

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **FINAL ORDER MO-3058-F**

Appeal MA12-144

Town of Halton Hills

June 10, 2014

**Summary:** The requester sought the winning proposal relating to a Request for Proposal, as well as records of the evaluation process. The town denied access to portions of the records in reliance on the mandatory exemption in section 10(1) (third party information), the discretionary exemption in section 11 (economic and other interests of the institution) and the mandatory exemption in section 14(1) (personal privacy). An interim order (MO-2896-I) did not uphold the application of the section 11 exemption, and partially upheld the application of the section 14(1) exemption, to the evaluation materials. This order deals with the section 10(1) exemption and upholds its application to portions of the winning proposal and the evaluation materials. It also finds that the personal privacy exemption in section 14(1) applies to some portions of the winning proposal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (personal information), 10(1), 14(1).

**Orders Considered:** Orders MO-2093; MO-1811; MO-1847

**Cases Considered:** *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)* 2012 SCC 3, [2012] 1 S.C.R. 23

## **OVERVIEW:**

[1] The Town of Halton Hills (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specified Request for Proposal (RFP). In particular, the requester sought access to "all submissions received for this RFP" and "all scorecards, notes, minutes from meetings, etc. related to the Town's evaluation and decisions pertaining to this RFP" (referred to here as the "evaluation materials").

[2] The records relate to the construction of a new sports complex, the proposals submitted by a number of contractors (the affected parties) for the provision of construction management services and the town's evaluation of the proposals.

[3] The history of the request and appeal is described in my Interim Order MO-2896-I and it is unnecessary to review all of it again here. Among other things, the requester (now the appellant) narrowed her request to include only the winning RFP submission, as well as the evaluation materials. The town's decision was to deny access to portions of the evaluation materials based on sections 10(1) (third party information), 11 (economic interests of an institution) and 14(1) (personal privacy), and deny access to the entire winning proposal based on the same exemptions. In my Interim Order, I considered whether sections 11 and 14(1) applied to the withheld portions of the evaluation records. I did not uphold the application of section 11, and partially upheld the application of section 14(1).

[4] I deferred my determination on whether section 10(1) of the Act applied to any of the records, as the affected parties had not been given an opportunity to review the portions previously withheld by the town under section 11. In the Interim Order, I therefore directed the town to provide notice to the affected parties of the records in which they may have an interest.

[5] I have before me the town's representations, as well as representations from some of the affected parties. The appellant was invited to submit representations in response to those of the town and the affected parties, and did not submit any. In the following, I will refer to the winning proponent as the "primary affected party" or the "winning bidder".

[6] This final order deals with the remaining issues in the appeal, concerning the application of sections 10(1) and 14(1) to parts of the records.

[7] In this order, I uphold the town's decision to withhold access to some information under sections 10(1) and 14(1), but order disclosure of other portions of the records.

## **RECORDS:**

[8] The records are grouped as follows:

1. Winning RFP proposal (64 pages). The town withheld portions of certain pages, and other pages in their entirety, based on sections 10(1) and 14(1). The primary affected party supports the position of the town, but also submits that additional information should be withheld on the basis of section 10(1). The submissions of the town and the primary affected party refer to pages of this submission, but use different numbering. In this order, I will use the numbering adopted by the primary affected party since the town will be receiving a copy of the pages that are subject to my directions in any event.<sup>1</sup>
2. Scorecards, notes, minutes (155 pages). This group of records consists of a chart summarizing the financial submissions of all thirteen affected parties, notes of meetings in which town staff reviewed the proposals by the affected parties, notes of interviews with the shortlisted affected parties, correspondence, interview questions, and scoresheets/evaluation spreadsheets for all affected parties. The town withheld portions of these records, as well as the entire chart, based on section 10(1) (it decided to disclose the names of the affected parties in the first column of the chart).

## **THIRD PARTY INFORMATION:**

[9] I note here that the winning bidder has not objected to the town's decision to disclose some portions of its proposal. Sections of its proposal that it has not objected to disclosing, except for discrete proposed severances, include the cover letter to its proposal, the Table of Contents, the Corporate Profile, its Construction Management Approach, Similar & Related Projects, and Letters of Reference. The winning bidder's representations support the town's decision to withhold parts of the proposal based on the application of the section 10(1) and 14(1) exemptions. It also identifies additional information in its proposal that it believes to be exempt under section 10(1).

[10] The parts of section 10(1) relevant to this appeal state:

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

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<sup>1</sup> The town provided this document on a CD. When printed out, it was apparent that pages 4-10 were inserted in error. All references to the winning RFP proposal below do not include these pages.

- (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;

[11] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>2</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>3</sup>

[12] 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.

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

[13] The types of information listed in section 10(1) have been discussed in prior orders. Relevant to this appeal are the following:

*Trade secret* means information including but not limited to a formula, pattern, compilation, program, method, technique, or process or

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<sup>2</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>3</sup> Orders MO-2855, PO-1805, PO-2018, PO-2184, and MO-1706.

information contained or embodied in a product, device or mechanism which

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

[14] The town and the affected parties submit that the records contain information falling under the categories of information described above. It is unnecessary to review each category separately as I am satisfied that all of the records fit within the definition of commercial information. The records contain a detailed proposal for the provision of construction management services to the town, and document the town's evaluation of the different proposals received. They were created for the purpose of entering into a commercial arrangement. More detailed information about the records is contained in the summary of the affected party's representations below.

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

### ***General principles***

[15] 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>4</sup> 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>5</sup>

[16] 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.<sup>6</sup>

[17] In order to satisfy the "in confidence" component of part two, the party 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>7</sup>

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<sup>4</sup> Order MO-1706.

<sup>5</sup> Orders PO-2020, PO-2043.

<sup>6</sup> This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, see above at footnote 1 and, more recently, in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) and *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (CanLII).

<sup>7</sup> Order PO-2020.

[18] 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; and
- prepared for a purpose that would not entail disclosure.<sup>8</sup>

### ***Representations***

[19] The town asserts that the information in the winning bid record was supplied in confidence to the municipality by the successful bidder "implicitly or explicitly." In its representations, it refers to the Request for Proposal which contains the following provision:

"All documents, including proposals, submitted to the Town become the property of the Town. They will be received and held in confidence by the Town, subject to the provisions of the *Freedom of Information and Protection of Privacy Act*."

[20] The town submits that the information in the winning proposal has been treated consistently in a manner that indicates a concern for its protection from disclosure and is not otherwise publicly available. Although it did not make detailed representations on the application of section 10(1) to the evaluation materials, it submits generally that its submissions on the winning proposal are equally relevant to those other records.

[21] A number of the affected parties provided representations to the town, when notified of the request, and then during the course of this appeal. I have reviewed and considered all of them in my determinations. The winning bidder submits that the information in its proposal was supplied to the town with a reasonable expectation that this information would remain confidential, and supports the town's representations. Other affected parties also submitted that the information in their proposals was submitted with an expectation of confidentiality, that the town treats their proposals as confidential, and that their information is never disclosed at any stage of the bidding process. One referred to specific confidentiality language in its proposal.

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<sup>8</sup> Orders PO-2043, PO-2371, PO-2497.

[22] As indicated above, the appellant made no submissions.

***Finding***

[23] Although the evaluation materials were created by the town's employees or evaluation committee, they incorporate some information taken directly from the affected parties' proposals, or provided by the proponents during their interviews. This information is contained in the chart at page 1 of the evaluation materials, in the interview notes of the evaluation committee, and in the spreadsheet. It includes descriptions of the proponents' methodology and approach to the project, examples of prior or current work, descriptions of their workforce, and the financial details of their proposals. It is typical of the type of information submitted by proponents in support of efforts to obtain a contract and constitutes the "informational assets" of the proponents. I find that this information was "supplied" to the town within the meaning of section 10(1).

[24] Record 1, the winning RFP submission, was also "supplied" to the town within the meaning of section 10(1). My conclusion with respect to this record is consistent with many previous orders of this office that have considered the application of section 10(1) or its provincial equivalent to RFP proposals.<sup>9</sup> As this office stated, in Order MO-1706, in discussing a winning proposal:

...it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution... [page 9]

[25] I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.

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<sup>9</sup> See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.



[26] I distinguish the circumstances before me from those where a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the parties, and no separate contract between the parties is created. In Order MO-2093, for instance, this office found that where a winning proposal governed the commercial relationship between a city and a proponent, and there was no separate written agreement, the terms of the winning proposal were mutually generated and not "supplied" for the purpose of section 10(1). In such a case, it is reasonable to view the winning proposal as no longer the "informational asset" of the proponent alone but as belonging equally to both sides of the transaction.

[27] I am therefore satisfied that that the information in the winning proposal, as well as information in the evaluation records that is derived from all the affected parties' proposals, was supplied to the town within the meaning of section 10(1). I am also satisfied that it was supplied with a reasonably held expectation of confidentiality. As the parties have noted, the confidentiality provision in the Request for Proposal states that it is subject to the *Act*. Given that the *Act* explicitly protects the confidential informational assets of third parties, this reference does not negate the expectation of confidentiality regarding the proponents' RFP proposals. It is an expression of the town's intent to maintain the confidentiality of the proposals, and it is reasonable for the affected parties to rely on it.

[28] Although I accept that, in general, the proposals were submitted with a reasonably held expectation of confidentiality, I also acknowledge that the winning proposal contains elements which are not inherently confidential. Some of this is in the nature of promotional material, similar to that found on its own website. In fact, the town decided to disclose this material, and the winning bidder does not oppose that decision.

[29] My finding on confidentiality therefore applies only to the parts of the proposal and the evaluation materials that remain at issue, containing commercial information of the proponents.

[30] In sum, I find that the information remaining at issue was supplied in confidence by the affected parties and meets the second part of the test for exemption under section 10(1).

### **Part 3: harms**

#### **General principles**

[31] This part of the test for exemption under section 10(1) is based on a conclusion that disclosure may result in one of the harms described in that section. As noted above, information of third parties is exempt if disclosure "could reasonably be expected to" lead to those harms.

[32] This office has stated that 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>10</sup>

[33] 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*. 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.<sup>11</sup>

[34] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner) (Community Safety)*,<sup>12</sup> the Supreme Court of Canada recently discussed the standard of proof required to establish the risk of harm from disclosure under access to information legislation. Although that decision dealt with the interpretation by this office of the law enforcement exemption in the provincial *Act*, it provided general guidance on the application of exemptions that are based on risk of harm. The Court reviewed the various ways in which the standard of proof has been described, in Ontario and in other jurisdictions. It concluded that there should be one consistent formulation of the standard, requiring that a party resisting disclosure provide evidence establishing a “reasonable expectation of probable harm”. The Court described this burden as follows:

The “reasonable expectation of probable harm” formulation simply “captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm”... [para. 52]

[35] The Court added:

This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...[para.54]

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<sup>10</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

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

<sup>12</sup> 2014 SCC 31.

[36] While proposing this single formulation, the Court also recognized that there was “no practical difference” between it, and the formulation applied by this office in previous decisions. [para. 53]

[37] In the Notice of Inquiry, I invited the parties to address a previous decision by the Supreme Court that also discussed the standard of proof required to establish a risk of harm from disclosure, *Merck Frosst Canada Ltd. v. Canada (Health) (Merck)*.<sup>13</sup> None of the parties addressed this decision in its representations. In this decision, I will apply the new formulation proposed in *Community Safety* recognizing, however, that neither *Merck* nor *Community Safety* alters the principles this office has long applied in discussing this part of section 10(1). I therefore turn to consider whether the material before me provides clear and convincing evidence establishing the “reasonable expectation of probable harm” required to support the application of the section 10(1) exemption.

## **Representations**

[38] The town reviews the winning proposal section by section, describing how disclosure of the information could reasonably be expected to prejudice significantly the competitive position of the successful bidder, and result in similar information no longer being supplied where it is in the public interest that it continue to be so supplied, within the meaning of sections 10(1)(a) and (b).

[39] An example given is information that illustrates how the winning bidder’s particular mode of operations leads to savings for its customers. The proposal contains information comparing the winning bidder’s bid on other projects with those of its competitors, linking the savings to this approach. The town submits that disclosure of this information will enable competitors of the winning bidder to adjust their pricing on future projects in a manner that will defeat the competitive advantage of the winning bidder’s particular mode of operations. This, in turn, can reasonably be expected to lead to such information no longer being supplied to the town. It is in the public interest that it continue to be supplied since it enables the town to assess the savings that may be realized by using the winning bidder.

[40] The town also submits that disclosure of parts of the proposal that describe a number of similar projects by the winning bidder could reasonably be expected to prejudice the competitive position of the winning bidder. The town’s submissions focus only on projects that are not described on the winning bidder’s website, as the proposal describes a number of past projects, some of which are also featured on the website. The town does not apply section 10(1) to exempt those proposals which are found on the website.

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<sup>13</sup> 2012 SCC 3, [2012] 1 S.C.R. 23.

[41] The town submits that sections 10(1)(a) and (b) apply to the details of those projects. The specific details at issue (the "value" of the contracts and "size" of the projects) would enable competitors to calculate the cost of each project on a per-square-foot basis, thereby facilitating adjustment of their pricing on future projects to the detriment of the successful bidder. Again, the town argues, this could reasonably be expected to result in similar information no longer being supplied, when it is in the public interest that it continue to be supplied.

[42] The town also addresses the portions of Record 1 containing the detailed bid of the winning bidder, including a description of the services and a breakdown of fees for different components of the services. The town submits that disclosure of the detailed pricing for the bid (ie. rates for employees and facilities on an hourly, weekly, monthly, etc. basis), as set out in chart form, could reasonably be expected to prejudice significantly the competitive position of the affected party and result in similar information no longer being supplied. It describes the anticipated harm in the same terms as above.

[43] In the town's submission, section 10(1) also applies to exempt information in the last 3 pages of Record 1, containing a bid by the primary affected party on a different project. At the time of the town's submissions, this contract had not been awarded. This bid also contains a description of the services offered, and a breakdown of fees for different components of the services.

[44] Turning to the evaluation materials, the town submits that, for the same reasons expressed above, section 10(1) exempts the portions of those materials consisting of the affected parties' information.

[45] The primary affected party provided lengthy and detailed representations on all aspects of its proposal that it objects to having disclosed. Although I am unable to refer to some of the detail of its representations, because of confidentiality, I describe them generally below.

[46] The primary affected party did not refer specifically to each paragraph in section 10(1), but its submissions address the harms described in sections 10(1)(a) and (c). It submits that disclosure of its proposal would significantly prejudice its competitive position within the field of construction management. Further, it states that disclosure would cause it undue loss and result in a substantial gain to any firm obtaining the information, in that the information could be exploited by its competitors in the marketplace.

[47] The winning bidder reviews its proposal in detail, explaining why disclosure of each part, in its view, would lead to the harms described above. It submits that information on pages 2, 6, 8 and 10 describes features of its business that provide it

with one of its largest competitive advantages. Disclosure of this information could lead to the loss of that advantage in a manner described in its confidential representations.

[48] Information on page 10 provides details of past bids, comparing the winning bidder's successful bid price with those of other contractors. Pages 17 to 24 and 27 to 34 provide information about past jobs performed by the winning bidder, including details of the total area of the construction project and the value. The primary affected party submits that disclosure of this information could be extrapolated into an advantage for its competitors.

[49] Pages 25 and 26 provide details of a large project. The primary affected party submits that it has lengthy non-disclosure agreements in place with this large client and any public release of this information could seriously cause harm to the client and the firm.

[50] The primary affected party submits that disclosure of information about its staff on page 38 could lead to consequences causing it significant financial hardship. I am unable to refer to the specific consequences it describes as it forms part of the confidential submissions of this party.

[51] Pages 39 to 47 consist of the resumes of various employees of the affected party and include information about past experience, professional qualifications and references. Included in these pages is information about past projects with the winning bidder, and their value. Pages 48 to 50 provide, in chart form, similar information about key staff, and also describe their proposed roles on the project.

[52] The primary affected party did not object to disclosure of pages 52 to 57, with the exception of some portions on pages 56 and 57 which contain similar information to that found on pages 17 and 19.

[53] Pages 59 to 61 consist of the detailed fee proposal for the project. The primary affected party submits that disclosure of the details of the project timeframe and pricing of the project could reasonably be extrapolated to reveal its operating costs. Amongst the details is information about the rates charged for specific employees and the breakdown of the bid price into phases of the project.

[54] Pages 62 to 64 consist of a detailed fee proposal for a separate project which had not, at the time of the submissions, been awarded.

[55] As indicated above, during the initial stage of the adjudication process, and following my Interim Order, the other affected parties (consisting of all the bidders discussed in the evaluation materials) were given notice of the information pertaining to them and invited to provide submissions on the application of section 10(1) to that information. Most of them had objected to disclosure of the information then at issue

at the request stage. Some provided representations in response to the Notice of Inquiry, and then in response to the additional notification following the Interim Order. Generally, the submissions of the affected parties addressed their concern regarding harm to their competitive position should the information be disclosed. Of greatest concern was the potential disclosure of their methodologies and detailed pricing structure.

[56] The appellant made no submissions on the appeal.

## **Analysis**

### ***Record 1 - the winning proposal***

[57] On my review of the evidence and representations before me, I conclude that parts of the proposal meet the "harms" part of the test for exemption under section 10(1). In particular, I find that disclosure of the detailed fee proposal for this project and another project, as contained on pages 59 to 64 of Record 1, could reasonably be expected to prejudice significantly the competitive position of the primary affected party, or result in undue loss or gain. They reveal the details of the primary affected party's proposed approach to the project. This information is unique to this affected party, was developed for the purpose of this particular project (based on its experience and expertise) and is not publicly known.

[58] I accept the submissions of the primary affected party that the information on these pages, including a description of the services and timeframe for this project and another project, charge out rates, wages, details of overhead costs and costing of bonding and insurance, could be used to extrapolate its operating costs. I accept its submission that these details, if disclosed, could be used to the advantage of competitors and disadvantage of the primary affected party. Disclosure could therefore reasonably be expected to result in significant prejudice to this party's competitive position, and result in undue loss to it with corresponding undue gain to its competitors.

[59] I am not satisfied that disclosure of the size and value of previous projects performed by the affected party (on pages 10, 17 to 34 and 56 to 57) could reasonably be expected to lead to the harms in section 10(1)(a) and/or (c). The information the affected party refers to consists, at most, of the total square footage and overall financial value of the project. The submissions of the affected party on the harm that could result from disclosure of this information are very general. It asserts, essentially, that information extrapolated from these figures could advantage its competitors. Given the range of costs that are taken into account in arriving at the total values, and the normal market fluctuations in those costs, I find that disclosure of this information

is unlikely to allow for an accurate extrapolation of the affected party's sensitive financial and commercial information.<sup>14</sup>

[60] As the town has acknowledged, the winning bidder's website provides this information for some of the projects featured in its proposal. This office has recognized that this type of information is frequently made public by contractors, if not by a public institution.<sup>15</sup> Given its willingness to disclose the size and value of at least some of its previous projects, I am not convinced that disclosure of the same information for other projects could reasonably be expected to result in the harms covered by section 10(1)(a) or (c).

[61] I am likewise not convinced that disclosure of the approximate number of the affected party's employees (on pages 2, 6 and 30) can reasonably be expected to lead to the harms described in section 10(1)(a) or (c). Not only is this information very general, I also find the representations of the affected party on this point speculative, given the many other factors that could contribute to the consequences it describes. I am also not convinced by its harms arguments with respect to the information it seeks to sever from page 6 of the proposal. This page provides general information about the company (such as annual business volume), in the nature of promotional material, whose disclosure could not reasonably be expected to result in the harms in section 10(1).<sup>16</sup> I arrive at the same finding with respect to the statement on page 13 about the company's history.

[62] I accept that the statements on page 8 reveal the affected party's approach to some elements of the construction budget and its construction management fees, and that disclosure of this information would reveal one of the company's most significant competitive strategies. I find that disclosure of this information can reasonably be expected to result in the harms described in section 10(1)(a) or (c).

[63] I find unconvincing the submission that disclosure of the information on page 10 could result in the harms described in section 10(1)(a) or (c). The examples of prior work given on that page are the result of public tendering processes and it is evident that the contractors bidding on those projects, including the affected party, had access to information allowing them to compare their bids. The other information on this page, describing a feature of the affected party's mode of operation and membership in an industry organization, is general in nature and hardly unknown.

[64] Below, I find that portions of a chart on pages 48 to 50 that describe the roles that certain employees of the affected party will fulfill on the project are not exempt under the personal privacy exemption. I find that those portions are also not exempt

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<sup>14</sup> See Order MO-2774, at para. 25.

<sup>15</sup> See Order MO-1847, at p. 5.

<sup>16</sup> See, for instance, Order MO-1847, at p. 15, regarding "annual business volume".

under section 10(1). I have considered the winning bidder's submissions on the harm that could result from disclosure of the information in this chart as a whole and they do support the application of the section 10(1) exemption to these specific portions.

[65] Although the town made representations on the application of section 10(1)(b), the primary affected party's submissions for the most part do not support the town's position that disclosure could reasonably be expected to result in similar information no longer being supplied. Its representations focus on harm to its competitive position, rather than on the prospect that disclosure will lead to a future reluctance to provide the information at issue. As I have found some information in the winning proposal exempt under sections 10(1)(a) and (c), it is unnecessary to consider whether section 10(1)(b) would also apply to that information.

[66] With respect to the information I have found not exempt under section 10(1)(a) or (c), I am not satisfied that the evidence establishes the risk of harm described in section 10(1)(b). In this respect, I have regard to the findings made in Order MO-1811, dealing with a similar argument and information about prior projects performed by RFP proponents:

I am not persuaded that disclosing the specific information that is at issue in this appeal could reasonably be expected to result in similar information no longer being supplied to the City in the context of future construction projects. Construction companies doing business with public institutions such as the City understand that past work experience on similar scale projects is often an important part of a competitive selection process, and it is simply not credible to argue that the City would be provided with less information of this nature in future... While different considerations might apply to other information forming part of a contractor's competitive bid for a project, the information at issue in this appeal is a high-level, bottom-line cost figure for past work, and I do not accept that its disclosure could reasonably be expected to have any impact on a contractor's willingness to provide the City with similar information in future. [page 6]

[67] In Order PO-1847, this office made the same observation with respect to reference letters submitted by bidders in an RFP process.

[68] I agree with the comments above and apply them here. As in Order MO-1811 I am not convinced that disclosure of information about prior projects could reasonably be expected to lead to such information no longer being supplied in a future RFP process. I come to the same conclusion with respect to the information in the nature of promotional material, as I find it unlikely that disclosure of this information would lead to a reluctance to provide such material in a future submission. The same conclusion



applies to the winning bidder's descriptions of its workforce and the proposed roles to be played by key staff on the project.

***Record 2 – the evaluation materials***

[69] As I have indicated, most of the affected parties objected to disclosure of their information, although only some provided representations in this appeal. To the extent that some affected parties provided evidence of harm that is general to all the contractors and not only to their particular circumstances, I have taken it into account in my findings on all the information remaining at issue.

[70] I find that disclosure of the total value of the construction management fee proposal from each proponent, found in the sixth column of the chart on page 1, as well as on other pages of the evaluation materials, could not reasonably be expected to lead to the harms identified in sections 10(1)(a), (b) or (c). This information is a total value only and provides no insight into the sensitive commercial or financial information of the affected parties. It does not disclose the particular approach or methodology each proponent proposes to apply to the project, nor the details of fixed costs and other factors contributing to the total value. I find it unlikely that a proponent would refrain from providing such information as part of a future RFP submission.

[71] I also find it significant that although one of the affected parties described the harm that could result from disclosure of the detailed components of its total bid price (see below), this company did not object to disclosure of the total figure on its own.

[72] I am also not convinced that disclosure of information about the total value and size of prior projects performed by the affected parties could reasonably be expected to result in the harms described in sections 10(1)(a), (b) or (c), and I refer to the reasons given above in relation to similar information in the winning proposal.

[73] Apart from the total bid prices, I am satisfied that disclosure of the other information in the chart at page 1, providing the detailed financial components of the affected parties' proposals, meets the test for exemption under sections 10(1)(a) and (c). Pricing information has been found to meet the harms test under section 10(1) where, for example, information could be extrapolated by a knowledgeable party to reveal the actual dollar values of various components of an affected party's proposal.<sup>17</sup> In this case, I accept the submissions of the affected parties that the level of detail in this chart is enough to allow competitors to exploit the affected parties' bidding practices. The information provides details of pricing for a construction manager and site superintendent, the price given for the Builders Risk insurance policy which, combined with other information in the evaluation records on base fees and bonus

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<sup>17</sup> Order PO-2853.

structures, would allow competitors to compare these elements of the total price and adjust their future bids.

[74] The same information has been incorporated into the evaluation materials at pages 8, 9, 17, 20, 22, 23, 25, 26, 29-32, 34, 36, 37, 39, 40, 44 to 46, 48, 49, 52 to 56, 60 to 65, 69 to 74, 80, 83 to 90, 95 to 97, 99 to 107, 110, 112, 114, 120, 125 to 130, 134, 137 to 142, 147, 148, 150. I find these portions exempt on the same basis as above.

[75] Other portions of the evaluation materials incorporate information taken directly from the affected parties' proposals and reveal details of the affected parties' methodologies and approaches. This office has described the type of information in RFP bids that has been found exempt from disclosure under section 10(1) in the following terms:

... the specific detail contained in those portions of the proposal that identify the specific information relating to the affected party's proposed approach to the project. In my view, the unique information contained in those small portions of the proposal discloses a particular approach to the project taken by the affected party.<sup>18</sup>

[76] I agree with the principle described above. In reviewing these portions, and the submissions of the affected parties, I am satisfied that disclosure of certain details of their particular approaches to the project would allow their competitors to modify their own approach and methodology, capitalizing on the expertise and experience of the affected parties. Disclosure of this information could reasonably be expected to result in significant prejudice to the competitive position of the affected parties or undue loss to them and undue gain to their competitors, within the meaning of sections 10(1)(a) and (c). This information is found in the evaluation materials at pages 16, 17, 80, 81, 83, 95 to 100, 103, 105, 120, 122, 125, 131 and 132.

[77] I find certain financial details about previous projects performed by the affected parties (for instance, information about cost overruns), or financial information about the affected parties' business, meets the test for exemption under section 10(1)(b). I accept the submissions of the town that disclosure of such information could reasonably be expected to result in similar information no longer being supplied where it is in the public interest that similar information continue to be so supplied, within the meaning of section 10(1)(b). This information is found on pages 3, 7, 8, 9, 12, 17 and 40.

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<sup>18</sup> Order MO-2141.

## **PERSONAL PRIVACY EXEMPTION**

[78] The only record at issue here is the winning proposal.

[79] In Interim Order MO-2496-I, I considered whether the personal privacy exemption applied to information the town decided to withhold from the evaluation materials. I concluded that some of this information did not qualify for exemption, as it consisted of the names of contact persons for the affected parties and was not the personal information of these individuals. As it was not personal information, the personal privacy exemption could not apply to this information. However, some of the information in the evaluation materials was covered by the definition of personal information, and I upheld the town's decision to apply the section 14(1) exemption to this information.

[80] In making submissions in response to the Interim Order, one affected party urged me to apply the section 14(1) exemption to some information I found did not qualify as personal information. I have reviewed the portions to which it refers, and I am satisfied that there was no error or oversight in my previous finding that the information about these individuals is not their personal information.

### **Personal information**

[81] Turning to the winning proposal, in order to determine whether the personal privacy exemption at section 14(1) applies, it is first necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

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

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

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

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

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

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

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

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

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

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

[83] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[84] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.

[85] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.

[86] The town submits that certain highlighted portions of the winning proposal contain the personal information of employees of the winning bidder. It submits that pages 39 to 50 (which it refers to as pages 46 to 57) contain information about these individuals' employment history, educational history, financial transactions in which they

have been involved, and their personal references. The primary affected party also submits that these pages contain the educational and employment history of its employees.

[87] On my review, I agree that these pages contain information that falls within paragraphs (b) of the definition of personal information. These pages contain information similar to that found in resumes, which this office has found to be personal information as defined in section 2(1).<sup>19</sup>

[88] Certain information in these pages does not qualify as personal information. Parts of pages 39 to 47 do not qualify as personal information in that they consist of the names and titles of employees of the affected party, which is addressed by section 2(2.1) of the *Act*. However, I find that severing the records for the purpose of disclosing this information would result in the disclosure of meaningless pieces of information and I will not deal with it separately.<sup>20</sup>

[89] Pages 48 to 50, as described above, contain information in chart form about named employees of the primary affected party. Some of the information qualifies as personal information, such as work history and references, and is similar to that found on pages 39 to 47. Some of the information is not personal, as it identifies the employees' job titles. The chart also contains information about these employees' proposed roles on the project. I find that the information about job titles and proposed roles is about these individuals in a professional or business capacity, does not reveal anything of a personal nature about them, and does not qualify as their personal information.

[90] Based on these findings, the first three columns of pages 48 to 50 cannot be exempt under the personal privacy exemption as they do not contain personal information. As I have also found above that these portions of the chart are not exempt under section 10(1), I will order them disclosed.

[91] I will now turn to consider the application of the personal privacy exemption to pages 39 to 47 and the last two columns of the chart at pages 48 to 50.

### **Unjustified invasion of personal privacy**

[92] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

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<sup>19</sup> See for example Orders MO-2151, MO-2193 and MO-2856.

<sup>20</sup> See Order MO-2865.

[93] In this case, the only exception that might apply is section 14(1)(f), which allows disclosure of the personal information if it would not constitute an unjustified invasion of personal privacy. The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

[94] Section 14(3)(d) states that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information relates to employment or educational history. A number of past orders have determined that information about employment or educational history, contained in resumes, falls within the scope of section 14(3)(d). I agree with those findings, and conclude that the personal information in these parts of the winning proposal is covered by this presumption.

[95] The Divisional Court has held that once a presumption against disclosure under section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2). If a section 14(3) presumption against disclosure is established, it can only be overcome if the personal information at issue fits within section 14(4) or if the “compelling public interest” override at section 16 applies.<sup>21</sup>

[96] Section 14(4) does not apply in the circumstances of this appeal, and the public interest override has not been raised. I therefore conclude that disclosure of the information in these pages would constitute an unjustified invasion of personal privacy and the information is exempt under section 14(1) of the *Act*.

## **CONCLUSION**

[97] In conclusion, I order disclosure of some information in the winning proposal that does not qualify as personal information, and to which the section 10(1) exemption does not apply. I order disclosure of information in the winning proposal and the evaluation materials about the size and value of past projects performed by the affected parties, as well as other information not exempt under section 10(1). I also order disclosure of information in the evaluation materials that reveals the total bid prices of the affected parties.

[98] I uphold the town’s decision to exempt the personal information in the winning proposal. I also uphold the town’s decision to exempt the remaining information at issue in the winning proposal and the evaluation records under section 10(1).

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<sup>21</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

[99] In correspondence from the town it indicates that its original decision, which was to grant partial access to the records, also contained the amount of fees the appellant would be required to pay. The appellant did not contest the amount of the fee. The town requests that any order that it disclose records be subject to the payment of fees. I will incorporate the town's request in my order below.

**ORDER:**

1. I uphold the town's decision to withhold parts of pages 1, 3, 7 to 9, 12, 16, 17, 20, 22, 23, 25, 26, 29 to 32, 34, 36, 37, 39, 40, 44 to 46, 48, 49, 52 to 56, 60 to 65, 69 to 74, 80, 81, 83 to 90, 95 to 107, 110, 114, 120, 122, 125 to 132, 134, 137 to 142, 147, 148 and 150 of the evaluation materials.
2. I uphold the town's decision to withhold pages 39 to 47, 59 to 64 and parts of pages 8 and 48 to 50 of the winning proposal [pages 46 to 54, 66 to 71 and parts of pages 15 and 55 to 57 in the town's version].
3. For greater certainty, I am providing the town with a copy of the pages listed above, highlighting the information to be withheld.
4. I order the town to disclose to the appellant the remaining information in the records by **July 16, 2014**, but not before **July 11, 2014**, and subject to the payment of the fee.
5. In order to verify compliance with this order, I reserve the right to require the town to provide me with a copy of the records disclosed to the appellant in accordance with provision 4 above.

Original Signed by: \_\_\_\_\_  
Sherry Liang  
Senior Adjudicator

\_\_\_\_\_ June 10, 2014