Information and Privacy Commissioner,
Ontario, Canada

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

FINAL ORDER PO-3268-F

Appeal PA10-87-2

Ontario Power Authority

October 25, 2013

Summary: The appellant represents a not-for-profit environmental protection organization. He requested records from the OPA relating to the proposed project to construct a gas-fired electricity plant in Oakville, Ontario. The OPA granted partial access to the responsive records and withheld a number of them pursuant to sections 17(1) (third party information) and 18(1) (economic interests). The appellant appealed the OPA's decision and raised the public interest override in section 23. In addition, the appellant believed that additional records should exist. In Interim Order PO-3146-I, the adjudicator upheld the section 17(1) and 18(1) exemptions for a number of records and ordered the OPA to disclose other records. The adjudicator also found that the OPA's search for responsive records was reasonable and concluded that the public interest override in section 23 did not apply in the circumstances. The adjudicator deferred her decision on specific records pending third party notification to five fourth parties and clarification from the OPA regarding one record. Only one of the five fourth parties objected to disclosure of the information about it in document 130 of record 3. The OPA provided clarification and a copy of record 17a to this office. In this final order, the adjudicator found that only the final column of the top four tables set out in record 17a is exempt under section 18(1)(c) and (d). She found further that document 130 of record 3 is not exempt under section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 18(1)(c) and (d).

Related order: Order PO-3146-I.

OVERVIEW:

[1] The appellant represents a not-for-profit environmental protection organization. He submitted a four-part request to the Ontario Power Authority (OPA) under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for a number of categories of information relating to the proposed project to construct a gas-fired electricity plant in Oakville, Ontario, including specific information about the successful bidder (the third party).

[2] Initially, the OPA issued an interim access decision to the appellant in which it identified 23 responsive records (set out on an attached index) and indicated that it was denying access to them in their entirety based on sections 18(1)(c) and (d) (economic and other interests). The OPA indicated further that records 1 to 4 were also being withheld pursuant to section 17(1) of the *Act* (third party information). The OPA indicated that it had notified the parties that submitted proposals in response to the Request for Proposals (RFP) (the affected parties), and that a final decision would be issued upon receipt of their representations.

[3] Prior to the issuance of the OPA's final decision, the appellant clarified and narrowed the request. Following receipt of the third party's representations, the OPA issued an access decision in which it granted partial access to the response to the RFP submitted by the third party (record 3), and to the Agreement (record 3A). The OPA denied access to the remaining records, pursuant to the sections 17(1) and 18(1)(c) and (d).

[4] The appellant appealed the OPA's decision. In his letter of appeal, the appellant indicated that he was only interested in seeking access to records 3, 7, 11, 15, 17, 18, 22 and 23. He also raised the possible application of the "public interest override" in section 23 of the *Act*, and indicated that he believed more records should exist.

[5] I addressed the majority of the issues arising from this appeal in Interim Order PO-3146-I, including the issues of reasonableness of search and whether the public interest override applied in the circumstances. After considering the parties' extensive representations on sections 17(1) and 18(1)(c) and (d), I upheld the section 17 and 18 exemptions for certain records and ordered the OPA to disclose other records.

[6] I also determined that additional notification of affected parties was necessary before I could dispose of certain records. As well, I found that one of the records at issue had not been provided to me. In these circumstances, I decided to defer my decision regarding these records pending notification of affected parties and clarification from the OPA regarding the missing record. These issues were set out as Preliminary Matters in Interim Order PO-3146-I as follows:

Record 17

In the index of records provided by the OPA, record 17 is described as an "OPA document summarizing total point scores arising out of Stage 3…" The copy of record 17 provided to this office is not the same as that described in the index of records or as described in the confidential portion of the affidavit provided by the "procurement expert." Moreover, the OPA's representations and affidavits contain confusing comments and descriptions of record 17.

On my review of record 17 (as provided to this office), I note that its contents are virtually identical to the contents of records 18 and 23. Accordingly, any decision I make regarding the copy of record 17 that was sent to this office will similarly apply to the same information in records 18 and 23.

I will not address access issues relating to record 17 as it is described in the index (which I will refer to as record 17a), but will address that record in the final order, once the issue has been clarified by the OPA and all parties have had an opportunity to address any issues arising from this clarification.

Notification and section 17(3)

In its representations, the third party indicates that it no longer objects to disclosing documents 10, 11, 12, 16, 17, 19, 36, 94, 125, 126, 135 and 136 of record 3. In addition, the affected party indicates that it no longer objects to disclosing documents 24, 32, 60, 85 and 130 of this record as long as other parties identified in the records consent to disclosure.

Section 17(3) states:

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

Although section 17(3) is worded as discretionary, in my view, it would be highly unlikely that an argument could be made that the section 17(1) harms could reasonably be expected to occur should disclosure be made where the third party consents to that disclosure. Accordingly, I will not consider the possible application of section 17(1) to documents 10, 11, 12, 16, 17, 19, 36, 94, 125, 126, 135 and 136 of record 3.

> However, the OPA has claimed the application of section 18(1) for documents 10, 11, 12, 16, 17, 19, 94, 125, 126, 135 and 136 of record 3, and I will consider the application of this section to these documents. As no other exemptions have been claimed for document 36, it should be disclosed to the appellant.
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> Although the third party has no section 17(1) concerns regarding documents 24, 32, 60, 85 and 130, these pages relate to other parties who have not had an opportunity to comment on them. Accordingly, I will defer my analysis and decision regarding documents 24, 32, 60, 85 and 130 pending notification of the parties referred to in them.
>
> As a result of the above, I will consider whether the mandatory exemption at section 17(1) applies to documents 52, 86, 87, 88, 89, 124 and 165 of record 3 only in the following discussion.

[7] As a consequence, I issued a Notice of Inquiry to five parties identified by the third party. Four of the five parties responded to this notice and consented to the disclosure of information in the records pertaining to them or their companies (documents 24, 32, 60 and 85 of record 3). One party responded to this notice and objected to the disclosure of the record (document 130 of record 3) pertaining to it on the basis of section 17(1). This party, which I will identify as the "fourth party" provided submissions in response to the notice. I sent a copy of these submissions to the third party and sought its views regarding disclosure of the record. The third party declined to submit further representations.

[8] As four of the parties to whom notice was sent consent to the disclosure of the records pertaining to them, I will order the OPA to disclose them to the appellant in this final order.

[9] In addition, I sent a letter to the OPA seeking clarification regarding record 17 and the record I identified as record 17a in Interim Order PO-3146-I. The OPA responded and indicated that it appeared that there had been some duplication in the numbering of the records. The OPA also provided a copy of the record that it had identified as record 17 in the index of records, and notes that it has already made representations on all of the records, which I considered in Interim Order PO-3146-I.

[10] After reviewing all of the submissions and information provided to this office in response to Interim Order PO-3146-I, I decided that it was not necessary to seek further representations on the remaining issues.

[11] In this final order, I find that only the final column of the top four tables set out in record 17a is exempt under section 18(1)(c) and (d). I find further that document 130 of record 3 is not exempt under section 17(1).

RECORDS:

[12] The records that remain at issue in this final order are record 17a as described in the OPA's index of records and document 130 of record 3, entitled "Consulting Report on the Impact of the Proposed Oakville Generating Station on Residential Property Values."

PRELIMINARY MATTER

Notification of additional third parties

[13] In responding to the letter I sent to it following the release of Interim Order PO-3146-I, the OPA notes that record 17a, as well as records 17, 18 and 23 contain information related to all of the proponents who submitted bids in response to the RFP, and submits that they should be given notice before information about them is disclosed. I have considered this submission in light of recent case law and previous decisions of this office, and, for the reasons set out below, conclude that it is not necessary to notify the other proponents in the circumstances of this appeal.

[14] In *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*,[1] the Divisional Court questioned whether homeowners should have been provided with an opportunity to participate in the inquiry process where the information that the adjudicator ordered disclosed contained their addresses or location information together with certain test results of tests done inside their homes, particularly in the circumstances where the homeowners had been given assurances of confidentiality. Recognizing that the circumstances of that case were unique, the court found that it was arguable that the information qualified as the homeowners' personal information and stated, "even if, strictly speaking it does not require notice, we are of the view that procedural fairness considerations include providing the homeowners with an opportunity to be heard."

[15] In *Merck Frosst Canada Ltd. V. Canada (Health)*[2] the Supreme Court of Canada addressed the issue of notice to third parties in the context of a federal *Access to Information Act* request for third party information. Although this decision relates to the federal *Access to Information Act* and to the institutions' obligations to provide notice prior to issuing a decision, the comments that the court made are useful in informing the analysis of this issue. In a lengthy discussion on this issue, the Supreme Court rejected Merck's argument that certain categories of records should "automatically" trigger the notice requirement. The court found that an automatic right of notice is inconsistent with the wording and purpose of the federal *Access to Information Act*, which is similar to the wording and purpose in the *Act.* That being

[1] 2011 onsc 2956 (Div.Ct.).
[2] Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, [2012] 1 S.C.R. 23.

said, the court went on to find that there is a "high threshold" that must be met before an institution can disclose information without notice. The court concluded that:

> Such disclosure is only justified in clear cases, that is, where the head, reviewing all the relevant evidence before him or her, concludes that there is no reason to believe that the record might contain material referred to in s. 20(1). The institutional head cannot repent after the fact from an ill-advised decision to disclose. Disclosure without notice and any harm that might follow are irreversible. Giving notice in all but clear cases reduces the risk of irremediable harm to the third party through inappropriate disclosure.

[16] In my view, the approach taken by this office is generally consistent with the principles set out above. In Order PO-1694-I, former Assistant Commissioner Tom Mitchinson reviewed the wording of section 28(1)(a) of the *Act* and concluded:

> If a head concludes that a record **might** contain section 17(1)-type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a).[3]

[17] I have been mindful of these principles in dealing with third party notice in the current appeal. In Interim Order PO-3146-I, I decided to notify certain fourth parties and to provide them with an opportunity to participate in the inquiry because the records clearly pertained to them and their disclosure might have affected the fourth parties' interests.

[18] However, the only information at issue about the four proponents in records 17, 17a, 18 and 23 is the scores assigned to the various criteria for each proponent by the OPA in its evaluation document. Previous orders of this office have clearly found that this type of information is not supplied in confidence, nor would its disclosure reveal information supplied by the third party, in confidence, and have found that the scores do not qualify for exemption under section 17(1).[4] As I noted in Order PO-1993:

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[3] Emphasis in the original.

[4] PO-1993, upheld in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563], MO-1237, P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, [1998] O.J. No. 3485, 41 O.R. (3d) 464, 164 D.L.R. (4th) 129, 112 O.A.C. 121 (C.A.), reversing [1995] O.J. No. 1319, 23 O.R. (3d) 31, 125 D.L.R. (4th) 171, 32 Admin. L.R. (2d) 76, 85 O.A.C. 43, 61 C.P.R. (3d) 480 (Div. Ct.), MO-1462.

> Unlike the situation described in many previous orders of this office, which have considered "notes" taken by evaluators during the interview/presentation portion of the RFP process or references to details of proposals in evaluation documents to reflect the information actually provided by the bidders at that stage (for example, Orders PO-1816, PO-1818 and PO-1957), the information at issue in this appeal is simply the score assigned to one particular aspect of each proposal by Ministry staff. The record as a whole similarly comprises the scores assigned by Ministry staff relating to other aspects of each proposal.

[19] Further, in Order MO-1237, former Senior Adjudicator David Goodis stated:

> …In each case, disclosure of these scores would not reveal the specific information actually supplied to the architect (as agent for the Board). Rather, the architect calculated or derived the scores based on the information that was actually supplied, or in some cases the architect arrived at the scores based on a subjective evaluation of the information actually supplied. Further, the number of submissions received and the name of the engineering firm clearly does not constitute information supplied to the Board, or to the architect as agent for the Board.[5]

[20] The information at issue in records 17, 17a, 18 and 23 is virtually identical to the types of information described in these previous orders. In *Northstar*, there were arguable issues to be determined. Given the clear and consistent findings in previous orders that the scores on their own are not supplied by third party bidders, there is, in my view, no procedural unfairness in not notifying the other proponents in the circumstances of this appeal.

ISSUES:

A: Does the discretionary exemption at section 18(1)(c) and/or (d) apply to record 17a?

B: Does the mandatory exemption at section 17(1) apply to document 130 of record 3?

[5] Emphasis in the original.

DISCUSSION:

A: Does the discretionary exemption at section 18(1)(c) and/or (d) apply to record 17a?

[21] As noted above, the OPA has claimed the application of sections 18(1)(c) and (d) to the information contained in a number of records, including record 17a. These exemptions state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[22] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (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.

[23] For sections 18(1)(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[6]

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

[24] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[7]

[25] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[8]

[26] 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.[9]

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

[27] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[10]

[28] This exemption is arguably broader than section 18(1)(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.[11]

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

[29] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[12]

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[7] Orders MO-1947 and MO-2363.
[8] Order MO-2363.
[9] See Orders MO-2363 and PO-2758.
[10] Orders P-1190 and MO-2233.
[11] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[12] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

Record 17a

[30] This record is defined in the index of records as, "undated untitled OPA document summarizing total point scores arising out of Stage 3 – Evaluation of Rated Criteria, for the four named proponents." It comprises four charts that contain the same information as that which is found in portions of record 15, which I addressed in Interim Order PO-3146-I. It also contains a summary chart that sets out the same information as that contained in a portion of record 17, which I also described and addressed in the interim order.

[31] In Interim Order PO-3146-I, I noted that the OPA was prepared to provide access to the headings of each of the rated criteria contained on record 15. This information is contained in the first two columns of the four charts on record 17a. In addition, I found that disclosure of the final score set out in the final column of record 15 could not reasonably be expected to result in the section 18(1)(c) or (d) harms, and I ordered that this information be disclosed to the appellant. A compressed form of this information is found in the third column of each of the four tables contained in record 17a. I note that record 15 pertains only to the winning bidder, whereas record 17a identifies the scores given to each of the four proponents. After reviewing my discussion in Interim Order PO-3146-I, I find that the reasoning applies regardless of who the information pertains to. Accordingly, for the reasons set out in Interim Order PO-3146-I, I find that the information contained in the first three columns of tables 1 through 4 does not qualify for exemption under section 18(1)(c) or (d) of the *Act*.

[32] The information contained in the summary table and the total portion of the four tables identified above is the same as the information found in the portions record 17 that I ordered the OPA to disclose. Similar to my findings above, I find that disclosure of this information could not reasonably be expected to result in either of the section 18(1)(c) or (d) harms.

[33] For the same reasons set out in Interim Order PO-3146, I find that disclosure of the final column of the tables relating to the four proponents could reasonably be expected to result in one of the harms set out in section 18(1).

[34] I reviewed the OPA's exercise of discretion in Interim Order PO-3146-I and apply my findings in that order to the portions of record 17a that I have found to qualify for exemption in this order. Accordingly, I find that the final column of the four tables relating to the individual proponents is exempt under section 18(1)(c) and (d).

[35] For greater certainty, I have highlighted the portions of record 17a that should be disclosed to the appellant.

B: Does the mandatory exemption at section 17(1) apply to document 130 of record 3?

[36] The fourth party states that, unless certain conditions are met, it objects to the disclosure of document 130 or record 3, which is entitled, "Consulting report on the impact of the proposed Oakville Generating Station on residential property values." The conditions for disclosure suggested by the fourth party require specific undertakings and releases from this office and the requester. It is not possible to meet these requirements as disclosure under the *Act* is effectively disclosure to the world, and a party receiving disclosure under the *Act* may do what they wish with the records, subject to any legal restrictions imposed by law (other than the *Act*).[13] Accordingly, I will address the reasons given by the fourth party for its objection to disclosure under the *Act*.

[37] Section 17(1) 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, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[13] Further in this final order, I will discuss issues relating to the *Copyright Act*. It is worth noting at this point, however, that the *Copyright Act* contains provisions that protect copyright in the event that copyrighted material is ordered disclosed under the *Act*:

> 32.1(2) Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright in the record, personal information or like information, as the case may be, has a right to do.

> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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

[39] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[40] In its initial representations, the OPA states that document 130 of record 3 contains technical and commercial information. These types of information are defined in previous orders of this office as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[16]

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[14] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[15] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[16] 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.[17] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[18]

[41] The fourth party does not specify the type of information that is contained in the record at issue. However, it indicates that the "contents of the report are comprised of a collection of data, from a variety of sources and our conclusions are unbiased opinions. The report identified the scope of our investigation and reliance on the data." After considering the fourth party's description, and reviewing the record, I find that it contains information that would qualify as "scientific," which is defined as follows:

> *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.[19]

[42] I am satisfied that the report was prepared by an expert in the social sciences field and that it contains specific information relating to methodology, approach and results.

Part 2: supplied in confidence

Supplied

[43] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[20]

[44] 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.[21]

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[17] Order PO-2010.
[18] Order P-1621.
[19] Order PO-2010.
[20] Order MO-1706.
[21] Orders PO-2020, PO-2043.

[45] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[22]

[46] 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.[23]

In confidence

[47] 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.[24]

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

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

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[22] This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[23] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).

[24] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[25]

[49] Document 130 of record 3 is part of the third party's bid package. Consistent with my decision in Interim Order PO-3146-I, I am satisfied that this document was supplied to the OPA in the sense contemplated above.

[50] In Interim Order PO-3146-I (at paragraphs 49 and 50), I referred to the third party's expectations of confidentiality as follows:

> The third party notes that the "Bid Package" was prepared and submitted to the OPA in response to the RFP, and indicates that the documents discussed under this heading were all included in the Bid Package. The third party states further that the Bid Package was submitted with an expectation that it would be kept confidential, noting that it did not receive information from its competitors.
>
> The OPA agrees with the third party's expectation of privacy at the time the bids were submitted. In addition, OPA states that the RFP contains an explicit expectation of confidentiality provision. The confidentiality provision indicates generally that all information provided by proponents is subject to the *Act*. The provision goes on to require proponents to clearly indicate which portions of the bids contain proprietary or confidential information. Finally, the confidentiality provision clearly states that if this is not done, the proponent "will be automatically deemed to certify to the OPA that no portion of the [bid] contains proprietary or confidential information for which confidentiality is to be maintained by the OPA…"

[51] I note that the confidentiality statement the third party attached to its bid package refers to the documents contained in Tab 3.3.3, which includes document 130. Consistent with my findings in Interim Order PO-3146-I, I am satisfied that the bid package, including document 130, was supplied to the OPA explicitly in confidence.

Part 3: harms

General principles

[52] 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.[26]

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[25] Orders PO-2043, PO-2371, PO-2497.
[26] Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.).

[53] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[27]

[54] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[28]

[55] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act.*[29]

[56] As I indicated above, in its initial submissions, the third party stated that it did not object to disclosing document 130 of record 3 unless the fourth party objected to disclosure. The third party did not address this document further in its submissions on section 17(1) of the *Act*.

[57] I provided the third party with a copy of the fourth party's submissions, and invited it to make further submissions regarding this record. However, the third party chose not to submit any additional representations. In an affidavit that the third party attached to its initial representations, the affiant stated:

> As part of the Bid Package, the OPA required [the third party] to obtain information and documentation from third parties. Several of the documents that remain at issue in this appeal are documents that were obtained by [the third party] from [fourth parties], or contain confidential or proprietary information that belongs to a [fourth party]. [The third party] objects to producing these documents on the basis that they either originated from or contain confidential or proprietary information related to [fourth parties].
>
> …
>
> With respect to page 130 of Record 3, Cornwall Study, [the third party] does not object to the release of this document, provided that consent to the release is provided in advance directly from [the fourth party] ….
>
> Absent express consent from the parties identified above, [the third party] objects to the release of these documents.

[27] Order PO-2020.
[28] Order PO-2435.
[29] Order PO-2435.

[58] Accordingly, although the third party indicates that it will support an objection made by a fourth party, it has not addressed any of the section 17(1) requirements insofar as this record is concerned. Moreover, I find that the comments made by the third party indicate that it has no third party concerns regarding document 130 of record 3.

[59] As a result, I will consider only whether the fourth party has met the remaining requirements of the section 17(1) exemption.

[60] The fourth party does not specifically refer to any of the harms set out above, although its representations allude to the harm set out in section 17(1)(c).

Section 17(1)(c): undue loss or gain

[61] The fourth party states that in order to avoid any misinterpretation of the information contained in its report, it does not want it to be disseminated and used out of context. Moreover, in order to protect itself, it made its report "user specific." Since the requester is not the party for whom the report was prepared, it is not user specific. As evidence of this specific user approach, the fourth party notes that the report is addressed to its client (the third party) and clearly states in several places that it is "for the use of [the third party] and the governmental authorities involved in the approval process…" and that it cannot be used for any other purpose.

[62] The fourth party points out another statement included in the report which states that the report is not intended for use by others and:

> [W]e accept no responsibility whatsoever if this analysis or any part of this report is used otherwise. This report is to assist [the third party] in assessing the impacts of the proposed Oakville Generating Station. It cannot be used for any other purpose. Any liability in this respect is strictly denied unless written authorization has been provided from [the fourth party].

[63] The fourth party also submits that the report is copyright protected.

Analysis and findings

[64] In Order M-37, former Commissioner Tom Wright commented on the relationship between copyright protection and disclosure under the *Act*:

> In its representations, the institution also states that the fact that the record is under copyright and was designed solely for use by a trained evaluating committee is evidence that it was "supplied in confidence".

The affected party claims that "our materials are copyright and as such are not to be reproduced without our expressed permission."

In Order M-29, dated July 30, 1992, I dealt with the issue of copyright and its relationship to a request for access to information under the Municipal Freedom of Information and Protection of Privacy Act.

In that Order, I noted that providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Sections 27(2)(i) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.

Sections 27(2)(i) and (j) of the Copyright Act[30] read as follows:

> The following acts do not constitute an infringement of copyright:
>
> (i) the disclosure, pursuant to the Access to Information Act, of a record within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like material;
>
> (j) the disclosure, pursuant to the Privacy Act, of personal information within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like information;

As the Municipal Freedom of Information and Protection of Privacy Act is a "... like Act of the legislature of a province ..." **disclosure** of copyrighted information is not an infringement of copyright.

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[30] These sections have been replaced by sections 32.1(a) and (b), which state:

> 32.1 (1) It is not an infringement of copyright for any person
>
> > (a) to disclose, pursuant to the *Access to Information Act*, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;
> > (b) to disclose, pursuant to the *Privacy Act*, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information;

> Since the Copyright Act will not be violated by reproducing records for the purposes of the Municipal Freedom of Information and Protection of Privacy Act, a government institution may not refuse to grant access to a record in its custody or control solely on the basis of a copyright claim.

[65] I agree with these findings and conclude that holding copyright in a document, on its own, is insufficient to establish that disclosure of the record at issue could reasonably be expected to result in any of the section 17(1) harms.

[66] It appears, from a reading of the fourth party's representations as a whole that the harm it envisions from disclosure of the record arises because the requester is not "user specific," and it would have "no control over how the report may be used, what data may be extracted and/or possible dissemination of conclusions." The fourth party expresses the concern that if the report is used out of context, there is a possibility that it would have to defend itself against other parties, and that it would have to bear any attendant expense in doing so. The fourth party believes that it is not fair that it should have to "assume this burden."

[67] I am not persuaded that the statements identified above, which were incorporated into the body of the record, support a reasonable expectation that disclosure of the information could result in one of the section 17(1) harms. Rather, these statements establish the limitations that the fourth party seeks to impose on the "use" to which the information is put. The statements referred to above clearly specify that reliance on the information contained in the report is qualified and restricted to the parties named in the report. As well, these statements appear to be designed to limit the fourth party's liability in the event that the information is misused. Although the fourth party has concerns about its liability with respect to the information contained in the record, I am not persuaded that the concerns raised by the fourth party provide the kind of detailed and convincing evidence required to establish a reasonable expectation of harm.

[68] After reviewing its submissions in their entirety, I conclude that the fourth party has failed to satisfy its burden of proof by providing "detailed and convincing" evidence to establish a "reasonable expectation of harm". In this case, the evidence provided by the fourth party amounts to speculation of possible harm, and is, therefore, not sufficient to meet its onus. Moreover, given the numerous references in the report that limit its liability, as noted in the above discussion, I am not persuaded that it could reasonably be expected to suffer the harm it envisions should the report be disclosed.

[69] In addition, I agree with the findings in previous orders of this office, which have held that even though certain information could be misleading, this is not sufficient to find that its disclosure would result in any of the section 17(1) harms.[31] In a similar

[31] Order MO-1452. See also: *Merck Frosst Ltd. V Canada (Health)*, cited above, para. 224.

vein, I find that, should the requester attempt to use the report for a purpose other than that which the fourth party intended, this is not a harm contemplated under section 17(1)(c).

[70] Further, previous orders of this office have found that the consequence of legal action as a result of disclosure does not fit within the harms set out in section 17(1).[32] I agree with this approach and find that, even if the fourth party were somehow to become involved in legal action as a result of the misuse of this report following its disclosure, it is not sufficient reason to withhold the record under section 17(1).

[71] Accordingly, I find that the fourth party has failed to satisfy the third requirement of section 17(1) and document 130 of record 3 not exempt under the third party exemption.

SUMMARY

[72] In summary, I find that only the final column of the top four tables set out in record 17a is exempt under section 18(1)(c) and (d). I find further that document 130 of record 3 is not exempt under section 17(1).

[73] As I indicated above, I have already considered and made my decision regarding the application of the public interest override in section 23 in Interim Order PO-1346-I. Accordingly, the records will be ordered disclosed as discussed above.

ORDER:

1. I order the OPA to disclose documents 24, 32, 60, 85 and 130 of record 3 and the highlighted portions of record 17a to the appellant by providing it with a copy of these records by **December 2, 2013** but not before **November 27, 2013.**

2. I uphold the OPA's decision to withhold the remaining portions of record 17a.

3. In order to verify compliance with this order, I reserve the right to require the OPA to provide me with a copy of the records disclosed to the appellant pursuant to order provision 1.

Original Signed by: October 25, 2013
Laurel Cropley
Adjudicator

[32] Order MO-1481.