Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3475

Appeal PA12-400

Niagara Parks Commission

March 31, 2015

Summary: This appeal arises out of request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the undisclosed portions of an agreement between the Niagara Parks Commission (NPC) and Hornblower Canada Co. (Hornblower) pertaining to the operation of boat tours at Niagara Falls over the next 30 years. The NPC initially relied on the discretionary exemptions at sections 14(1)(i) (endanger security of a building or vehicle) and 18(1)(a) and (c) (valuable government information) to deny access to the portions it withheld. During mediation of the appeal, Hornblower took the position that the mandatory exemptions at sections 17(1)(a), (b) and (c) (third party information) also applied to some of the withheld information. At the adjudication stage NPC also sought to rely on section 14(1)(e) (endanger the life or safety of a person) to withhold the portions of the record that NPC alleged were exempt under section 14(1)(i). In this order the adjudicator permits the late raising of section 14(1)(e) and determines that only certain portions of the record qualify for exemption under sections 14(1)(e) or (i) of the *Act*. The adjudicator further determines that sections 17(1)(a), (b) and (c) and 18(1)(a) and (c) do not apply to the balance of the withheld information and orders that it be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(e), 14(1)(i), 17(1)(a), (b) and (c), 18(1)(a) and (c).

Orders Considered: MO-1706, MO-3058-F, PO-2384, PO-2753, PO-2758, PO-3011 and PO-3157.

Cases Considered: *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.); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139; *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776; *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392, upholding PO-3311; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

BACKGROUND:[1]

[1] This appeal arose out of request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for, amongst other things, access to the undisclosed portions of an agreement between the Niagara Parks Commission (NPC) and Hornblower Canada Co. (Hornblower) pertaining to the operation of boat tours at Niagara Falls over a 30 year term.

[2] The NPC was established in 1885 to control the lands and buildings immediately surrounding the Canadian Horseshoe Falls. NPC was continued as a corporation pursuant to the *Niagara Parks Act,*[2] and now owns and maintains over 1,325 hectares of parkland along the Niagara River, stretching from Fort Erie to Niagara-on-the-Lake. NPC has the mission to preserve and enhance the natural beauty of the Falls and the Niagara River corridor for the enjoyment of visitors, while maintaining financial self-sufficiency. NPC has its own police service, road maintenance, waste collection and other services needed to sustain its extensive operations. During the height of the tourist season, NPC employs over 1,700 staff: approximately 300 full-time and 1,400 seasonal hires. NPC receives no government financing and it raises its own revenues through, among other things, tourist attractions, gift shops, golf courses, restaurants and parking lots.

[3] Boat tours have been conducted at Niagara Falls since 1846. They are a flagship attraction in the region, generating millions of dollars in revenue for NPC each year, as well as substantial spin-off revenues and jobs for NPC, local businesses and the travel and tourism industry. NPC submits that the record at issue in this appeal was the result of a lengthy and complex procurement process conducted by NPC commencing in 2010. The record is a comprehensive agreement that governs the operation of boat tours at Niagara Falls over a 30 year term, commencing in 2014. By virtue of this agreement the Maid of the Mist Corporation (the Maid of the Mist or Maid) would no longer be providing boat tour operations from Canada. On December 4, 2012, New York Governor, Andrew Cuomo, announced that the Maid of the Mist would be entitled to relocate its boat tour operations to the United States' side and continue them at that location for 30 years.

[1] Sourced for the most part from the representations of the Niagara Parks Commission.
[2] RSO 1990, c. N.3.

[4] Maid now operates from the United States side of Niagara Falls with Hornblower operating from the Canadian side.

THE APPEAL

[5] After notifying Hornblower of the request for access to a copy of the agreement between it and the NPC, and receiving its position on disclosure, the NPC issued its access decision. The NPC initially relied on the discretionary exemptions at sections 14(1)(i) (endanger security of a building or vehicle) and 18(1)(a) and (c) (valuable government information) to deny access to the portions it withheld. The requester (hereafter referred to as the appellant) appealed the decision. During mediation of the appeal, Hornblower took the position that the mandatory exemptions at sections 17(1)(a), (b) and (c) (third party information) also applied to some of the withheld information. As these are mandatory exemptions, the possible application of sections 17(1)(a), (b) and (c) of the *Act* was added as an issue in the appeal.

[6] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to NPC and Hornblower. Both NPC and Hornblower provided confidential and non-confidential versions of their representations. NPC also provided an affidavit from its Chair. In its representations NPC raised, for the first time, the possible application of the discretionary exemption at section 14(1)(e) (endanger the life or safety of a person) of the *Act*. I then sent a Notice of Inquiry to the appellant, along with the non-confidential version of the representations of the NPC, and Hornblower, as well as the affidavit from the NPC's Chair. The appellant advised that it would not be providing responding representations. In the course of the appeal I requested, and received, a copy of the initial Request for Proposal (RFP) issued by the NPC and the bid that Hornblower provided in response to the RFP.

[8] In making my determinations in this appeal, I considered the confidential and non-confidential submissions of the parties.

RECORDS:

[9] Remaining at issue in this appeal are portions of a document entitled "Boat Tours Lease and Operating Agreement, 2012" (Agreement) between the NPC and Hornblower, being the withheld portions of pages 23, 24 and 27 as well as pages 60 to 130 (also referred to as Schedule "C"), and 135 to 136 (also referred to as Schedule "F") of the Agreement, which were withheld in full.

ISSUES:

A. Should NPC be permitted to rely on the discretionary exemption at section 14(1)(e) of the *Act*?

B. Do the discretionary exemptions at sections 14(1)(e) or 14(1)(i) apply to portions of the Agreement?

C. Do the mandatory exemptions in sections 17(1)(a),(b) and/or (c) apply to the information in Schedule "C"?

D. Do the discretionary exemptions at sections 18(1)(a) and 18(1)(c) apply to the withheld portions of pages 23 and 24 and Schedules "C" and "F" of the Agreement?

E. Did NPC appropriately exercise its discretion under sections 14(1)(e) or 14(1)(i) of the *Act*?

DISCUSSION:

A. Should NPC be permitted to rely on the discretionary exemption at section 14(1)(e) of the *Act*?

[10] This office's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Sections 11.01 and 11.02 state:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.
>
> An institution does not have an additional 35-day period within which to make a new discretionary exemption claim after it makes an access decision arising from a Deemed Refusal Appeal.

[11] The objective of the 35-day policy established by this office is to provide institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced. These principles have been discussed at length in a number of orders.[3]

[12] NPC wishes to raise section 14(1)(e) (danger to the life or physical safety of any person) in addition to section 14(1)(i) with respect to a portion of page 27 and all of Schedule "C". The new exemption is claimed in addition as well as in the alternative, to section 14(l)(i). The NPC submits that given the seriousness of the type of harm that section 14(1)(e) protects against, this office has commonly afforded a greater degree of deference to late raised claims, which rely on section 14(1)(e). NPC submits that raising the exemption at this stage will not result in prejudice to the appellant, or compromise the integrity of the appeals process because section 14(1)(e) is a natural extension of section 14(1)(i), which is already in issue in this appeal.

[13] I have decided to permit the NPC to claim the additional discretionary exemption in section 14(1)(e) outside this office's 35-day policy. This finding is unrelated to the merits of the exemption claim. Rather, it is based on my conclusion that there has been neither prejudice to the appellant, nor compromise to the integrity of the appeals process, as a consequence of the late raising of the exemption claim.

[14] With consideration to the overall circumstances of this appeal, I am not persuaded that the late raising of section 14(1)(e) delayed either the processing of this appeal or its completion. In addition, similar facts will be considered to those that are already at issue with respect to the possible application of section 14(1)(i). Furthermore, although asked for submissions on any prejudice it may suffer by the later raising of section 14(1)(e), the appellant chose not to provide a response. In my view, and in light of the lack of any submissions on this issue from the appellant, any possible prejudice that may have arisen was adequately addressed when the appellant was invited to provide its representations on the application of section 14(1)(e). Accordingly, I am satisfied that the late raising of section 14(1)(e) has not compromised the integrity of the appeals process or significantly prejudiced the appellant.

[15] Accordingly, I will consider the possible application of section 14(1)(e) to a portion of page 27 and all of Schedule "C" of the Agreement.

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[3] See Orders P-658, PO-1858, PO-1880, PO-2500, PO-3098, MO-2226 and MO-2308. The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

B. Do the discretionary exemptions at sections 14(1)(e) and 14(1)(i) apply to portions of the Agreement?

[16] NPC submits that disclosure of a portion of page 27 and Schedule "C" could reasonably be expected to endanger: (a) the security of buildings, vehicles (including the boat tour boats), and systems and procedures for which protection is reasonably required; and (b) the life or physical safety of boat tour customers, employees, and the general public. Hornblower explains that Schedule "C" is composed of eleven numbered sections, and summarizes its operational responsibilities under the agreement.

[17] Sections 14(1)(e) and 14(1)(i) form part of section 14 of the *Act*, generally known as the "law enforcement" exemption.

[18] Sections 14(1)(e) and (i) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (e) endanger the life or physical safety of a law enforcement officer or any other person;
>
> (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

[19] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[4]

[20] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record.[5] The institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[6]

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[4] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[5] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[6] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[21] With respect to section 14(1)(e), a person's subjective fear, while relevant, may not be enough to justify the exemption.[7] The term "person" is not necessarily limited to a particular identified individual, and may include the members of an identifiable group or organization.[8]

[22] Although section 14(1)(i) is found in a section of the *Act* dealing specifically with law enforcement matters, it is not restricted to law enforcement situations and can cover any building, vehicle or system which requires protection.[9]

The representations

[23] NPC submits that section 14 must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context and that:

> This consideration is particularly important in the current climate of domestic and international terrorism that demands vigilance on security matters, including restricting access to information about buildings, vehicles, and systems that could make them more vulnerable to attack [Footnote omitted].

[24] NPC further submits that a "vehicle" referred to in section 14(1)(i) includes boats such as those to be used in the boat tour operations. It then states:

> It stands to reason that would-be attackers and criminals typically gather information that may be useful in planning and carrying out an attack, including exploiting and compromising a target organization's security systems and barriers. Information about the target, and in particular the security measures that are intended to protect it, is arguably the most important information that a would-be attacker could have at his or her disposal.
>
> As confirmed in past orders under section 14(1)(e) and (i), it is therefore accepted that information about the plans, blueprints, layout, design, and components of buildings, vehicles and security systems, particularly those that may be potential targets for breaches or attacks (e.g. courthouses, animal shelters and major tourist destinations) could reasonably result in endangerment and should not be disclosed [Footnote omitted].

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[7] Order PO-2003.
[8] Order PO-1817-R.
[9] Orders P-900 and PO-2461.

[25] Citing two research papers on terrorism risks,[10] NPC submits that its reasons for refusing disclosure pursuant to sections 14(l)(e) and (i) are not frivolous or exaggerated, particularly because of:

> (a) the high profile of Niagara Falls as a major international tourist destination, with about 8 million visitors each year; (b) the fact that up to 700 people and a crew will travel on each boat tour (i.e. far more people than are carried on most commercial airliners) [Footnote omitted]; and (c) the location of the boat tours on a shared international waterway and border, near critical infrastructure (e.g.) international bridges [Footnote omitted].

[26] NPC submits that Transport Canada has also recognized the importance of security for the boat tour operations by requiring compliance with the Marine Transportation Security Regulations, S0R/2004-144 (MTSR). It states that MTSR provides a complex framework (comprised of 813 different regulatory provisions) to detect security threats and take measures to prevent security incidents that could affect marine vessels and facilities.

[27] NPC then states:

> Disclosure of Schedule "C" would pose serious risks to the operations, property and interests of NPC, Hornblower, Canada and the United States, not to mention the lives and safety of the public and others who may be impacted by a breach of security of the boat tour operations. In addition to the security-related provisions of Schedule "C," it is crucial to note that endangerment could reasonably be expected to result from disclosure of Schedule "C" in general because it provides a forward-looking 'blueprint' of the operations.
>
> Bearing in mind the foregoing and the difficulty of predicting future events in a law enforcement context, NPC submits that disclosure of the withheld information could reasonably be expected to: (a) endanger the life or physical safety of persons, namely employees, visitors and others who may use or be impacted by a breach of security of the tours; and (b) endanger the security of the buildings, boats and systems and procedures established for the protection of items, for which protection is reasonably required.

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[10] Alexandros Paraskevas & Beverley Arendell, "A strategic framework for terrorism prevention and mitigation in tourism destinations" (2007) 28 Tourism Management 1560-73. Available online: http://www.academia.edu/168228/A_Strategic_Framework_for_Terrorism_Prevention_and_Mitigation_in_Tourism_Destinations. Pizam, Abraham, and Ginger Smith. "Tourism and terrorism: A quantitative analysis of major terrorist acts and their impact on tourism destinations." (2006) 2 Tourism Economics 123-138.

[28] NPC also specifically submits that the severed information on page 27 of the Agreement relates to the security system for the boat tour operations, which it claims is exempt from access pursuant to sections 14(l)(e) and (i) of the *Act*.

[29] In the affidavit provided by NPC with its representations, NPC's Chair states that that disclosure of the portions of the Agreement that have not yet been released, including the "Security Plan" in Schedule "C", would compromise the effectiveness of the security measures under the Agreement and could reasonably be used by a would-be attacker, terrorist or other criminal to facilitate, plan, and/or carry out a breach of security, attack or infiltration of the Boat Tour operations.

[30] Hornblower also provides representations in support of the position that section 14(1)(i) applies. It refers to significant security measures in place at one of its other boat tour operations in the US, and then states:

> Tight security will also be necessary in the boat tour operations in Canada. Hornblower so advised the [NPC] in its proposal, the [NPC] agreed, and significant security measures will be implemented to deal with all potential threats.

[31] Hornblower then provides an example of how its Canadian operations could be used to cause the section 14(1)(i) harms alleged if Schedule "C" is disclosed and further submits:

> … The proximity of the site to critical infrastructure, including international bridges significant to the economies of both countries, raises even further security issues. Transport Canada has recognized these issues by requiring Maid of the Mist to comply with its Marine Transportation Security Regulations, and Hornblower will also be required to comply in its operations. The security plans prepared pursuant to those Regulations will not be subject to public scrutiny, and Hornblower's security obligations in [Schedule "C"] should likewise not be disclosed for public review.
>
> Disclosure of [Schedule "C"] poses risks to Hornblower's security operations, and the interests of both Canada and the United States. Most obviously, [Schedule "C"] includes information about our proposed security plan, vessels, crewing and staffing, and its disclosure would therefore jeopardize the effectiveness of that plan. We are quite confident that if Maid operates in New York, its own security plans, for the reasons expressed herein, will be evaluated and approved by the United States Coast Guard, and they will not be available for any type of public scrutiny.

> [Schedule "C"] should not be disclosed for these security reasons. The boat tour operations are a "system" within the meaning of *FIPPA* that reasonably requires protection.

[32] Further confidential submissions are provided in support of the application of sections 14(1)(e) and 14(1)(i), which I considered but cannot be set out in this order as it may reveal the content of the record at issue.

Analysis and finding

[33] In light of the events of September 11, 2001, increased vigilance is the norm, not the exception. After reviewing the representations and record I am satisfied that NPC has established that disclosing certain portions of Schedule "C" could reasonably be expected to result in the harms alleged. Niagara Falls is a major tourist attraction and in my view, the evidence provided establishes that disclosure of certain information in Schedule "C" could reasonably be expected to pose a threat to the safety of Hornblower's employees or staff and/or the vessel's used by Hornblower to transport passengers, and/or those passengers themselves. Specifically, I find that disclosing pages 99 to 104 and pages 119 to 127 of Schedule "C", which specifically address the subject of risk and security, could reasonably be expected to result in the harms alleged, and fall within the scope of the section 14(1)(e) or (i) exemptions.

[34] That said, I am not satisfied that the withheld portion of page 27 or the other withheld portions of Schedule "C" fall within the scope of sections 14(1)(e) or (i). The withheld portion of page 27 is a very generic statement relating to security and is not unique or surprising given today's security environment. Disclosing it could not, in my view, reasonably be expected to cause the harms alleged. Schedule "C" is defined by Hornblower as summarizing its operational responsibilities under the Agreement and covers a broad spectrum of information relating to the operation of the boat tours. This information is broad in focus and disclosing that information, including the basic specifications of the vessels, could not, in my view, reasonably be expected to cause the harms alleged.

[35] Therefore, I conclude that only the information found at pages 99 to 104 and 119 to 127 of Schedule "C" qualifies for exemption under sections 14(1)(e) or (i) of the *Act*.

[36] I will now consider the balance of the information at issue.

C. Do the mandatory exemptions in sections 17(1)(a),(b) and/or (c) apply to the information in Schedule "C"?

[37] Sections 17(1)(a), (b) and (c) of the *Act* state:

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

[38] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[11] 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.[12]

[39] For section 17(1) to apply, NPC or Hornblower 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) and/or (c) of section 17(1) will occur.

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[11] *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.).
[12] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: Type of Information

[40] The NPC and/or Hornblower submit that the information at issue qualifies as a trade secret, scientific, technical, commercial, financial and/or or labour relations information.

[41] The appellant provided no specific representations on the application of this, or any other, part of the section 17(1) test.

[42] The meaning and scope of these types of information have been discussed in past orders of this office, as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[13]
>
> *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.[14]
>
> *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.[15]

[13] Order PO-2010.
[14] Order PO-2010.
[15] 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.[16] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[17]

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.[18]

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. 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[19]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,[20]

but not to include:

- names, duties and qualifications of individual employees[21]

- an analysis of the performance of two employees on a project[22]

- an account of an alleged incident at a child care centre[23]

[16] Order PO-2010.
[17] Order P-1621.
[18] Order PO-2010.
[19] Order P-1540.
[20] Order P-653.
[21] Order MO-2164.
[22] Order MO-1215.
[23] Order P-121.

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation[24]

[43] I adopt these definitions for the purposes of this appeal.

[44] NPC submits that "there is no question that Schedule "C" reveals trade secret or scientific, labour relations, technical, commercial or financial information, particularly the latter three categories."

[45] Hornblower submits that Schedule "C":

> … includes trade secret, scientific, technical, commercial, financial and labour relations information should be self-evident from the adjudicator's review of its terms. These items plainly qualify as "commercial information" since they directly relate to and indeed summarize our projected commercial operations of the boat tour services for the [NPC], They also qualify as scientific, technical and financial information, since they provide technical details, specifications and cost information of the boats that we designed and will build in order to provide the services, along with similar information relating to other services. All of this information was developed by us solely for purposes of submitting our confidential bid proposal to the [NPC] and thus further qualifies as "trade secrets".
>
> Other portions of [Schedule "C"] provide additional commercial information. By definition, much of this information is also trade secret, technical and financial information. In addition, some sections provide labour relations information which is likewise not subject to disclosure.
>
> All of this information is without question both "financial" and "commercial." Taken as a whole, [Schedule "C"] is composed of trade secret, scientific, technical, commercial, financial, and labour relations information.

[46] Schedule "C" is an attachment to an agreement for the provision of commercial boat tour services. It includes a description of the services to be offered, basic specifications of the tour boats and some financial and expenditure projections. There are no drawings, designs or blueprints that are contained in the withheld information.

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[24] Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[47] I have reviewed the information at issue and I am satisfied that it contains financial, commercial and technical information as defined in past orders of this office for the purposes of section 17(1). That said, I am not satisfied on the evidence before me that the information that Hornblower seeks to withhold meets the threshold of a trade secret as defined in orders of this office under the *Act*. This is because my review of the information at issue, indicates that it does not meet the definition of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism", or otherwise meet the definition of a "trade secret" as contemplated by section 17(1).

[48] Furthermore, I am also not satisfied that the information at issue contains scientific or labour relations information under section 17(1) of the *Act*.

[49] In conclusion, I find that Schedule "C" contains commercial, financial and technical information for the purposes of part 1 of section 17(1).

[50] I will now consider whether this information was "supplied in confidence" to NPC under part 2 of the test.

Part 2: Supplied in Confidence

[51] In order to satisfy part 2 of the test under section 17(1), sufficient evidence must be provided to satisfy me that information was "supplied" to NPC in confidence, either implicitly or explicitly.

[52] 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.[25]

[53] 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.[26]

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

[25] Order MO-1706.
[26] Orders PO-2020 and PO-2043.

decisions.[27] Most recently, it was once again upheld by the Divisional Court in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*.[28]

[55] 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-negotiable 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. [29]

[56] In order to satisfy the "in confidence" component of part 2, the appellant must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[30]

[57] 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 appellant 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.[31]

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[27] *Supra,* note 1. See also, Orders MO-1706, PO-2018, and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 (Div. Ct.) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct) (*CMPA*). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139.

[28] 2015 ONSC 1392, upholding PO-3311.

[29] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above) and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (Div. Ct.).

[30] Order PO-2020.

[31] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No 3475 (Div. Ct.).

[58] The appellant provided no specific representations on the application of this, or any other, part of the section 17(1) test.

[59] NPC submits:

> On the question of confidentiality, NPC notes that Hornblower's bid (portions of which make up the entirety of Schedule "C") was submitted with a confidentiality notice and that in section 4.5.4 of the RFP, NPC agreed to maintain confidentiality.
>
> Confidentiality was express, the circumstances reinforced that fact and NPC and Hornblower have acted in a manner consistent with that fact.
>
> The only remaining question in respect of section 17 is whether Schedule "C" was "supplied" by Hornblower. The information was clearly generated and submitted by Hornblower to NPC as part of its bid and now forms a part of the boat tours lease and operating agreement. …

[60] In a subsequent letter, NPC provided examples of what it viewed as being sourced from areas of the bid materials that found its way into Schedule "C". That said, however, NPC further stated that:

> … Schedule "C" to the [Agreement] (the record at issue in the appeal) is comprised of material that is contained in the Hornblower bid [in an identified section of the bid]. Certain of the activities or proposed uses in [the identified section of the bid] were rejected by the evaluation committee and the approved activities were evaluated as part of the evaluation of the bid. **Once Hornblower was chosen as the successful proponent, NPC and Hornblower created Schedule "C" using the material from [the identified section of the bid], and the approved activities described therein, leaving out anything that had not been accepted by NPC.** Accordingly, Schedule "C" to the [Agreement] is comprised of excerpts of the Hornblower bid. [emphasis added]

[61] With respect to the "in confidence" component of part 2 of the section 17 test, Hornblower submits:

> The information in our bid in response to the [NPC's] RFP for Boat Tour Services was supplied by us in explicit confidence. This is demonstrated by the fact that when we submitted our bid to the [NPC], we included this legend on each page of the bid:
>
> > "This page contains trade secrets or confidential commercial and financial information that Hornblower believes to be

> exempt from disclosure under the *Freedom of Information and Protection of Privacy Act* and other applicable law, except as mandated in the rules of this RFP by the Niagara Parks Commission."[32]
>
> In addition, Section 4.5.4 of the RFP (130 pages total) expressly stated that the confidentiality of material provided to the [NPC] with such a declaration "will be maintained by the NPC". Thus, not only was the information submitted in our bid supplied in explicit confidence, we were advised that it would be maintained by the [NPC] in that status.
>
> Beyond this, we were told when we submitted our bid that it would immediately be taken into the possession of the Niagara Parks Police and taken to an undisclosed location to be evaluated by experts whose identity likewise would not be disclosed. Press reports indicated that during the evaluation process not even the then-Chair of the [NPC] knew the identity of the bidders, the contents of their bids, or the names of the evaluators. A report filed by a Fairness Commissioner with respect to the RFP process confirms that information. Indeed, we were required to sign nondisclosure agreements precluding us from publicly disclosing any aspect of the RFP process or our bid. Thus, we submitted our bid in explicit confidence, we were compelled to maintain it in confidence, and the [NPC] thereafter acted consistently to maintain that confidence.

[62] With respect to the "supplied" component of part 2 of the section 17 test, Hornblower submits:

> ... that *FIPPA* is sometimes interpreted as meaning that a contract entered into by a public agency after a party's submission in response to a RFP is mutually negotiated and generated by both the public agency and the submitting party, rather than having been "supplied" for purposes of section 17(1) by the submitting party, and thus not representing protected informational assets.
>
> That interpretation should not apply here, because of the complex, extensive, and company-specific information Hornblower supplied in response to the [NPC's] RFP, and because [Schedule "C"] is a distillation and summary of Hornblower's proposal in response to the RFP. Moreover, even if it does, the information in [Schedule "C"] falls within the inferred disclosure exception, and should not be disclosed for that reason.

[32] NPC pointed out that the confidentiality notice on some pages of the bid uses slightly different wording, but to the same effect.

[63] Hornblower submits that prior decisions of this office support the conclusion that the Schedule "C" was "supplied". It submits that this is based on three propositions:

> First, the Commissioner has consistently held that the actual *response* to an RFP (as opposed to the ultimate contract between the public agency and the responding party based on the RFP and response) is not "negotiated" but "supplied" and thus not subject to disclosure.[33] Thus, Hornblower's proposal and response to [NPC's] RFP was "supplied" and not subject to disclosure.
>
> Second, in [Order PO-2435] … the issue was whether a per diem rate proposed in a response to a RFP and ultimately included in a contract was "supplied" by the bidder, and the Commissioner concluded that this rate was "negotiated", rather than "supplied". In a later case explaining this conclusion, the Commissioner wrote that "except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be 'supplied.'"[34] … Thus, even essential terms *in unusual circumstances* can be considered to be "supplied" and not subject to disclosure.
>
> Third, the current appeal involves such "unusual circumstances" and [Schedule "C"] therefore cannot be viewed as the product of a negotiation process. The complexity of [NPC's] RFP, the complex, highly technical, financial, extensive and company-specific information provided in response by Hornblower, and the nature of [Schedule "C"], makes this the "unusual circumstances" described in [Order PO-2753].
>
> In particular, as we pointed out earlier, [Schedule "C"] is a distillation and summary of the proposal that Hornblower submitted in confidence. We could have agreed with the [NPC] to include our complete response to the RFP as [Schedule "C"], and it then would have been protected from disclosure under the rationale of [MO-1706]. Rather than doing that, however, Hornblower prepared [Schedule "C"] as a distillation and summary of its bid proposal, so that the actual boat tour operations would follow the outline of the bid.
>
> Hornblower "supplied" its proposal providing that information in order to present its long-term professional vision how to best operate the boat tour services and become the [NPC's] long-term partner. That information was accepted by the [NPC] when it decided that Hornblower was the successful proponent and awarded it the boat tour services contract. It simply cannot be said in this case that the information now included in

[33] The affected party relies on Order MO-1706 in support of this submission.
[34] The affected party cites Order PO-2753 in this regard.

> [Schedule "C"] was "negotiated" rather than supplied, especially since it directly reflects and is a summary and distillation of Hornblower's proposal itself.
>
> As such, [Schedule "C"] must receive the same confidential status as Hornblower's proposal. That result is completely consistent with cases such as [Orders MO-1706 and PO-2753]. [Emphasis in original]

[64] Hornblower further submits:

> Moreover, even if [Schedule "C"] were deemed to have been "negotiated," rather than "supplied" by Hornblower, it is subject to the "inferred disclosure" exception. "The 'inferred disclosure' exception applies where 'disclosure of the information in a contract would permit accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution.'"[35]
> …
>
> Here, disclosure of [Schedule "C"] would without question "permit accurate inference to be made with respect to [the] underlying *non-negotiated* confidential information supplied by" Hornblower in its proposal to the [NPC]. Indeed, since [Schedule "C"] is a summary and distillation of that non-negotiated confidential information supplied by Hornblower in its proposal, disclosure of it not only would "permit accurate inference" to be made with respect to the proposal information, but would effectively disclose the protected material itself. It is difficult to imagine a situation in which the "inferred disclosure" exception should more clearly apply.
>
> Since, as [MO-1706] states, Hornblower's bid information by definition is non-negotiated and protected from disclosure, it must necessarily follow that [Schedule "C"] too is not subject to disclosure under the "inferred disclosure" exception.

[35] The affected party cites Order PO-2753 in this regard.

Analysis and findings

Supplied

[65] Section 1.1(i) of the Agreement provides that Schedule "C" forms a part of the Agreement. Other sections of the Agreement incorporate provisions of Schedule "C" by specific reference[36].

[66] Hornblower argues generally that agreed upon essential terms of a contract in "unusual circumstances" can be considered to be supplied and not the product of negotiation. In that regard, Hornblower refers to the circumstances leading up to the Agreement and its subject, scope and length. I do not find that the circumstances before me are such "unusual circumstances" as to justify a departure from a regular section 17(1) analysis. Commercial agreements are becoming increasingly complex over time and this office has dealt with many long term agreements on major undertakings between large corporations and institutions. In my view, there is nothing in the circumstances before me to find that these are "unusual circumstances" which merit a derogation from the tests developed and applied by this office over time, and upheld by the Courts.[37]

[67] Hornblower acknowledges that it prepared Schedule "C" as a distillation and summary of its bid proposal, so that the actual boat tour operations would follow the outline of the bid. Schedule "C" is defined by Hornblower as summarizing its operational responsibilities under the Agreement. Tellingly, throughout its submissions it refers to Schedule "C" as the "Operating Agreement". Hornblower argues, however, that because Schedule "C" is a distillation of the information it supplied in its successful proposal, it must receive the same treatment as Hornblower's proposal, even if it has become part of the Agreement.

[68] In Order PO-2384, I found that a proposal that was incorporated by reference as a schedule to a contract was not "supplied" by the third party, but rather was the result of negotiation between the parties to the contract. In coming to this conclusion, I wrote:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, agreed upon terms of a contract are not qualitatively

[36] For example, references to portions of Schedule "C" are found at articles 1.1(g), 5.1(1)(a), 5.1(3) and 7.1(2)(d).
[37] See in this regard, the discussion at paragraph 32 of *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776.

> different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
>
> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.
>
> As set out in the section of the Finalized Contract dated April 17, 2002 entitled "Background", the tender bid that was submitted by the affected party is wholly incorporated into the contract by reference. Found at schedule VII to the contract is the version of the pricing sheet that accompanied the affected party's tender that it objects to disclosing. On the pricing sheet an option is crossed through and a handwritten asterisk appears next to another, supporting, in my view, that a negotiation process occurred. . .

[69] In Order MO-3058-F, addressing the municipal equivalent of section 17(1), Senior Adjudicator Sherry Liang[38] considered whether a proposal was considered to be supplied to an institution. In making her finding, she undertook a thorough examination of this office's historical approach on this issue and distinguished between an access request for a winning proposal and an access request for a contract between a third party and an institution. She wrote:

> 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

[38] Now Assistant Commissioner.

considered the application of section 10(1) or its provincial equivalent to RFP proposals.[39] 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]

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.

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.

[70] In *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*[40], the Divisional Court of Ontario had this to say about this office's approach with respect to the municipal equivalent of section 17(1):

> The IPC adjudicator's approach in this case was consistent with the approach taken in other cases interpreting the same provision in *FIPPA*.

[39] See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.
[40] 2013 ONSC 7139.

Those cases have held that, absent evidence to the contrary, the content of a negotiated contract involving a government institution and a third party is presumed to have been generated in the give and take of negotiations, not "supplied" by the third party under s. 10(1) of the *Act*. This approach was approved of in *Boeing* at paras 18-19 as follows:

> The Commissioner has consistently found that information in a contract is typically the product of a negotiation process between the parties and that the content of a negotiated contract involving a governmental institution and another party will not normally qualify as having been "supplied". Even where the contract is preceded by limited negotiation, or where the final agreement substantially reflects information that originated from a single party, the Commissioner has concluded that the information was not supplied….
>
> The Commissioner took the view that the records before him did not contain information which was supplied to the ministry because the information was found in complex contracts which were the subject of agreement by a number of parties….His conclusion that complex and detailed agreements like the ones before him were the result of negotiations was a reasonable one. While the Ministry has suggested that its role was passive with respect to the Asset Purchase Agreement, it was reasonable for the Commissioner to conclude that the agreement was, nevertheless, negotiated and that it reflected all the parties' interests.

[71] The Divisional Court then discussed the Supreme Court of Canada's decision in *Merck*, a case that dealt with the "supplied requirement" under the federal *Access to Information Act,* (*ATIA*)[41] writing:

> *ATIA* also contains a third party information exemption that requires the information purportedly covered by the exemption to have been "supplied" to the government. Cromwell J. summarized the analytical principles that bear on this requirement at para. 158:
>
> > To summarize, whether confidential information has been "supplied to a government institution by a third party" is a question of fact. The content rather than the form of the

[41] R.S.C. 1985, c. A-1.

> information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.

In *Merck*, the appellant pharmaceutical company argued that certain information in Health Canada's possession as a result of the regulatory process for approving a new drug was covered by the third party exemption. The specific information said to have been "supplied" consisted of reviewers' notes prepared by scientists retained by Health Canada to evaluate the drug and correspondence between Merck and Health Canada. The information was not contained within a contract. In *Boeing*, as well as the IPC decisions cited by the adjudicator, the information purportedly covered by the exemption consisted of information in a contract entered into by a government institution and a third party. The interpretive principle employed by the IPC adjudicator in this case and many past IPC decisions – that contractual information is presumed to have been negotiated, not supplied – flows from this key factual distinction.

Merck does not alter the law on this point. Rather, the presumption that contractual information was negotiated and therefore not supplied is consistent with *Merck*. A party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that that the "inferred disclosure" or "immutability" exception applies.

Miller Transit further submits that the Supreme Court's caution to consider the "content rather than the form" of the information renders the presumption invalid. Again, it is significant that this caution was made in the context of a different factual scenario: Merck was arguing that the reviewers' notes and correspondence were supplied simply because they were in the government's possession. Contractual information was not in issue. To the extent that the caution applies I read it as having the opposite effect to that which is asserted by Miller Transit. The third party information exemption will only apply if it can be shown, on a balance of probabilities, how the information in the contract meets the exceptions based on its content, not merely the fact that it originated with the third party. In this case, neither Miller Transit nor York Region highlighted specific information supplied to the Region that would permit the drawing

> of an accurate inference with respect to information supplied, what that inference would be, or what information in the contract was not susceptible to change in the negotiation process and why.

[72] The request before me is not for access to the winning proposal, which was the type of record at issue in MO-3058-F. At issue in this appeal is a request for the final agreement between Hornblower and the ministry, which incorporates the withheld schedule (Schedule "C"). This involves a consideration of the authorities listed above, in accordance with this office's approach to the interpretation of the "supplied" portion of this part of the section 17(1) test.

[73] NPC and Hornblower chose to incorporate a summary of the proposal into the Agreement entered into between them. The Agreement clearly indicates that Schedule "C" is incorporated into it, and it forms part of that Agreement. Schedule "C" sets out agreed upon contractual terms that govern the relationship between NPC and Hornblower in regard to the implementation and the operation of the boat tours. I conclude that the presence of Schedule "C" in the Agreement, as well as certain language indicating acceptance and agreement that is found in Schedule "C" itself, signifies that the parties agreed to its terms. Upon execution of the Agreement, which represents the negotiated intentions of the parties, the informational assets in the Agreement belong as much to NPC as to Hornblower.[42] I find that Schedule "C" cannot, in this context, be considered to have been "supplied" by the successful proponent, but rather forms part of the negotiated and executed Agreement.

[74] In the circumstances of this appeal, I accept that at the time that the appellant's bid was provided to NPC, it may well have been "supplied" for the purpose of section 17(1). However, I have compared the materials provided under the successful proposal with the content of Schedule "C". Without disclosing the content of the bid materials, I have observed that the bid materials are far more voluminous and far more detailed than that which is found in Schedule "C". The content of Schedule "C" is a version of a summary of the bid materials, rather than a duplication. Furthermore, portions of Schedule "C" have been referred to in the Agreement and incorporated by reference into it. In my view, the information in Schedule "C"[43] really represents the functional terms of Agreement. It cannot be insulated from this part of the section 17(1) test simply because it may have been sourced from bid materials and appears as a schedule to the Agreement.

[75] I find further support for this conclusion from a portion of a letter from NPC that I reproduced above, where NPC stated:

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[42] See in this regard the discussion in Order PO-3157.

[43] Pages 99 to 104 and 119 to 127 have been found to qualify for exemption under section 14(1)(e) or (i) above.

> … Schedule "C" to the [Agreement] (the record at issue in the appeal) is comprised of material that is contained in the Hornblower bid [in an identified section of the bid]. Certain of the activities or proposed uses in [the identified section of the bid] were rejected by the evaluation committee and the approved activities were evaluated as part of the evaluation of the bid. **Once Hornblower was chosen as the successful proponent, NPC and Hornblower created Schedule "C" using the material from [the identified section of the bid], and the approved activities described therein, leaving out anything that had not been accepted by NPC.** [emphasis added]

[76] Furthermore, on my review of Schedule "C", I find that the majority of the information does not fit within either of the "inferred disclosure" or "immutability" exceptions referenced above. I have not been provided with sufficiently detailed and convincing evidence to establish that the disclosure of this information would reveal underlying non-negotiable confidential information supplied by Hornblower; nor in my view, is it information that is not susceptible to change.

[77] That said, a portion of Schedule "C", although it is prefaced by language indicating acceptance, being information that consists of certain specifications of the tour boats at pages 62 to 66 of Schedule "C" may meet the "immutability" test and may be viewed as "supplied" by Hornblower to NPC for the purposes of section 17(1), because its disclosure would reveal underlying information that was not susceptible to change in the negotiation process.

[78] Consequently, except for the information in the pages indicated above, I find that the remaining information in Schedule "C" consists of mutually generated, agreed-upon terms that I find to be the product of a negotiation process and that it was not "supplied" by Hornblower for the purposes of part 2 of the section 17(1) test.

[79] In light of my determination regarding whether disclosing the specifications of the tour boats at pages 62 to 66 of Schedule "C" satisfy the section 17(1) harms test below, it is not necessary for me to make a determination with respect to the in confidence portion of part 2 of the section 17(1) test.

Part 3: Harms

[80] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[44]

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[44] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[81] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[45]

[82] In applying section 17(1) to government contracts, 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).[46]

[83] The appellant provided no specific representations on the application of this, or any other, part of the section 17(1) test.

[84] In the affidavit provided by the NPC with its representations, NPC's Chair states that:

> (a) disclosure of the portions of the Agreement that have not yet been released would prejudice the economic interests and competitive position of NPC and Hornblower;
>
> (b) it appears that a boat tour operation will be launched from the United States which will compete with the Boat Tours. Disclosure of the Agreement would allow a competitor to gain an unfair competitive advantage by using the valuable information in the Agreement to springboard the planning, promotion and launch of its competing business based on NPC and Hornblower's investment to date, instead of having to invest in its own planning and development;
>
> (c) in addition, a competitor knowing the commercial plans and strategies for the Boat Tours for the next thirty years could also gain an unfair competitive advantage because it could use that information to develop counter competitive strategies that could undermine the Boat Tour business. For example, using the information in the Agreement, a competitor would be able to anticipate and undercut the marketing and pricing plans and strategies for the Boat Tours. For NPC and Hornblower, this would result in the loss of sums already invested to develop the detailed plans, strategies and terms in the Agreement, the loss of potential customers to the competing operation and the loss of future profits.

[85] Hornblower submits that section 17 is "designed to protect the confidential 'informational assets' of businesses that provide information to governmental

[45] Order PO-2435.
[46] Order PO-2435.

organizations and thus "limit the disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace"[47] and states that:

> When Hornblower was selected by the [NPC] to operate the boat tours at Niagara Fails, it bid against a number of other commercial entities, including the Maid of the Mist Corporation ("Maid") which had operated the boat tours for many years previously. When Maid operated the tours from the Canadian side of the Niagara River Gorge, it also carried passengers from an embarkation point in Niagara Falls, New York, on the United States side of the Gorge, and returned them to that same point. Maid operated that American concession under a separate license with the State of New York.
>
> After Maid lost the Canadian rights to operate the boat tours, it opened discussions with New York to continue its New York operations and to build a new boat yard on the New York side of the Gorge. …, it signed a lease and contract with the State of New York to operate its tour boats on the American side of the Niagara River Gorge, …
>
> Release of [Schedule "C"] would thus provide Maid with a complete roadmap of Hornblower's plans to operate the boat tours from Niagara Falls, Canada. Maid, without question, would then be able to exploit that information to design its own plans to compete with Hornblower through its operations in Niagara Falls, New York.

[86] Hornblower further submits that:

> [It] does not know the identity of the appellant in this matter, but believes and assumes it is in fact Maid of the Mist. If that assumption is correct, then the Adjudicator should ask why Maid seeks the Operating Agreement. It was unsuccessful in retaining the rights to operate from the Canadian side of the Niagara Gorge, and, as noted earlier, is now attempting to compete against Hornblower with tours from a New York location. Since it no longer will operate in Canada, its interest in the Operating Agreement can only be to gain a competitive advantage against Hornblower and to financially undercut both Hornblower and [the NPC] through those New York operations. The fact of its interest thus by itself demonstrates its intent as a competitor to exploit the information in the Operating Agreement in the marketplace. …
>
> In this case, disclosure of [Schedule "C"] can reasonably be expected to cause a number of recognizable harms to Hornblower, by disclosing

[47] In support of this submission Hornblower relies on Order MO-2738 and *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct).

> information that would be exploited commercially and in opposition to Hornblower's interests by Maid. Disclosure of the Operating Agreement can also reasonably be expected to cause harm to the [NPC] itself.

[87] Hornblower argues that harm from disclosure can occur to itself and the NPC in two ways:

> Disclosure of [Schedule "C"] would provide important Hornblower operational information to Maid. That will result in a competitive advantage to them (and a correlative competitive disadvantage to us) in two separate ways. First, it will enable them to more effectively conduct their New York operations in that State: knowing the information pertaining to our operations will allow them to structure their operations in the most competitive ways
>
> Second, through those New York operations they would be a competitor in the tour boat business and (1) undercut and underprice our Canadian operations (2) undermine the financial stability of our operations; (3) undermine the financial stability that our operations and guaranteed payments provide to the [NPC]; and (4) allow them to completely understand our operations and thus obtain a competitive advantage for their New York operations.
>
> Disclosure of the information in [Schedule "C"] would "prejudice significantly our competitive position" vis a vis Maid of the Mist's efforts to operate from New York; and disclosure would also prejudice significantly the Commission's efforts to operate the Canadian boat tour services successfully in a way that protects its long-term budgetary stability.
>
> In addition, for the same reasons disclosure would result in "undue loss" financially both to us and the [NPC] within the meaning of *FIPPA*.

[88] Hornblower further submits that:

> In addition, Section 7.1(1)(a) of our Lease with the [NPC] specifies that if Hornblower uses the [NPC's] leased premises to transport passengers to and from the United States side of the Niagara River gorge, we "shall provide additional financial consideration to the Landlord." By contrast, Maid of the Mist is under no such financial constraint, and providing the Operating Agreement to them increases the likelihood of them retaining and continuing New York operations and thus threatens that potential additional income to the [NPC]. Disclosure thus would significantly prejudice not only Hornblower, but also the [NPC].
>
> …

> Finally, we cannot predict what other RFPs the [NPC] may issue in the future, or whether it would use the model of the Boat Tour RFP and the ultimate boat tour services lease and [Schedule "C"] as a template. But, if Hornblower's [Schedule "C"] is released under *FIPPA*, we are certain that any future bidders to the Commission will not be as open as we have been in the RFP and contractual negotiating process.
>
> Release of [Schedule "C"] would inevitably make any future bidder on other items apprehensive about disclosure and the financial and competitive impacts they could suffer. For that reason, we also believe that disclosure would result in similar information in the future no longer being supplied to the [NPC] where it is in the public interest that such information be supplied. That is yet a further "harm" within the meaning of *FIPPA* that justifies non-disclosure of [Schedule "C"].

[89] I will address the last statement first. This is essentially an argument that disclosure will result in similar information no longer being supplied to the institution. This appears to be the foundation for the argument that the information qualifies for exemption under section 17(1)(b) of the *Act*. I do not accept this position. The allegation that specifications of the tour boats or similar information will not be provided by other future bidders on "other items" is highly speculative. This agreement is a complex one having a thirty year term, and I am not persuaded by the evidence that a similarly placed company would not provide the same level of information in order to secure an agreement with NPC. Therefore, I find that I have not been provided with sufficiently detailed and convincing evidence to establish the section 17(1)(b) harm alleged.

[90] Furthermore, based on my review of the representations and the nature of the information that I have found to be immutable, as set out above, I find that I have not been provided with sufficient evidence to link the disclosure of the specifications of the tour boats to the harms alleged under section 17(1)(a) or (c). In particular, I find that I have not been provided the kind of "detailed and convincing" evidence required to satisfy part 3 of the section 17(1) test with respect to the disclosure of the information that I have found to be immutable, above. In my view, the information I found to be immutable is known or readily observable and in any event, I am not satisfied that a "reasonable expectation of harm" exists if the information that I have found to be immutable is disclosed. Hornblower has failed to explain to me how disclosing the specifications of the tour boats could reasonably be expected to cause it harm, as contemplated in sections 17(1)(a) or (c).

[91] As all three parts of the three-part test must be met for section 17(1) to apply, I find that the information in Schedule "C" does not qualify for exemption under section 17(1) of the *Act*.

[92] I will now consider whether the exemptions at sections 18(1)(a) and 18(1)(c) apply to the withheld portions of pages 23 and 24 and Schedules "C" and "F" of the Agreement.

D. Do the discretionary exemptions at sections 18(1)(a) and 18(1)(c) apply to the withheld portions of pages 23 and 24 and Schedules "C" and "F" of the Agreement?

[93] Sections 18(1)(a) and 18(1)(c) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[94] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[48]

[95] NPC submits that it is classified as an Operational Enterprise ("OPE") of the Government of Ontario. It submits that:

> Operational Enterprise agencies, including NPC, sell goods and/or services to the public in a commercial manner, including, but not necessarily, in competition with the private sector. [Footnote omitted]
>
> As an OPE, NPC generates and receives revenues from its commercial activities and applies them to further the objects for which it was incorporated. Due to its revenue producing operations, NPC is, among other things, able to provide many attractions and services to the public for free, including in partnership with others: thousands of floral displays, nightly illumination of Niagara Falls, fireworks and concert series, picnic tables and benches along the Niagara River corridor, special lighting

[48] *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).

> for a winter-time festival of lights, hundreds of hectares of parkland, and over 100 historic plaques and markers. [Footnote omitted]
>
> The agreement with Hornblower is an important part of NPC's revenue-generating commercial activity. It is estimated that the agreement will generate in excess of $500 million in revenue to NPC. [
>
> The safety and security of all the persons in the Niagara Falls area and the commercial success of the boat tours (and the revenues to be paid to NPC) are important to NPC and indeed the public and the Niagara Region in general.

[96] Hornblower submits that the Agreement is of great financial significance to the NPC, because of its guaranteed rent and surety provisions, its 30-year term, and the 30-year impact on the NPC's budget as a result of payments to be made by Hornblower to the NPC.

[97] In support of its assertion that the information at issue is subject to exemption under sections 18(1)(a) and 18(1)(c), NPC submits in particular that:

> Schedule "C" in the Record provides a comprehensive forward-looking plan, design, strategy and agreement for the successful operation of the boat tours for the next 30 years. Access to the Schedule "C" by a competitor would, among other things, provide the competitor with information regarding the current strategy regarding the boat tour, how the boat tour operation is structured and how it will operate.
>
> NPC submits that, in the circumstances of this appeal, disclosure of Schedule "C" can reasonably be expected to prejudice NPC's economic interests and competitive position, particularly considering the competing boat tour operation to be launched on the United States' side.
>
> It is critical to note that, from a competitive intelligence perspective, Schedule C provides a complete roadmap to the boat tour operation for the next 30 years and is absolutely the most valuable and important type of information that a competitor could exploit to the detriment of NPC and Hornblower. …

[98] NPC further submits that:

> Forward-looking long term plans and strategies have been exempted from access in past appeals for the same reasons cited by NPC in this appeal.[49]
> …
>
> Schedule "C" and the information it contains, is confidential and is intended only for the use of Hornblower and NPC. NPC implemented very strict procedures and controls to protect confidentiality of information in respect of the procurement and the Record. Among other things, bidders were required to sign non-disclosure agreements prohibiting disclosure of the procurement and bids.
>
> Given the fact that NPC will be competing for boat tour customers (and the related spin-off revenue generated by such tourist activities), and in light of the nature of the withheld portions of the Record, disclosure would affect the ability of NPC to secure customers and would reveal their strategies and plans thereby impacting their competitiveness. Therefore disclosure of the withheld information could reasonably be expected to prejudice the economic interests and competitive position of NPC.
>
> The foregoing analysis applies both to Schedule "C" and to the withheld portions of the body of the Record. In addition, Schedule "F" provides a detailed timetable, or 'checklist' of milestones, for the implementation of the boat tour operation pursuant to the Record. Disclosure of this confidential commercial information would allow a competing operation to springboard the planning and launch of its operation using the type and order of identified milestones (instead of having to research and develop its own plan).

[99] NPC further submits that disclosure of the withheld information would adversely impact NPC existing and future negotiations and agreements submitting that:

> … disclosure of the withheld portions of the Record could reasonably be expected to prejudice the economic interests of NPC because disclosure would adversely affect NPC's future negotiating position with third party private sector organizations.
>
> NPC frequently contracts with private sector entities to permit them to engage in commercial operations on NPC lands. The terms of each

[49] NPC references Order PO-2569 in this regard submitting that although that appeal dealt with the impact of disclosure on a third party, the reasoning describes the same type of prejudice and harm that would result to NPC and Hornblower from disclosure of Schedule "C" in respect of the boat tour operation.

> agreement that NPC enters into with private sector entities are confidential and negotiated on a case-by-case basis.
>
> NPC submits that disclosure of the exempt portions of the Record could reasonably be expected to prejudice its economic interests in respect of its existing and future agreements and negotiations with other private sector entities.

[100] In Hornblower's representations on section 17(1) of the *Act*, set out above, it refers to harm that may arise to NPC from the disclosure of the remaining information at issue. In addition, the affidavit of NPC's Chair, also set out above, asserts that NPC will suffer harm if the remaining withheld information is disclosed. I have also considered these submissions, as well as the confidential submissions provided (which I cannot set out in this order as it may reveal the content of the record at issue), and all the circumstances of the appeal, in my analysis below.

Section 18(1)(a): information that belongs to government

[101] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,

2. belongs to the Government of Ontario or an institution, and

3. has monetary value or potential monetary value.

[102] NPC submits in the context of the application of section 18(1)(a) specifically, that:

> The value or advantage associated with business information may exist due to the fact that the information is secret or because resources have been expended to bring the information into existence. Factors that make information confidential can include economic value to the business, or its competitors, or the expenditure of independent effort and resources to protect the information.[50]

Part 1: type of information

[103] The definition of the types of information listed in section 18(1)(a) are the same as those set out in my section 17(1) analysis, above. I draw the same conclusions here as I did there. Accordingly, I find that the withheld portions of the Agreement, including

[50] NPC cites *Thorburn and Fairbaim, The Law of Confidencial Business Information* Aurora, Ontario: Canada Law Book Inc., 2004) at 3-21 and following.

Schedules "C" and "F", contain commercial, financial and/or technical information for the purposes of section 18(1)(a) of the *Act*.

Part 2: belongs to

[104] The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.[51]

[105] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,[52] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.[53]

Part 3: monetary value

[106] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.[54]

Analysis and finding

[107] In making my determinations on this issue, I must examine whether the information "belongs" to the institution. Based upon my review of the records and representations, I have concluded that the withheld information does not "belong to" NPC in the sense contemplated by the exemption. The information at issue was produced in the course of negotiations and included in the mutually generated Agreement. In my view, it belongs as much to Hornblower as to NPC, for the purposes

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[51] Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner),* [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.
[52] Order P-636.
[53] Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.
[54] Orders M-654 and PO-2226.

of section 18(1)(a) of the *Act*. Further, I am satisfied that the information is not in the nature of a trade secret that the courts would protect from misappropriation.

[108] Support for this conclusion may be found in Order PO-3011,[55] where Assistant Commissioner Brian Beamish[56] stated the following with respect to similar arguments on part 2 of section 18(1)(a) made by Infrastructure Ontario:

> [83] In keeping with my findings in my section 17(1) analysis, I find that the information contained in the agreement does not "belong" exclusively to Infrastructure Ontario, but was the product of negotiation(s) with the affected party. I do not accept that the schedules, once incorporated into the project agreement, became the property of Infrastructure Ontario. The project agreement and its schedules comprise the contract between the affected party and Infrastructure Ontario, setting out each party's rights and responsibilities. I also note that the RFP document, which Infrastructure Ontario submits is copyright protected, is not at issue in this appeal.
>
> [84] The project agreement was the result of negotiations between Infrastructure Ontario and the affected party. Therefore, the schedules that comprise the records at issue are not proprietary information of Infrastructure Ontario and do not satisfy the second part of the test under the discretionary exemption in section 18(1)(a).

[109] Given my finding that I have not been provided with sufficient evidence to establish the second part of the test under 18(1)(a), it is unnecessary for me to review whether, for the purpose of part 3, the information also has monetary value.

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

[110] 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.[57]

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[55] Order PO-3011 was followed by Reconsideration Order PO-3072-R, which addressed the Assistant Commissioner's reconsideration of his section 17(1) finding. These orders were upheld in *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776, on section 17(1). The Assistant Commissioner's section 18 finding was not reviewed in Order PO-3072-R or challenged at the Divisional Court.

[56] Now Commissioner.

[57] Orders P-1190 and MO-2233.

[111] 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.[58]

[112] For section 18(1)(c) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[59]

[113] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[60]

[114] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[61]

[115] NPC submits in the context of the application of section 18(1)(c) that:

> … The purpose of section 18(1)(c), on which NPC principally relies, 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.[Footnote omitted] This exemption has particular resonance in this appeal given NPC's status as an OPE which earns money in the marketplace and has a direct economic interest in the commercial success of the boat tour operation (both in general terms and because of the provisions of the agreement which require payments to NPC as a variable percentage of gross revenues).

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[58] Orders PO-2014-I, MO-2233 and PO-2758.
[59] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[60] Order MO-2363.
[61] See Orders MO-2363 and PO-2758.

> …
>
> The harms addressed in section 18(1)(c) may be inferred from the record and/or the circumstances, particularly where disclosure of the withheld information could reasonably be expected to be used by a competing entity serving a common market (e.g. boat tours at Niagara Falls) to gain a competitive advantage, thereby producing lower revenues for and prejudicing the economic interests of an institution.[Footnote omitted]

[116] NPC submits that the Supreme Court of Canada has ruled that a "reasonable expectation" means that something must at least be foreseen and perhaps likely to occur, but less than 'more likely than not', cautioning that too high a standard must not be applied.[62]

Analysis and finding

[117] As set out above, the mere fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not necessarily prejudice the institution's economic interests, competitive position or financial interests.[63]

[118] In Order PO-2758, Senior Adjudicator John Higgins reviewed the decision of McMaster University to deny access under section 18(1)(c) to the terms of contracts it had signed with various third parties. Senior Adjudicator Higgins reviewed the arguments of the parties in that appeal in the following manner:

> Referring to the records at issue in this appeal, McMaster submits:
>
> > By revealing certain detailed negotiated financial payments contained in the Records such as rent, royalty payments, payment arrangements and other commercial terms, McMaster's negotiating position is severely compromised when negotiating new agreements. The same can be said in instances where McMaster is attempting to negotiate renewal terms of existing agreements.
>
> McMaster argues that this is the case because:
>
> > … the competitor would have knowledge of the actual pecuniary and commercial terms negotiated between McMaster and the original Service Provider. A precedent of a

[62] NPC refers to paragraphs 196 and 204 of *Merck*, supra, in support of this submission.
[63] See Orders MO-2363 and PO-2758.

> "floor" or ceiling would be established for any prospective supplier in advance of negotiations.

[119] In dismissing these arguments, the Senior Adjudicator stated:

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

[120] I agree with the reasoning of the Senior Adjudicator in Order PO-2758 and adopt it in my analysis of the information remaining at issue.

[121] The agreement at issue is unique. It is for a thirty year term and involves a large capital expenditure by Hornblower, creating a durable infrastructure for boat tours from the Canadian side of Niagara Falls. In my view, unless Hornblower defaults under the Agreement, I think it would be unlikely that a competitor will be able to supplant Hornblower before the end of the current term. And to paraphrase Senior Adjudicator Higgins if it did it would likely do so by creating more favourable contractual terms with NPC than Hornblower.

[122] In their representations, NPC and Hornblower refer to possible contracts with third party private sector organizations or entities, but provide no specific examples of the timing of specific contracts or their actual subject matter. In many of the appeals of this office where the application of section 18(1)(c) was upheld, examples of specific pending proposals or similar pending contracts were provided.[64] This was not done here. What is at issue here is a finalized contractual agreement, not an agreement relating to a pending transaction or one that may be subject to tender again in the very near future. This is a request for an Agreement which has been negotiated and finalized. Again, to paraphrase Senior Adjudicator Higgins, if a potential third party private sector organization or entity truly wishes to secure a contract with NPC, it will do so by creating more favourable contractual terms with NPC than its competitor.

[123] With respect to the allegation that this information can be used as a "springboard" to create a competing Boat Tour business, it must be noted that the Hornblower boat tours are already operating on the Canadian side pursuant to the thirty year operating agreement. Hornblower has the exclusive rights to conduct boat

[64] For example, Orders P-1026, P-1190 and PO-1639.

tours from the Canadian side of Niagara Falls. A would be competitor, including Maid, would simply not be able to reproduce the extensive and expensive infrastructure that Hornblower already has in place to compete from this location.

[124] With respect to the argument that releasing the information would allow third parties, such as Maid, to structure its operations to NPC's detriment or compete for customers from the American side of Niagara Falls, I have not been provided with sufficiently detailed and convincing evidence to demonstrate how Maid could undercut the Canadian boat tours in such a way as to motivate a Canadian side traveler to cross over to the American side to use Maid's services. Given the inconvenience and time that is often coupled with crossing the border, I believe this concern to be significantly overstated.

[125] Another ground relied upon is the potential chilling effect releasing this information may have upon other contractual suppliers to NPC, who would, it is argued, be reluctant to provide fulsome information in a contracting process. This is essentially an argument that disclosure will result in similar information no longer being supplied to the institution. I do not accept this position. The allegation that similar information will not be provided by other future bidders is highly speculative. I am not persuaded by the evidence tendered that a similarly placed company would not provide the same level of information in order to secure an agreement with NPC.

[126] I also find the grounds set out in the NPC's confidential submissions (which I cannot set out in this order as it may reveal the content of the record at issue), with respect to disclosing the withheld portion of page 23 to be overstated and exaggerated.

[127] Finally, considering that the Canadian boat tours have commenced, with a great deal of information now being in the public domain, I find other grounds set out in NPC's confidential submissions (which I cannot set out in this order as it may reveal the content of the record at issue) relating to the impact of the timing of disclosure to be overstated and exaggerated.

[128] Accordingly, I find that I have not been provided with sufficiently detailed and convincing evidence to establish that the remaining withheld portions of the pages 23 and 24 and Schedules "C" and "F" of the Agreement qualify for exemption under section 18(1)(c) of the *Act*.

E. Did NPC appropriately exercise its discretion under sections 14(1)(e) or 14(1)(i) of the *Act*?

General principles

[129] The sections 14(1)(e) and (i) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An

institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[130] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

[131] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[65] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations

[132] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[66]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

[65] Order MO-1573.
[66] Orders P-344 and MO-1573.

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[133] NPC submits that in response to the request, it granted access to virtually the entire Agreement and disclosed as much of it could reasonably be severed without disclosing material which is exempt. NPC submits that it withheld only those portions of the Agreement which it had safety and security concerns about. In its representations the NPC set out in detail the factors it considered in the exercise of its discretion to withhold information under sections 14(1)(e) or (i) of the *Act*.

[134] NPC submitted that in denying access to the information at issue it exercised its discretion based on all proper and relevant factors, not in bad faith or for an improper purpose and not based on any irrelevant factors.

[135] I agree. I have reviewed the circumstances surrounding this appeal and the representations pertaining to the manner in which NPC exercised its discretion. I have considered that the majority of the Agreement will be provided to the requester as a result of this order. In all the circumstances, I am satisfied that NPC has not erred in the exercise of its discretion not to disclose to the appellant the information that I have found to qualify for exemption under sections 14(1)(e) or (i) of the *Act*.

ORDER:

1. I find that the information on pages 99 to 104 and 119 to 127 of Schedule "C" to the Agreement qualify for exemption under sections 14(1)(e) or (i) of the *Act*.

2. I do not uphold the decision of NPC with respect to the balance of the withheld information remaining at issue and order that it be disclosed to the appellant, by **May 8, 2015** but not before **April 30, 2015**.

3. I reserve the right to require NPC to provide me with a copy of the pages of the record as disclosed to the appellant in accordance with paragraph 2, above.

Original Signed by: March 31, 2014
Steven Faughnan
Adjudicator