all correspondence, documentation and information provided to the Agency by any vendor in connection with or arising out of the Vendor Submission, once received by the Agency:

i) shall become the property of the Agency and may be appended to any agreement and/or purchase order with the successful vendor;

ii) shall become subject to the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA"), and

may be disclosed pursuant to that legislation. **Vendors must identify in their Vendor Submissions any scientific, technical, proprietary, commercial or other confidential information, the disclosure of which could cause them injury.** [emphasis added]

(c) In purchases where a public opening of Vendor Submissions will be taking place, the name of each vendor and the lump sum price contained in their Vendor Submission shall be read out by the Agency at the public opening.

(d) Where award is to be made by Regional Council, the Peel Police Services Board or the Board of Directors of Peel Housing Corporation, information regarding the Vendor Submissions, including names of vendors, lump sum price and the annual or overall value of the Contract, may be reported in public reports to Regional Council or the Board, as applicable, and discussed at meetings that are open to the public.

[68] The vendor in these appeals is the affected party. Pages 1 to 230 contain excerpts from the affected party's bid in response to the RFP. The affected party was asked to identify in its response to the RFP any scientific, technical, proprietary, commercial or other confidential information, the disclosure of which could cause it injury. On page two of its bid, the affected party only identified the following information:

- Package #1 – Pricing: Exempt the entire section. [Pages 989 – 1044]
- Proposal Section 3.3.1.1 – Software Components: Exempt the portion of Exhibits 3.3-2 and through 3.3-16 marked Component Licensing/IP Rights. [found at pages 30 – 42 of the records]
- Proposal Section 3.3.1.12 – Exempt the entire response section. [Pages 49 (part) – 50 (part)]

[69] I will consider the pricing information later on in this order.

[70] With respect to the pages identified above by the affected party that are within pages 1-230 of the records, these pages are located at pages 30-42 and parts of pages 49 and 50.

[71] Concerning the portions of Exhibits 3.3-2 and through 3.3-16 at pages 30-42, I have reviewed each section marked "Component Licensing/IP Rights". I find that these sections contains general information such as referencing other portions of the RFP submission or proposing options for Peel to consider in deciding how to implement the



affected party's product. I find that the "inferred disclosure" and "immutability" exceptions do not apply.

[72] With respect to the Proposal Section 3.3.1.12, the affected party has identified the response sections on pages 49 and 50. These sections from the bid contain general information about the affected party's customer service issues.

[73] Based on my review of the information at issue on pages 30-42 and 49-50 of the records, I find that this information was not supplied in confidence to Peel. The affected party did not provide specific representations concerning why it has specifically identified this information as confidential the disclosure of which could cause it injury. In making my determination, I took into account the inclusion of the affected party's bid made in response to the RFP into the executed Master Agreement.<sup>17</sup> I also find that the "inferred disclosure" and "immutability" exceptions do not apply to this information. I will consider below the application of section 11(a) to this information.

[74] In summary, the Master Agreement signed by Peel and the affected party incorporates the affected party's RFP bid. Taking into account the confidentiality provisions in the RFP form and the Master Agreement set out above and the reasoning in Orders MO-2435 and MO-2299, I find that the excerpts from the affected party's bid at pages 1-230 of the records are part of the negotiated agreement between the parties and were not supplied by the affected party to Peel for the purpose of section 10(1)(a).<sup>18</sup> In making this finding, I have considered whether the "inferred disclosure" and "immutability" exceptions apply.

[75] I will consider below whether pages 23-199, 201-202, 212, 215, and 217-229 are subject to section 11(a). As no other exemptions have been claimed for pages 1-22, 200, 203-211, 213-214, 216, 230, I will order these pages disclosed.

### Cheque

[76] Page 231 is the affected party's cheque for the RFP deposit. The RFP form required this cheque to be certified. The affected party's account number has been severed by Peel in only one of two locations. I am not satisfied that this information was supplied "in confidence" to Peel. As stated by Adjudicator Catherine Corban in Order MO-2070:

...a certified cheque is a common method of payment that generally does not carry any expectations of confidentiality. In my view, the evidence does not demonstrate that this cheque was supplied, either implicitly or explicitly, in confidence to [the institution].

---

<sup>17</sup> Orders MO-2435 and MO-2299.

<sup>18</sup> See also Order MO-2494.

[77] I will consider below whether section 11(a) applies to this cheque at page 231.

### System Installation Requirements

[78] Pages 232-263 contain the system installation requirements for the affected party's product. This document does not appear to be part of the required RFP response. It contains details of the initial estimate of the required hardware and software to install the contact management system. I find that this information was supplied in confidence to Peel. As part 2 of the test has been met, I will consider below whether part 3 of the test is met.

### Training Brochures

[79] Pages 264-302 contain the affected party's training brochure. It is a brochure advertising the affected party's various training programs available to a number of different professionals in various companies. I find that this brochure was prepared for a purpose that would entail disclosure. A more recent version of this brochure is publicly available on both the affected party's website under the Education Services section and also on another website.<sup>19</sup> Accordingly, I find that section 10(1)(a) does not apply as the information in this brochure was not supplied in confidence to Peel. As no other exemptions have been claimed for this record, I will order it disclosed.

[80] Pages 1142-1158 contain another training brochure prepared by the affected party. It is entitled *Region of Peel Phase One Statement of Work Training Courses Description*. It contains much of the same information as is publicly available in pages 264-302. For the same reasons as I found concerning pages 264-302, I find that this brochure was not supplied in confidence to Peel. I will consider below whether section 11(a) applies to this record.

### Internal Task List

[81] Pages 303-317 contain the internal task list which details the anticipated dates for particular steps in the completion of the project. It includes tasks to be completed by both Peel and the affected party. As this document contains tasks for both Peel and the affected party to complete, and appears to have been completed with the input of Peel, and absent specific representations on this record, I find that I do not have sufficient evidence to find that this information was supplied in confidence to Peel by the affected party. Accordingly, I find that section 10(1)(a) does not apply to this record. I will consider below whether section 11(a) applies to this information.

---

<sup>19</sup> <http://ebookbrowse.com>.

### Standard Form Contract

[82] Pages 339-351 and 801-813 contain the affected party's standard form contract. Pages 339 to 351 are the standard contract form supplied by the affected party to Peel. Pages 801-813 is a copy of this form with certain portions highlighted and handwritten comments written thereon. Although Peel states in its index of records that it has withheld portions of pages 801-812, it has not provided me with a copy of the proposed severances. It is clear from my review of pages 801-813 that the handwritten comments on the standard form contract were written by Peel.

[83] I find that part 2 of the test has been met under section 10(1)(a) as the "inferred disclosure" exception applies to pages 339-351 and 801-813. Disclosure of this information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to Peel.<sup>20</sup> I will consider below whether part 3 of the test applies to this information.

### Brochure

[84] Pages 352-355 consist of a brochure advertising the affected party's product to potential customers. It is not addressed to Peel nor does it mention Peel or the affected party's RFP response. I find that this brochure was for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product. Accordingly, I find that section 10(1)(a) does not apply as the information in this brochure was not supplied in confidence to Peel. As no other exemptions have been claimed for these pages, I will order them disclosed.

### Proponent Self-Assessment

[85] Pages 356-368 and 1159-1176 are described in the index of records as the system functionality self-assessment. Peel has severed some of the information in the proponent assessment column and all of the information in the comments sections of these records. The severed information in these records was completed by the affected party.

[86] Pages 945-962 are described in the index of records as the product functionality self-assessment. Peel has severed the information under the column potential process maps which was the portion completed by the affected party.

[87] Pages 1353-1366 is described in the index of records as email correspondence re: negotiation meetings. It is actually an attachment to the emails at pages 1348-1352.

---

<sup>20</sup> See Orders PO-3011 and PO-3072-R.

[88] The attachment at pages 1353-1366 is a copy of the completed Exhibit Two to Attachment Two of the RFP form. Peel has severed the information related to the affected party's comments.

[89] These records are the completed versions of the form entitled "Proponent Self-Assessment, [RFP #] CMS Technology, Solutions, Professional Services and Support". These records were submitted to Peel as part of the affected party's RFP bid.<sup>21</sup> As these records form part of the RFP bid and, were not identified by the affected party as confidential records in its RFP response, I find that these records were not communicated to Peel on the basis that they were confidential and were to be kept confidential. Therefore, part 2 of the test under section 10(1)(a) has not been met. I will consider below whether section 11(a) applies to these records. As well, I will consider whether section 11(c) applies to pages 1353-1366.

#### Scalability and High Availability White Paper

[90] Pages 369-391 are described by Peel as a white paper. The title of this paper is "[Name of Affected Party] Scalability and High Availability White Paper". It is essentially a brochure explaining how the affected party's product is able to meet the needs of government organizations. This record includes information on how a number of government organizations have already used this product. This record is not addressed to Peel nor does it mention Peel or the affected party's RFP response.

[91] I find that the record at pages 369-391 was prepared for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product. Accordingly, I find that section 10(1)(a) does not apply as the information in this brochure was not supplied in confidence to Peel. I will consider below whether section 11(a) applies to this record.

#### Product Description Reports

[92] Pages 413-453, 478-503 and 553-570 are the affected party's product description reports. The RFP in these appeals is dated March 23, 2010 and the affected party's response to the RFP is dated May 12, 2010. I find that these reports were not supplied in confidence. These reports were created in 2007 or 2008, prior to the RFP, and were to be read by the affected party's staff, customers, and potential customers, in order to promote the affected party's products. These records were prepared for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product. Accordingly, I find that section 10(1)(a) does not apply as the information in these reports was not supplied in confidence to Peel. I will consider below whether section 11(a) applies to these records.

---

<sup>21</sup> RFP form, page 63, paragraph 5 and pages 70 to 86, Exhibit Two to Attachment C, Functional Requirements Self-Assessment Sheet.

### Presentation Slides

[93] Pages 454-477, 610-730, 758-794, and 814-845 are presentation slides. Neither Peel nor the affected party provided me with specific representations on these slides. In particular, I do not have representations as to who these slides were presented to nor why certain information was severed from the slides by Peel. I find that I do not have sufficient information to determine that these slides were communicated to Peel by the affected party on the basis that they were confidential and were to be kept confidential or were prepared for a purpose that would not entail disclosure. Accordingly, I find that these slides were not supplied in confidence to Peel.

[94] I will consider below whether section 11(a) applies to pages 611-616, 618, 620-622, 624-625, 629-635, 639-641, 647-653, 656-659, 662-664, 669-670, 672-673, 675, 678-690, 698-704, 712-715, 719, 720, 722, 725-728, 730, 759, 761-764, 769-772, 776, 792-794, and 814-845.

[95] As no other exemptions have been claimed for pages 454-477, 610, 617, 619, 623, 626-628, 636-638, 642-646, 654-655, 660-661, 665-668, 671, 674, 676-677, 691-697, 705-711, 716-718, 720-721, 723-724, 729, 758, 760, 765-768, 773-775, 777-791, I will order them disclosed.

### Sample Discovery Disaster Report

[96] Pages 504-513 is a Sample Disaster Recovery Report and pages 514-552 is the affected party's Security Guide, both dated December 18, 2009. Neither Peel nor the affected party provided specific representations on these reports. However, unlike the reports at pages 413-453, 478-503 and 553-570, there is no indication in these reports that they were to be used to promote the affected party's business. Nor is there any indication that these reports formed part of the affected party's RFP bid. Based on my review of the specific detailed technical information in these two reports, I find that they were supplied in confidence to Peel. I will determine below whether part 3 of the test applies to these records.

### Product Processes and Policies

[97] Pages 571-609 is the affected party's Product Processes and Policies report dated prior to the issuance of the RFP.<sup>22</sup> I find that this report was not supplied in confidence as it was intended to be read by the affected party's staff, partner, customers, prospects and analysts. This record was prepared for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product. Accordingly, I find that section 10(1)(a) does not

---

<sup>22</sup> This record is dated August 27, 2008.

apply as the information in this report was not supplied in confidence to Peel. I will consider below whether section 11(a) applies to this record.

### Reports of Other Third Parties

[98] Pages 392-412 contain a report prepared by an independent consultant in 2007 to verify the ability of the affected party's product to handle a growing amount of work. This report is identified by the third party that prepared it as "commercial in confidence". It contains information about this third party's testing procedures and how it applied these procedures to the assessment of the affected party's product in 2007. Peel could not locate this record as being publicly available. Peel also did not apply any exemptions to this record.

[99] Based on my review of this record, and taking into consideration the detailed technical and commercial information in this report and the fact that it was prepared in 2007, well in advance of the date of the RFP, I find that it was supplied in confidence to Peel. I will consider below whether part 3 of the test applies to this record.

[100] Pages 731-750 contain a report entitled "Marketscope for Local Government CRM Products". Pages 1367 to 1383 contain a report entitled "Magic Quadrant for Web Customer Service". These reports were not prepared by the affected party. Peel has decided to grant full access to these reports. According to Peel, both of these reports are publicly available online for a fee.

[101] As these reports are available from sources to which the public has access and were prepared for a purpose that would entail disclosure, I find that they were not supplied in confidence to Peel and section 10(1)(a) does not apply to this information. As no other exemptions have been claimed for these reports, I will order them disclosed.

### Case Study

[102] Pages 751-757 contain a Case Study prepared by the affected party discussing generally the use of its product by two different municipalities. It appears to be an advertisement promoting one of the affected party's products. I find that I do not have sufficient information to determine that this record was communicated to Peel by the affected party on the basis that it was confidential and was to be kept confidential or was prepared for a purpose that would not entail disclosure. Accordingly, I find that this record was not supplied in confidence to Peel and section 10(1)(a) does not apply to this information.

[103] As no other exemptions have been claimed for pages 751 to 757, I will order them disclosed.

### Product Prototype Scope

[104] Pages 933-934 and pages 963-967 contain the Product Prototype Scope. Both records contain the same form with different information.<sup>23</sup> The forms contain columns for Peel's position and the affected party's position on this topic. Peel has severed the columns related to the affected party's position, as well as the columns containing Peel's analysis of adopting the affected party's position from pages 933-934, but has withheld in full these forms at pages 965-967.

[105] I find that the information severed from pages 933-934 and the corresponding information in pages 965-967 was supplied in confidence as disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party concerning the proposed implementation of its prototype. I will consider below whether part 3 of the test applies to the information at issue in pages 933-934 and 965-967.

[106] Pages 963-964 are two copies of the same flow chart. This chart was supplied to Peel by the affected party. However, absent specific representations on this chart and based on the general nature of this chart, I find that I do not have sufficient information to find that it was prepared for a purpose that would not entail disclosure. Therefore, part 2 of the test has not been met for pages 963-964. I will consider below whether section 11(a) applies to pages 963-964.

### Post Installation Tests

[107] Pages 935-944 and pages 1132-1139 contain Post Installation Tests. I find that these records were supplied in confidence by the affected party. These records contain specific technical details about the tests needed to be done on the affected party's product to ensure proper installation. I will consider below whether part 3 of the test applies to pages 935-944 and 1132-1139.

### Responses to Peel's Post-Clarification Questions

[108] Pages 987-988, 1052-1057, pages 1335-1337, and pages 1384-1387 contain Peel's questions to the affected party and the affected party's responses about the project. Page 1335 contains the affected party's cover facsimile page to pages 1336 and 1337.

[109] The withheld responses in pages 987-988 concern the draft SOW. I find that this information was supplied in confidence for the same reasons as I have determined that the draft SOW agreements were supplied in confidence. As part 2 of the test has been

---

<sup>23</sup> At pages 933-934 and 965-967.

met for these pages, I will consider below whether part 3 of the test has been met for this information.

[110] The withheld responses in pages 1052-1057 contain clarifications of certain information contained in the RFP bid of the affected party. There are also notations on this record as to whether Peel is satisfied with these responses. Based on my reasoning above concerning the RFP bid, I find that the affected party did not supply the information in pages 1052-1057 in confidence and I will order it disclosed.

[111] Page 1335 is a cover sheet listing who the facsimile was sent by and who it was sent to, the date, and the number of pages. Peel has decided to grant full access to this page. Based on the limited and general nature of the information on this page, I find that it was not supplied in confidence and I will order it disclosed.

[112] The withheld responses in pages 1336-1337 concern information as to where certain information may be found in the affected party's RFP response. Based on the general nature of these responses and the availability of this information in the RFP form and response, I find that these pages were not supplied in confidence. I will consider below whether section 11(a) applies to this information.

[113] The information withheld by Peel in pages 1384-1387 contains detailed information about the affected party's business, including products or information not contained in the RFP bid. Based on my review of this record, I find that it was supplied in confidence. I will consider below whether part 3 applies to this information.

### Pricing

[114] Pages 989-1044 and pages 1388-1421 contain pricing information submitted by the affected party in response to the RFP. This information was supplied in the format set out in Appendix D to the RFP and submitted by the affected party to Peel in accordance with the instructions set out in section 6.1 in the RFP form.

[115] Pages 1388-1396 and pages 993-1001 appear to be identical.

[116] Pages 1029-1032 and pages 1397-1400 are identical. These pages are almost identical to 989-992, with some differences in certain prices. It appears from my review of the records that the prices were subject to negotiation. As stated in by Adjudicator Daphne Loukidelis in Order MO-2403:

The application of the "supplied" part of the section 10(1) test to the disclosure of pricing information contained within a contract or bid proposal has been addressed in a number of previous orders of this office. ...In the circumstances, and for the reasons that follow, I find that the information is not exempt under section 10(1).



In Order PO-2435, Assistant Commissioner Brian Beamish considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish rejected that position and observed that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part 2 of the section 10(1) test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in Order PO-2453 contained the successful bidder's pricing for various components of the service to be delivered as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under section 17(1) (the equivalent to section 10(1) in the provincial *Act*), Adjudicator Corban stated (at page 7):

Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the

"back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

Additionally, having reviewed the information at issue, I do not find, nor have I been provided with any evidence to show, that any of the information at issue is "immutable" or that disclosure of the information, including the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied to the Ministry by the affected party. I have also not been provided with any evidence to show that the pricing information reflects the affected party's underlying costs. In fact in my view, the information contained in the record itself appears to point to the opposite conclusion that the amounts charged by the affected party are for the provision of particular services.

In my view, this excerpt from Adjudicator Corban's reasons in Order PO-2453 emphasizes that the exemption in section 10(1) is intended to protect information belonging to an affected party that *cannot* change through negotiation, not that which could, but was not, changed [see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); Orders PO-2371, PO-2433 and PO-2435].

I agree with the reasoning articulated in the orders excerpted and discussed above, and have applied it in my analysis of the records at issue.

With regard to the actual information at issue, and the appellant's brief representations on this point, I have concluded that the appellant's pricing totals are not immune from disclosure under section 10(1). In my view, pricing information, particularly the pricing totals at issue here, cannot reasonably be said to have inherent value as an informational asset. Rather, with specific reliance on the principles expressed in past orders of this office, I find that the information at issue represents the position taken by the appellant in its bid regarding the cost of providing and performing the various components of the TTC website redevelopment contract. If the pricing or rates submitted by the appellant had been deemed by the TTC to be "too high, or otherwise unacceptable," the TTC

was in a position to accept or reject them. This is the form of negotiation envisaged by Assistant Commissioner Beamish in Order PO-2435.

Moreover, I have not been provided with any evidence to demonstrate that the pricing totals reflect the appellant's "immutable" or fixed underlying costs, or that disclosure would somehow permit accurate inferences to be drawn about other, non-negotiated confidential information of the appellant. In my view, the pricing totals at issue reflect the contractual interests and intentions of the TTC and the appellant. Accordingly, I find that this information was not "supplied" within the meaning ascribed to that term in section 10(1) of the *Act*.

[117] I adopt this reasoning of Adjudicator Loukidelis in Order MO-2403 and the orders she has relied on and find that the pricing information from the RFP bid forms part of the Master Agreement at pages 989-1044 and pages 1388-1421 has not been supplied by the affected party to Peel. Therefore, part 2 of the test under section 10(1)(a) has not been met.

[118] As no other exemptions have been claimed for pages 989-1001, 1004, 1018, 1021-1022, 1026, 1032, and pages 1388-1421, I will order these pages disclosed. I will consider below whether section 11(a) applies to pages 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, and 1033-1044.

#### Email Correspondence

[119] Pages 1045-1051, 1140-1141, and 1347-1352 contain emails.

[120] For pages 1045-1051, Peel only severed the names of a type of software. On page 1048, Peel severed two responses from an email from the affected party, one response concerns the SOW and one concerns staffing. Peel did not indicate in its representations why this information has been severed whereas other information has not been severed from these emails. Nor can I ascertain why Peel considers this severed information in this record to be supplied in confidence, whereas the remaining detailed information in the emails in this record was not, according to Peel, supplied in confidence.

[121] Pages 1140-1141 are emails that Peel has decided to grant full access to. These emails concern general matters, such as the forwarding of documents and arrangements for meetings.

[122] Pages 1347-1352 are emails that Peel has decided to grant full access to, except for one amount from the same email contained on page 1348 and on page 1351. This email refers to information provided by Peel to the affected party. As the information

severed from this record by Peel was not supplied by the affected party, part 2 of the test is not met for this severance.

[123] Therefore, based on my review of pages 1045-1051, 1140-1141, and 1347-1352, I find that it has not been established that the affected party had a reasonable expectation of confidentiality, implicit or explicit, at the time that the information in these emails was exchanged between Peel and the affected party.<sup>24</sup> As no other exemptions have been claimed for this information, I will order them disclosed, except for the one severed amount on pages 1348 and 1351. I will consider the application of sections 11(a) and (c) to this amount below.

#### CMS Prototype Gaps

[124] Page 1124 is entitled CMS Prototype Gaps. Peel did not apply section 10(1)(a) to this record. As the affected party has claimed the application of this mandatory exemption to all the records, I will consider whether part 3 of the test under section 10(1)(a) applies.

[125] This record is a flow chart with eight small boxes of information four of which contain Peel's position on the CMS prototype and four on the affected party's position on the CMS prototype. The record appears to have been prepared by Peel using the RFP bid information. I find that it has not been established that the affected party had a reasonable expectation of confidentiality, implicit or explicit, at the time that the information in this record that reflects the affected party's position on the prototype was prepared. Therefore, part 2 of the test has not been met. I will consider below whether sections 11(a) and (c) apply to this record.

#### Post Clarification Addendum

[126] Pages 1125-1126 contain a letter from Peel to the affected party entitled "Post Clarification Addendum 1". Peel has severed one sentence from page 1125 only. This sentence contains Peel's questions about where to find certain information in the RFP bid that was supposed to be included in the bid.

[127] The remainder of this record also asks the affected party about where to find certain information in the RFP bid that was supposed to be included in the bid.

[128] I find that both the severed sentence and the remainder of this record do not reveal or permit the drawing of accurate inferences with respect to information supplied in confidence by the affected party. Therefore, part 2 of the test has not been met. As no other exemptions have been claimed for this information, I will order it disclosed.

---

<sup>24</sup> Order PO-2020.

Peel's Questions re: Project Plan

[129] Pages 1127-1131 contain Peel's questions regarding the affected party's proposed approach and project plan. Page 1127 is the cover letter and the remaining pages contain Peel's questions. Peel has withheld portions of its questions on pages 1128-1131.

[130] This record was prepared by Peel and contains its questions about the affected party's RFP bid. I found above that the RFP bid was not supplied in confidence. Accordingly, I find that disclosure of this record would not reveal or permit the drawing of accurate inferences with respect to information supplied in confidence by the affected party. Part 2 of the test under section 10(1)(a) has not been met.

[131] As no other exemptions apply to page 1127, I will order that page disclosed. I will consider below whether sections 11(a) and (c) apply to pages 1128-1131.

WSIB Letter and Clearance Certificate

[132] Page 1326 contains a cover letter from the Workplace Safety and Insurance Board of Ontario (WSIB) addressed to "To Whom It May Concern" attaching the Clearance Certificate found at page 1327. A Clearance Certificate is described on the WSIB website as:

... a document issued free of charge by the Workplace Safety and Insurance Board (WSIB). It provides you assurance that the contractor or subcontractor:

- is registered with the WSIB
- has filed all premium remittance forms and reconciliation forms, and
- has paid all premiums owing to the WSIB based on payroll reported.

[133] Pages 1326-1327 were prepared by the WSIB not the affected party. The WSIB website indicates that these certificates can be viewed online. I find that these pages were prepared for a purpose that would entail disclosure. Therefore, I find that they were not supplied in confidence to Peel and section 10(1)(a) does not apply to this information. As no other exemptions have been claimed for these pages, I will order them disclosed.

### Peel Pricing Tables

[134] Pages 1328-1334 contain Peel's Pricing Tables. This record contains Peel's detailed analysis and comparison of prices supplied by the affected party and another company that responded to the RFP. Based on my review of this record, I find that the information in this record was supplied in confidence to Peel. I will consider below whether part 3 of the test applies to this record.

### Letters from Peel to Affected Party

[135] Pages 1338 and pages 1345-1346 contain letters from Peel to the affected party. Page 1338 is a cover letter enclosing copies of the agreements signed by Peel and the affected party. Pages 1345-1346 contain a letter about meeting arrangements. Peel has decided to grant full access to these records. I find that both these letters from Peel do not contain information supplied in confidence by the affected party and part 2 of the test does not apply. As no other exemptions apply, I will order these two letters disclosed.

### Mutual Non-Disclosure Agreement

[136] Pages 1339-1344 contain two copies of the Mutual Non-Disclosure Agreement between Peel and the affected party. Peel has decided to grant full access to these pages. The Mutual Non-Disclosure Agreement is a standard form agreement with only the names of the parties, dates and the RFP number and date of issuance inserted. This agreement was prepared by Peel. I find that the information in this record was not supplied in confidence by the affected party and part 2 of the test does not apply. As no other exemptions apply, I will order these pages disclosed.

### ***Part 3: harms***

[137] I will now consider whether the information at issue in the records found at pages 232-263, 392-412, 339-351, 504-513, 514-552, 797-800, 801-813, 846-932, 933-934, 935-944, 965-967, 968-986, 987-988, 1058-1123, 1132-1139, 1328-1334, and 1384-1387 is subject to part 3 of the test under section 10(1)(a).

[138] 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.<sup>25</sup>

[139] 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

---

<sup>25</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.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.<sup>26</sup>

[140] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 10(1).<sup>27</sup>

[141] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.<sup>28</sup>

[142] Peel submits that the information provided by the affected party has monetary value in the marketplace (i.e. pricing tables, trade secrets, technical information, software configuration, templates etc.) that could prejudice the competitive position of the affected party.

[143] The affected party submits that if the pricing contained in its documentation was made available to the appellant this would provide them with commercial and financial advantages which could be used in future work not only limited to the area of Ontario but further afield. It states that:

If the documentation is released without the redactions sought by the [affected party] it would lead to significant prejudice in terms of the company’s competitive position and would have the potential to interfere significantly with future contractual opportunities both within Ontario and further afield.

The information provided by [the affected party] has been developed and critiqued over a number of years and developed for this market in particular.

[The affected party has] developed standard contracting forms over the years which allow them to remain competitive which are trade secrets for use by [it]. These contracts and forms are central to the running of [it]’s business and contains information on how [it] will provide the services to the Region of Peel. If disclosed this would allow the appellant an insight into the way [the affected party] structures it work and provide them with a potential unfair commercial and financial advantage.

The documentation also contained technical information on electronic systems and software configuration to be used during implementation. Disclosure of such information would provide the appellant with

---

<sup>26</sup> Order PO-2020.

<sup>27</sup> Order PO-2435.

<sup>28</sup> Order PO-2435.

information that is central to the workings of the company and would have the real potential of causing commercial and financial harm to the business. If such information was to be released the appellant would gain an understanding of the systems and software used by [the affected party] and give them an unfair advantage in the market place.

The documentation submitted by [the affected party] contained pricing for each of the products and services needed to fulfill the requirements set by the Region of Peel. If this information was to be disclosed this would have serious ramifications on the company's competitive position and would interfere with future contractual opportunities. It would give the appellant an unfair advantage as they would be given access to trade secrets and the internal workings of the company and how it goes about structuring its deals and bids. This would have the potential of causing commercial and financial harm to the business.

[144] The requester submits that the vast majority of the information provided by the affected party and subsequent information developed during the contract negotiation phase of the project is likely very specific to the region's needs and as such would not "significantly prejudice the competitive position" of the affected party in the marketplace. It states that:

... the subject of much of this information includes many standard type documents such as PowerPoint slides, Standard Master Agreement, Term & Conditions, Statement of Work - this would be very similar for any large municipal implementation, as well as other documents outlining various aspects of the work.

For the Region to indicate the disclosure of this information would impact the economic interests of the Region is, in our opinion, not accurate. The Region's contract with [the affected party] is no different than any other contract a municipality/region enters into for the supply of goods and/or services and should be subjected to the same openness, accountability, and as such access to these documents should be allowed

### *Analysis/Findings*

[145] I found above that the information at issue in part 3 was supplied in confidence by the affected party to Peel. Based on my review of these records or portions of records and the parties' representations, I agree with the affected party that this information is either central to the internal workings of the affected party or is information that reveals how it goes about structuring its deals and bids and would have the real potential of causing commercial and financial harm to its business.



[146] Accordingly, I find that part 3 of the test has been met for the information at issue in pages 232-263, 392-412, 339-351, 504-513, 514-552, 797-800, 801-813, 846-932, 933-934, 935-944, 965-967, 968-986, 987-988, 1058-1123, 1132-1139, 1328-1334, and 1384-1387. Disclosure of this information could reasonably be expected to prejudice significantly the competitive position the affected party. Therefore the mandatory exemption in section 10(1)(a) applies to this information.

**B. Does the discretionary exemption at section 11 apply to the records?**

[147] The relevant parts of section 11 state:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
- (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[148] The purpose of section 11 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 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) 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.

[149] For sections 11(c) or (g) 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.<sup>29</sup>

[150] 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 11.<sup>30</sup>

[151] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.<sup>31</sup>

[152] 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.<sup>32</sup>

***Section 11(a): information that belongs to government***

[153] I will now consider whether the information at issue in pages 23-199, 201-202, 212, 215, 217-229, 231, 303-317, 356-368, 369-391, 413-453, 478-503, 553-570, 571-609, 611-616, 618, 620-622, 624-625, 629-635, 639-641, 647-653, 656-659, 662-664, 669-670, 672-673, 675, 678-690, 698-704, 712-715, 719, 720, 722, 725-728, 730, 759, 761-764, 769-772, 776, 792-794, 795-796, 814-845, 945-962, 963-964, 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, 1033-1044, 1124, 1128-1131, 1142-1158, 1209-1210, 1223, 1263-1325, 1336-1337, 1348, 1351, 1209-1210, 1223, 1263-1325, and 1353-1366 is subject to the discretionary exemption in section 11(a).

[154] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

---

<sup>29</sup> *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

<sup>30</sup> Orders MO-1947 and MO-2363.

<sup>31</sup> Order MO-2363.

<sup>32</sup> See Orders MO-2363 and PO-2758.

[155] Concerning section 11(a), Peel submits that the records contain financial information that was negotiated between the affected party and Peel. It states that this information contains confidential business information (i.e. unit pricing information).

[156] The adjudicator previously assigned to these appeals did not seek representations from the affected party on section 11 since, as stated above, the purpose of section 11 is to protect certain economic interests of institutions.

[157] The requester made one set of representations concerning all of the claimed section 11 exemptions. It states that Peel has not demonstrated “detailed and convincing” evidence that establishes a “reasonable expectation of harm” and has merely stated that disclosing this information would compromise the economic interests of the Peel without specifically identifying how this would occur if the information was disclosed.

*Part 1: type of information*

[158] The types of information listed in section 11(a) have been discussed in prior orders, more details of which can be found above in the discussion of section 10(1)(a).

[159] Peel has applied section 11(a) to records for which it has also applied section 10(1)(a). As stated above, based on my review of the records, I find that they contain technical, commercial and financial information. As such, part 1 of the test under section 11(a) has been satisfied.

*Part 2: belongs to*

[160] The term “belongs to” refers to “ownership” by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[161] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,<sup>33</sup> customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid

---

<sup>33</sup> Order P-636.

interest in protecting the confidential business information from misappropriation by others.<sup>34</sup>

[162] The records at issue that Peel claims are subject to section 11(a) are more particularly described as follows:

<b>Description of Record</b>	<b>At Issue</b>
Excerpts from RFP Bid of the affected party	23-199 Withheld in Full Detailed Product Layout  212 Withheld in Part GST Registration Information  215 Withheld in Part Financial & Business Viability Information  217-229 Withheld in Part Sample Agreement Compliance Form
Cheque for Bid Deposit	231 Withheld in Part
Internal Task List	303-317 Withheld in Full
System Functionality Self-Assessment	356-368, 1159-1176 Withheld in Part
White Paper	369-391 Withheld in Full
Product Description Reports	413-453, 478-503, 553-570 Withheld in Full
Product Processes & Policies	571-609 Withheld in Full
Presentation Slides	611-616, 618, 620-622, 624-625, 629-635, 639-641, 647-653, 656-659, 662-664, 669-670, 672-673, 675, 678-690, 698-704, 712-715, 719, 720, 722, 725-728, 730, 759, 761-764, 769-772, 776, 792-794 Withheld in Part

<sup>34</sup> Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.

	814-845 Withheld in Full
Statement of Work (Unit Pricing Lists)	795-796 Withheld in Part
Product Prototype Scope	963-964 Withheld in Full
Product Functionality Self-Assessment	945-962 Withheld in Part
RFP Bid Pricing Tables	1397-1399, 1401-1417, 1419-1421 Withheld in Part
RFP Bid Pricing Package Info	1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, 1033-1044 Withheld in Part
Email correspondence	1348, 1351, 1353-1366 Withheld in Part
CMS Prototype Gaps	1124 Withheld in Full
Peel's Questions re: Project Plan	1128-1131 Withheld in Part
Phase One Training Course Description	1142-1158 Withheld in Full
Master Agreement	1209-1210, 1223 Withheld in Part
Statement of Work (Executed Copy)	1263-1325 Withheld in Full

[163] I will determine whether the information at issue belongs to Peel and, therefore, meets part 2 of the test under section 11(a).

Excerpts from RFP Bid of the affected party

[164] Pages 23-199 were withheld in full by Peel and are described as "Detailed Product Layout". These portions of the RFP bid contain the affected party's response to Exhibit One to Attachment C of the RFP form, Peel's request for information about the affected party's goods and services. The particular categories the affected party was required to provide information on included its approach to the project, how it was going to implement the project, what ongoing support and maintenance it was proposing to provide, the functional and technical requirements of the CMS system, the ease of the CMS system and the potential return on Peel's investment in the CMS system.

[165] Severed by Peel from page 212 is the affected party's GST number. Severed by Peel from page 215 is the affected party's revenue amount for a particular fiscal period.

Severed from pages 217-229 is the affected party's responses in the RFP bid as to its willingness to accept the Master Agreement form set out in the RFP.

[166] I find that all of these pages contain information that belongs to the affected party. These pages all form part of the successful RFP bid of the affected party and were also incorporated into the Master Agreement. In Order MO-2103-I, Adjudicator Catherine Corban considered the application of part 2 of the test under section 11(a) to a proposal package submitted by a successful bidder. In that order, concerning part 2 of the test, she stated that:

...the Township does not have a proprietary interest in the [proposal package submitted by the successful bidder and the 3-page summary of the evaluation results of the proposals with respect to the design-build project], either in a traditional intellectual property sense or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[167] Accordingly, Adjudicator Corban determined that the information in an affected party's successful bid did not belong to the institution within the meaning of section 11(a).

[168] I also do not accept that the information at issue in the RFP bid of the affected party belongs to Peel. This information belongs to the affected party. As part 2 of the test under section 11(a) has not been met and as no other exemptions have been claimed for this information, I will order it disclosed.

#### Cheque for Bid Deposit

[169] Page 231 contains the affected party's cheque to Peel. Peel has severed part of the bank account number in one location on the cheque, however, the account number is visible on another part of the cheque. The information at issue in this record belongs to the affected party, not Peel. As no other exemptions have been claimed for this information, I will order it disclosed.

#### Internal Task List

[170] Pages 303-317 contain the internal task list which details the anticipated dates for particular steps in the completion of the project. It includes tasks to be completed by both Peel and the affected party to complete the project. This document has been withheld in full by Peel. I find that this record does not belong to Peel within the meaning of section 11(a).

[171] As stated above, for information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense -

such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. This record merely lists specific tasks in the completion of the CMS project by the affected party, whether Peel or the affected party is responsible for the task and what dates the task will be performed. The information in this record would have had to have been circulated both within Peel and the affected party to ensure compliance. As section 11(a) does not apply and no other exemptions apply, I will order it disclosed.

#### System Functionality Self-Assessment

[172] Pages 356-368 and 1159-1176 are described in the index of records as the system functionality self-assessment. Peel has severed some of the information in the proponent assessment column and all of the information in the comments sections of these records. The severed information in these records was completed by the affected party as part of the RFP bid. The severed information details the ways in which the affected party's product can be utilized. I find that Peel does not have a proprietary interest in this information and it does not belong to Peel within the meaning of section 11(a). As section 11(a) does not apply and no other exemptions apply, I will order it disclosed.

#### Scalability and High Availability White Paper

[173] Pages 369-391 are described by Peel as a white paper. The title of this paper is "[Name of Affected Party] Scalability and High Availability White Paper". It is essentially a brochure explaining how the affected party's product is able to meet the needs of government organizations. This record includes information on how a number of government organizations have already used this product. This record is not addressed to Peel nor does it mention Peel or the affected party's RFP response.

[174] I found above that this record was prepared for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product. The information in this record belongs to the affected party, not Peel. Accordingly, I find that section 11(a) does not apply. As no other exemptions have been claimed for this information, I will order it disclosed.

#### Product Description Reports

[175] Pages 413-453, 478-503, and 553-570 are the affected party's product description reports. The RFP in these appeals is dated March 23, 2010 and the affected party's response to the RFP is dated May 12, 2010.

[176] These reports were created in 2007 or 2008, prior to the RFP. I found above that they were intended to be read by the affected party's staff, customers, and potential

customers and were prepared for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product. Accordingly, I find these records do not belong to Peel and that section 11(a) does not apply. As no other exemptions have been claimed for this information, I will order these records disclosed.

#### Product Processes and Policies

[177] Pages 571-609 is the affected party's Product Processes and Policies report dated prior to the issuance of the RFP.<sup>35</sup> I found above that this report was intended to be read by the affected party's staff, partner, customers, prospects and analysts. This record was prepared for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product. Accordingly, I find this record does not belong to Peel and that section 11(a) does not apply. As no other exemptions have been claimed for this information, I will order these records disclosed.

#### Presentation Slides

[178] Pages 611-616, 618, 620-622, 624-625, 629-635, 639-641, 647-653, 656-659, 662-664, 669-670, 672-673, 675, 678-690, 698-704, 712-715, 719, 720, 722, 725-728, 730, 759, 761-764, 769-772, 776, 792-794, and 814-845 are presentation slides. Peel has claimed the application of section 11(a) for portions of these slides.

[179] All of these slides were prepared for Peel by the affected party. The information at issue in these slides contains specific information about the CMS project as it pertains to Peel. I find that the information at issue in these slides belongs to Peel. I will consider below whether part 3 of the test under section 11(a) is met for the information at issue in these slides.

#### Statement of Work (Unit Pricing Lists)

[180] Pages 795-796 contain the SOW unit pricing lists. Peel withheld one monetary amount from this record.

[181] The monetary amount severed by Peel is the same amount that is part of the executed SOW agreement forming part of the Master Agreement. Peel does not have a proprietary interest in this amount and part 2 of the test under section 11(a) has not been met for this information. I will consider below the application of sections 11(c) to pages 795-796.

---

<sup>35</sup> This record is dated August 27, 2008.



### Product Prototype Scope

[182] Pages 963-964 are two copies of the same flow chart. This chart is a prototype of the setup of the affected party's product. Based on the general nature of this chart, I find that the information in this chart does not belong to Peel. As section 11(a) does not apply and no other exemptions have been claimed for pages 963-964, I will order this information disclosed.

### Proponent Self-Assessment

[183] Pages 945-962 are described in the index of records as the product functionality self-assessment. Peel has severed the information under the column "potential process maps," which was the portion completed by the affected party.

[184] These pages are the completed versions of the form entitled "Proponent Self-Assessment, [RFP #] CMS Technology, Solutions, Professional Services and Support". These records were submitted to Peel as part of the affected party's RFP bid.<sup>36</sup> As this information was prepared by the affected party as part of its self-assessment of the RFP requirements, I find that this information does not belong to Peel and part 2 of the test under section 11(a) has not been met. As no other exemptions have been claimed for pages 945-962, I will order this information disclosed.

### RFP Bid Pricing Package Information

[185] Pages 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, and 1033-1044 contain the affected party's pricing for various parts of the project. Peel has withheld the affected party's prices from these tables.

[186] As stated above, the only representations about section 11(a) by Peel was that the records contain financial information that was negotiated between the affected party and Peel and that this information is confidential business information i.e. unit pricing information.

[187] Adjudicator Laurel Copley in Order PO-2620, relying on Order PO-1736<sup>37</sup> discussed part 2 of the test under section 11(a) as follows:

Based upon my review of the records and representations, I conclude that the information contained in the records does not "belong to" the OLG. I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitute the intellectual property of the OLG or are

---

<sup>36</sup> RFP form, page 63, paragraph 5 and pages 70 to 86, Exhibit Two to Attachment C, Functional Requirements Self-Assessment Sheet.

<sup>37</sup> Referred to above.

a trade secret of the OLG. Other than a statement that the information was created at the expense of the OLG and the other contracting parties, I have not been provided with evidence to indicate how the OLG expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" the OLG within the meaning of section 18(1)(a) of the [*Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent to section 11(a) of the *Act*]. Part 2 of the test under that section has not, therefore, been met.

[188] I agree with this reasoning and find that the negotiated unit pricing information of the affected party's product in pages 1002-1003, 1005-1017, 1019-1020, 1023-1025, 1027-1031, and 1033-1044 of the records does not "belong to" Peel.<sup>38</sup> I find that I have not been provided with sufficient evidence to demonstrate that the mutually-generated, agreed-upon terms which formed part of a negotiation process constitutes the proprietary information of Peel. I have not been provided with evidence to indicate how Peel expended money, skill or effort to develop this information. Part 2 of the test under section 11(a) has not been met. As no other exemptions have been claimed for these pages, I will order this information disclosed.

#### Email Correspondence

[189] Pages 1348, 1351, and 1353-1366 are described in the index of records as emails regarding SOW negotiations.

[190] Peel has withheld one amount from the same email contained on page 1348 and on page 1351. This email refers to information provided by Peel to the affected party. From a review of the remaining information in this email, this amount appears to be an amount subject to negotiation. For the same reasons as set out above for the unit pricing amounts in RFP Bid Pricing Package Info, I find that this information does not belong to Peel. I will consider below whether section 11(c) applies to this information in pages 1348 and 1351.

[191] Pages 1353-1366 contain an attachment to the emails at pages 1348-1352, which is a copy of the completed Exhibit Two to Attachment Two of the RFP form. Peel has severed the information related to the affected party's comments.

[192] Pages 1353-1366 are the completed versions of the form entitled "Proponent Self-Assessment, [RFP #] CMS Technology, Solutions, Professional Services and Support". This record was submitted to Peel as part of the affected party's RFP bid.<sup>39</sup> As this information was prepared by the affected party as part of its self-assessment of

---

<sup>38</sup> See also Order PO-2914.

<sup>39</sup> RFP form, page 63, paragraph 5 and pages 70 to 86, Exhibit Two to Attachment C, Functional Requirements Self-Assessment Sheet.

the RFP requirements, I find that this information does not belong to Peel and part 2 of the test under section 11(a) has not been met. I will consider whether section 11(c) applies to pages 1353-1366.

#### CMS Prototype Gaps

[193] Page 1124 contains a flow chart with eight small boxes of information comparing both Peel's and the affected party's positions on the affected party's CMS prototype. It appears to have been prepared by Peel. The information in this record appears to concern information that was subject to negotiation as between Peel and the affected party. I find that this information does not belong to Peel and part 2 of the test under section 11(a) has not been met. I will consider below whether section 11(c) applies to this record.

#### Peel's Questions re: Project Plan

[194] Pages 1128-1131 contain Peel's questions regarding the affected party's proposed approach and project plan to the project. Peel has withheld portions of its questions on these pages.

[195] This record was prepared by Peel and contains its questions about the affected party's RFP bid. The information in this record appears to concern information that was subject to negotiation as between Peel and the affected party. I find that this information does not belong to Peel and part 2 of the test under section 11(a) has not been met. I will consider below whether section 11(c) applies to this record.

#### Phase One Training Course Description

[196] Pages 1142-1158 contain another training brochure prepared by the affected party. It is entitled *Region of Peel Phase One Statement of Work Training Courses Description*. As stated above, it contains much of the same information as is publicly available in the training brochure at pages 264-302.

[197] Based on my review of the information in this record, I find that this brochure on the affected party training courses does not belong to Peel within the meaning of section 11(a). As no other exemptions have been claimed for this information I will order it disclosed.

#### Master Agreement

[198] Pages 1209-1210 are described in Peel's Index of Records as information about insurance coverage in the executed Master Agreement. However, the information at issue is actually part of paragraph 11.2 of the Master Agreement, which is about limitation of liability of the parties. The amounts withheld by Peel are two amounts that

relate to the financial liability limit under the agreement. In Order PO-2522, Adjudicator Steven Faughnan stated:

I have not been provided with sufficient evidence to demonstrate that the mutually generated agreed upon terms that were part of a negotiation process constitute the intellectual property of OPG [Ontario Power Generation] or is/are a trade secret of OPG. Nor have I been provided with evidence to indicate that OPG expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" OPG within the meaning of section 18(1)(a) of the [provincial] *Act*. Part 2 of the test is, therefore, not met.

[199] I agree with this reasoning and find that mutually agreed upon terms that were part of a negotiation process concerning the limitation of liability under the agreement does not belong to Peel and part 2 of the test under section 11(a) has not been met. I will consider below whether section 11(c) applies to pages 1209-1210.

[200] Page 1223 contains the affected party's rates for service by certain workers on the project. These rates are subject to numerous preconditions and may be increased to other amounts which are not set out in the Master Agreement. I find that this information was subject to negotiation as between Peel and the affected party. I find that this information does not belong to Peel and part 2 of the test under section 11(a) has not been met. I will consider below whether section 11(c) applies to this page.

#### Statement of Work (Executed Copy)

[201] Pages 1263-1325 contain the executed copy of the SOW agreement. The form for the SOW agreement is part of the Master Agreement and can be found at pages 191-194 of the RFP form.<sup>40</sup> The RFP indicates that the SOW agreement is made pursuant to the Master Agreement. It also states that the definitions of certain terms in the SOW agreement are to be found in the Master Agreement.

[202] Adopting the same reasoning under section 11(a) as set out immediately above for the information withheld by Peel from pages 1209-1210 of the executed Master Agreement, I find that the executed SOW agreement between Peel and the affected party found at pages 1263-1325 does not belong to Peel and part 2 of the test under section 11(a) has not been met. I will consider below whether sections 11(c), (e) and (g) applies to these pages.

---

<sup>40</sup> At Schedule G to Attachment L of the Sample Master Agreement which is part of the RFP.

*Part 3: monetary value*

[203] I will now consider whether part 3 of the test under section 11(a) has been met for the information in the presentation slides at pages 611-616, 618, 620-622, 624-625, 629-635, 639-641, 647-653, 656-659, 662-664, 669-670, 672-673, 675, 678-690, 698-704, 712-715, 719, 720, 722, 725-728, 730, 759, 761-764, 769-772, 776, 792-794, and 814-845.

[204] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.<sup>41</sup>

[205] The fact that there has been a cost to the institution to create the record does not mean that it has monetary value for the purposes of this section.<sup>42</sup> In addition, the fact that the information has been kept confidential does not, on its own, establish this exemption.<sup>43</sup>

Presentation Slides

[206] Pages 611-616, 618, 620-622, 624-625, 629-635, 639-641, 647-653, 656-659, 662-664, 669-670, 672-673, 675, 678-690, 698-704, 712-715, 719, 720, 722, 725-728, 730, 759, 761-764, 769-772, 776, 792-794, and 814-845 contain presentation slides. Neither Peel nor the affected party provided me with specific representations on these slides. In particular, I do not have representations as to who these slides were presented to nor why certain information was severed from the slides by Peel.

[207] Based on my review of these slides, I find that the information at issue in the slides does not have monetary value or potential monetary value within the meaning of section 11(a). As part 3 of the test under section 11(a) has not been met and as no other exemptions have been claimed for this information, I will order these slides disclosed.

*Section 11(c): prejudice to economic interests*

[208] I will now consider whether section 11(c) applies to pages 795-796, 1124, 1128-1131, 1209-1210, 1223, 1263-1325, 1348, 1351 and 1353-1366 of the records.

[209] The purpose of section 11(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,

---

<sup>41</sup> Orders M-654 and PO-2226.

<sup>42</sup> Orders P-1281 and PO-2166.

<sup>43</sup> Order PO-2724.

and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.<sup>44</sup>

[210] This exemption is arguably broader than section 11(a) in that it 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.<sup>45</sup>

[211] Peel states that it is currently undergoing negotiations for the implementation of the CMS technology purchased from the affected party and submits that disclosure of the information at issue could prejudice the economic interests of Peel during current or in future negotiations.

[212] The records at issue that Peel claims are subject to section 11(c) are more specifically described as follows:

Statement of Work (Unit Pricing Lists)	795-796 Withheld in Part
CMS Prototype Gaps	1124 Withheld in Full
Peel's Questions re: Project Plan	1128-1131 Withheld in Part
Master Agreement	1209-1210, 1223 Withheld in Part
Statement of Work (Executed Copy)	1263-1325 Withheld in Full
Email correspondence	1348, 1351, 1353-1366 Withheld in Part

Statement of Work (Unit Pricing Lists)

[213] Pages 795-796 are described as the Statement of Work (Unit Pricing Lists). Peel withheld one monetary amount from this record. Both pages of this record appear identical to each other.

[214] This record contains only one monetary amount. This monetary amount severed by Peel is the same amount that is part of the executed SOW agreement forming part

---

<sup>44</sup> Orders P-1190 and MO-2233.

<sup>45</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

of the Master Agreement.<sup>46</sup> This figure is part of the negotiated executed agreement. Peel has not provided me with any information as to how disclosure of this amount, which is known to the affected party, could prejudice the economic interests of Peel during current or in future negotiations. I find that section 11(c) does not apply. As no other exemptions have been claimed for this information, I will order it disclosed.

#### CMS Prototype Gaps

[215] Page 1124 contains a flow chart with eight small boxes of information comparing both Peel's and the affected party's positions on the affected party's CMS prototype. It appears to have been prepared by Peel. This record appears to concern information that was subject to negotiation as between Peel and the affected party and contains very limited general information. As the Master Agreement between Peel and the affected party has been executed and based on my review of this record, I find that disclosure could not reasonably be expected prejudice to Peel's economic interests or competitive position. As section 11(c) does not apply and no other exemptions have been claimed for this information, I will order it disclosed.

#### Peel's Questions re: Project Plan

[216] Pages 1128-1131 contain Peel's questions regarding the affected party's proposed approach and project plan to the project. Peel has withheld portions of its questions on these pages.

[217] This record was prepared by Peel and contains its questions about the affected party's RFP bid. The record contains information that was subject to negotiation between Peel and the affected party. As the Master Agreement between Peel and the affected party has been executed and based on my review of this record, I find that disclosure could not reasonably be expected prejudice to Peel's economic interests or competitive position. As section 11(c) does not apply and no other exemptions have been claimed for this information, I will order it disclosed.

#### Statement of Work (Executed Copy)

[218] Pages 1263-1325 contain the executed copy of the SOW agreement. The form for the SOW agreement is part of the Master Agreement and can be found at pages 191-194 of the RFP form.<sup>47</sup> The RFP indicates that the SOW agreement is made pursuant to the Master Agreement.

[219] Although Peel submits that it is currently undergoing negotiations for the implementation of the CMS technology purchased from the affected party, it has not indicated how disclosure of this executed agreement could reasonably be expected to

---

<sup>46</sup> At page 1269 of the records.

<sup>47</sup> At Schedule G to Attachment L of the Sample Master Agreement which is part of the RFP.

prejudice its economic interests, nor can I ascertain this from my review of this executed agreement. Therefore, I find that section 11(c) does not apply. I will consider below whether sections 11(e) and (g) applies to these pages.

### Email Correspondence

[220] Pages 1348, 1351, and 1353-1366 are described in the index of records as emails regarding SOW negotiations.

[221] Peel has withheld one amount from the same email contained on page 1348 and on page 1351. This email refers to information provided by Peel to the affected party. From a review of the remaining information in this email, this amount appears to be an amount subject to negotiation. However, the email in which this amount is found pre-dates the date of both the executed Master and SOW Agreements. Accordingly, I find that disclosure could not reasonably be expected to prejudice the economic interests or competitive position of Peel. As section 11(c) does not apply and no other exemptions have been claimed for this information, I will order it disclosed.

[222] Pages 1353-1366 contain an attachment to the emails at pages 1348-1352, which is a copy of the completed Exhibit Two to Attachment Two of the RFP form. Peel has severed the information related to the affected party's comments.

[223] Pages 1353-1366 are the completed versions of the form entitled "Proponent Self-Assessment, [RFP #] CMS Technology, Solutions, Professional Services and Support". This record was submitted to Peel as part of the affected party's RFP bid.<sup>48</sup> As this information was prepared by the affected party as part of its self-assessment of the RFP requirements, I find that disclosure of this information could not reasonably be expected to prejudice the economic interests or competitive position of Peel. As section 11(c) does not apply and no other exemptions have been claimed for this information, I will order it disclosed.

### ***Section 11(e): positions, plans, procedures, criteria or instructions***

[224] Peel has claimed the application of section 11(e) to pages 1263-1325 of the records, the executed SOW Agreement.

[225] In order for section 11(e) to apply, the institution must show that:

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

---

<sup>48</sup> RFP form, page 63, paragraph 5 and pages 70 to 86, Exhibit Two to Attachment C, Functional Requirements Self-Assessment Sheet.



2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.<sup>49</sup>

[226] Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.<sup>50</sup>

[227] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.<sup>51</sup>

[228] The term "plans" is used in sections 11(e), (f) and (g). Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."<sup>52</sup>

[229] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.<sup>53</sup>

[230] Peel states in its representations that the SOW is currently under negotiation (SOW 2 to be negotiated in 2011) and outlines the actions ("instructions") and plans for the implementation of the CMS technology solution.

[231] Peel's representations are dated November 22, 2011. Although its representations were provided towards the end of 2011, Peel has not indicated in its representations, nor can I ascertain from a review of this record, how the information in this record relates to a strategy or approach to the negotiations that were to be carried out in 2011. Therefore, I find that section 11(e) does not apply to pages 1263-1325 of the records. I will consider below whether section 11(g) applies to these pages.

***Section 11(g): proposed plans, policies or projects***

[232] Peel has claimed the application of section 11(g) to pages 1263-1325 of the records, the executed SOW Agreement.

---

<sup>49</sup> Order PO-2064.

<sup>50</sup> Orders PO-2064 and PO-2536.

<sup>51</sup> Orders PO-2034 and PO-2598.

<sup>52</sup> Orders P-348 and PO-2536.

<sup>53</sup> Order PO-2034.

[233] In order for section 11(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and
2. disclosure of the record could reasonably be expected to result in:
  - (i) premature disclosure of a pending policy decision, or
  - (ii) undue financial benefit or loss to a person.

[Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

[234] For this section to apply, there must exist a policy decision that the institution has already made.<sup>54</sup>

[235] Peel states that in response to a corporate wide project with the objective of recommending technology/business changes to support multi-channel customer service approaches, it issued a policy decision through Regional Council on the implementation of a customer service integration solution in 2009 (prior to the RFP submission of the affected party). With the support of Regional Council, the CMS technology acquisition project was launched. Peel submits that disclosure of this information would impact the economic interests of Peel as it is currently undergoing negotiations for the subsequent Statements of Work with the affected party.

[236] Peel has not indicated in its representations, nor can I ascertain from a review of this executed agreement as between it and the affected party, how the information in this record could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a Peel. The information in this agreement is known to both Peel and the affected party. Any subsequent SOW agreement would be negotiated between the same parties. I find that section 11(g) does not apply to pages 1263-1325 of the records and as no other exemptions apply, I will order this record disclosed.

### ***Conclusion Regarding Section 11***

[237] In conclusion, I find that none of the information in the records that I have found not subject to section 10(1)(a) is subject to the discretionary exemptions in sections 11(a), (c), (e) and (g).

---

<sup>54</sup> Order P-726.

### **C. Should the fee be upheld?**

[238] In this appeal all 1421 pages of the records have been located and Peel is seeking a fee to process the request from the requester. In charging a fee, an institution must provide a requester with a detailed breakdown of its fee, and a detailed statement as to how the fee was calculated.<sup>55</sup>

[239] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[240] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

[241] More specific provisions regarding fees are found in sections 6, 7 and 9 of Regulation 823. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.

---

<sup>55</sup> Orders P-81 and MO-1614.

4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[242] Peel submits that the majority of the fee is based on both a search and preparation component. Peel states that included in the search was staff time spent reading through numerous files (1421 pages of records) and extracting 462 pages as non-responsive to the original request.

[243] Peel states that it calculated its fee by charging one minute per page for manually searching through documents. As a result it calculated its search time as 23.68 hours which equals 1421 pages at 1 minute per page. At the rate of \$7.50 for each 15 minutes, as set out in section 45(1), Peel calculated its search fee to be \$710.40.

[244] In addition, Peel states that it severed pages in both the original request and the subsequent request. It states that it calculated its preparation time based on estimating 2 minutes for every page severed in part. When combining both access decisions, Peel states that it severed 280 pages in total for an estimated total of 560 minutes of chargeable time. The breakdown of the cost to prepare the records is as follows:

- \$279.00 for 9.3 hours of preparation time at \$7.50 per 15 minutes.

[245] The requester disagrees with Peel's calculation of the fee. The requester also refers to Peel's decision letters of March 3, 2011 and August 18, 2011. The March 3, 2011 decision letter states:

A review of the responsive records indicates that it will cost \$709.00 to process your request. The fee estimate is based on the following:

\$86.20 for photocopying 431 pages @ \$.20 per page  
\$600.00 for 20 hours of preparation at (\$30.00/hour); and  
\$22.80 for shipping costs.

[246] The August 18, 2011 decision letter states that Peel has decided to grant partial access to an additional 219 pages of records. This decision letter states that:

A review of the responsive records indicates that it will cost \$366.60 to process your request. The fee estimate is based on the following:

\$43.80 for photocopying 219 pages @ \$.20 per page  
\$300.00 for 10 hours of preparation at (\$30.00/hour); and  
\$22.80 for shipping costs.

[247] The requester does not dispute the photocopying or shipping costs in these decision letters but does dispute the preparation time.

### ***Analysis/Findings***

[248] As set out above, Peel did not mention any search time in its decision letters to the requester.

[249] In its initial decision letter to the affected party, which was dated five days after the date of its decision letter to the requester, Peel advised the affected party that it had reviewed a total of 1421 pages of records, which is the amount of pages at issue in this appeal.<sup>56</sup> Therefore, Peel had searched for and located the responsive records before it rendered its decisions in these appeals. Shortly thereafter, Peel provided this office with copies of 1421 pages of records.

[250] In the Notice of Inquiry dated October 25, 2011, Peel was asked the following questions concerning its search for responsive records:

How are the requested records kept and maintained?

---

<sup>56</sup> This includes pages 318-338, which were not adjudicated upon as the requester withdrew its request for records that Peel claimed the application of the mandatory personal privacy exemption in section 14(1).

What actions are necessary to locate the requested records? What is the estimated or actual amount of time involved in each action?

[251] Peel has not indicated how the records were kept or maintained. Nor did it indicate what actions were necessary to locate the records and the estimated or actual amount of time involved in each action. Instead, Peel has taken the total amount of pages and allotted one minute of search time to each page. It relies on Order PO-1834 and states that in that appeal, Senior Adjudicator David Goodis found it reasonable to charge one minute per page for manually searching through documents.

[252] In Order PO-1834, the Ministry of Health and Long-Term Care provided detailed representations as to its manual searches through both hard copy files and printouts from the computerized accounting system to locate the responsive records. The ministry sought a fee of eight hours of search time to locate and extract information from 250 printout pages, not for making severances. Senior Adjudicator Goodis found it reasonable to charge one minute per page to search for responsive information from these computerized printouts.

[253] From my review of the records and Peel's representations, it is clear that the responsive records were not extracted from computer printouts; therefore in these appeals, Order PO-1834 is not applicable.

[254] Concerning the search fee, I note that Peel did not charge the requester a search fee in either of its two decision letters. In addition, although asked to do so in the Notice of Inquiry, Peel did not provide representations as to its search for the responsive 1421 pages of records.

[255] Section 45(1)(a) of the *Act* allows an institution to charge a fee for the costs of every hour of manual search required to locate a record. Section 6 of Regulation 823 allows a search fee for manually searching for a record of \$7.50 for each 15 minutes spent by any person, which is the equivalent of \$0.50 per minute for manually searching for responsive records. Therefore, under the *Act* and Regulation 823, Peel cannot arbitrarily charge a search fee of one minute per page of record it has located.

[256] Without any information as to the amount of time spent by Peel in manually searching for the records, I find that I do not have any information on which to uphold Peel's search fee of \$710.40.

[257] With respect to preparation fee under section 45(1)(b) of the *Act*, Peel can charge for severing a record<sup>57</sup> and for a person running reports from a computer system.<sup>58</sup>

---

<sup>57</sup> Order P-4.

<sup>58</sup> Order M-1083.

[258] Section 45(1)(b) does not include time for

- deciding whether or not to claim an exemption [Order P-4, M-376, P-1536]
- identifying records requiring severing [MO-1380]
- identifying and preparing records requiring third party notice [MO-1380]
- removing paper clips, tape and staples and packaging records for shipment [Order PO-2574]
- transporting records to the mailroom or arranging for courier service [Order P-4]
- assembling information and proofing data [Order M-1083]
- photocopying [Orders P-184 and P-890]
- preparing an index of records or a decision letter [P-741, P-1536]
- re-filing and re-storing records to their original state after they have been reviewed and copied [PO-2574]
- preparing a record for disclosure that contains the requester's personal information [Regulation 823, section 6.1].

[259] Peel has not sought a preparation fee for a person running reports from a computer system.

[260] In these appeals, due to the affected party's appeal, Peel has not disclosed any information from the records to the requester. In addition, I have only ordered disclosure of 17 pages that require severance.<sup>59</sup> Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.<sup>60</sup> Therefore, I will only allow Peel for severing these 17 pages of records 34 minutes of preparation time, which amounts to a preparation fee \$17.00.<sup>61</sup>

[261] Section 45(1)(c) includes the cost of photocopies. Peel has charged the amount allowed under section 6 of Regulation 823 of \$0.20 per page for photocopies and the requester does not dispute this charge.

---

<sup>59</sup> Pages 797-800, 933-934, 1328-1334, and 1384-1387.

<sup>60</sup> Orders MO-1169, PO-1721, PO-1834 and PO-1990.

<sup>61</sup> Section 6 of Regulation 823 allows a fee of \$7.50 for each 15 minutes spent by any person for severing a part of a record.

[262] Section 45(1)(d) allows an institution to charge for shipping costs and the requester does not dispute this charge.

[263] In conclusion, I only uphold Peel's fee for \$17.00 for preparation time and its fee for photocopies and shipping costs.

**ORDER:**

1. I find that the information for which Peel has claimed the application of section 10(1)(a) in pages 232-263, 339-351, 392-412, 504-513, 514-552, 797-800, 801-813, 846-932, 933-934, 935-944, 965-967, 968-986, 987-988, 1058-1123, 1132-1139, 1328-1334, and 1384-1387 of the records qualifies for exemption under section 10(1)(a).
2. I order Peel to disclose the remaining information in the 1421 pages of records, except for the information at pages 318-338, to the requester **by NOVEMBER 21, 2012 but not before NOVEMBER 16, 2012.**
3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require a copy of the records disclosed by Peel to be provided to me.
4. I uphold Peel's fee in the amount of \$17.00 for preparation time and its fee for photocopies and shipping costs.

Original Signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ October 17, 2012