Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3647-I

Appeal PA12-552-2

Infrastructure Ontario

September 13, 2016

Summary: This order addresses the issues raised by an access request submitted under the *Freedom of Information and Protection of Privacy Act* to Infrastructure Ontario (IO) for records related to the 2015 Pan/Parapan American Games Athletes' Village Alternative Financing and Procurement Project. IO issued an access decision to the requester, granting partial access to some records, while denying access to others under sections 13(1) (advice or recommendations), 17(1)(a) and 17(1)(c) (third party information), 19(a) and 19(b) (solicitor-client privilege) and 21(1) (personal privacy). During the inquiry, both IO and an affected party sought to raise section 18.

In this order the adjudicator does not permit IO or the second affected party to raise section 18. IO's decision to withhold information under the mandatory exemptions in section 17(1)(a), 17(1)(c) and 21(1) is partly upheld. The adjudicator upholds IO's access decision and exercise of discretion under section 13(1) and partly upholds it under section 19, but finds that privilege has been waived over the draft versions of the project agreement by virtue of their disclosure to the successful proponent during negotiations. The non-exempt information is ordered disclosed, but the adjudicator remains seized of the appeal for the purpose of determining the possible application of the mandatory exemption in section 17(1) to the draft versions of the PAAV Project Agreement.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 2(1) (definition of "personal information"), 2(3), 10(2), 13(1), 17(1)(a), 17(1)(c), 19(a), 19(b), 21(1), 21(3)(a), 21(3)(d).

Orders Considered: Orders MO-3253-I, P-257, PO-2497, PO-2965, PO-2987, PO-3011, PO-3032, PO-3067, PO-3154, PO-3158, PO-3253-I, PO-3311, PO-3572 and PO-3601; BC Order 03-02.

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII); *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (CanLII); *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510; *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)* 2002 BCSC 1344 (CanLII); *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 98 D.T.C. 6456 (Alta. Q.B.); *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.).

OVERVIEW:

[1] This order addresses the issues raised by Infrastructure Ontario's decision in response to an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or FIPPA) for records related to Toronto 2015 Pan/Parapan American Games.

[2] In October 2010, Infrastructure Ontario (IO)[1] released a request for qualifications (RFQ) to shortlist teams for the design, build, finance and development of an 80-acre portion of the West Don Lands area in Toronto as the site of the 2015 Pan/Parapan American Games Athletes' Village (PAAV). The PAAV would provide accommodations for athletes and officials during the games and then, in its post-games phase, be developed into a "sustainable, mixed-use, pedestrian-friendly, riverside community," including affordable housing. In January 2011, IO invited three shortlisted proponents to submit bids in response to the Request for Proposals (RFP) for the PAAV Project, which proceeded under IO's Alternative Financing and Procurement (AFP) model.[2] On the basis of the proposals submitted, IO selected one successful bidder. This party entered into a fixed-price contract with the Province of Ontario for the PAAV Project.

[3] After the contract was signed, IO received a request under the *Act* for records related to the PAAV Project, dated from October 2010 to the date of the request in July 2012, and itemized as follows:

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[1] IO describes itself as "a Crown corporation wholly owned by the Province of Ontario and established by the *Ontario Infrastructure and Lands Corporation Act.* IO, among other things, provides services including construction project management, facilities management, real estate portfolio management, real estate asset rationalization and strategic asset management as well as environmental planning, leasing and sales."

[2] Under the AFP model, risks associated with designing, constructing, and financing the facilities are transferred to the private sector.

1) The submission(s) made by [a named company] in relation to the Infrastructure Ontario 2015 Pan/Parapan American Games Athletes' Village Alternative Financing and Procurement [AFP] Project. Without limiting the generality of the foregoing, such records should include:

a. Submissions made by [the named company] during the Stage 1 Prequalification Stage of this project (as defined in RFP No. OIPC-11-00-0024 – hereinafter referred to as the "RFP");

b. Submissions made by [the named company] during the Stage 2 RFP Procurement Process, including the Proposal submitted by [the named company] in response to the RFP;

c. Submissions made by [the named company] during the Stage 3 Implementation of the Project Agreement as referred to in the RFP;

d. Infrastructure Ontario's (or any of its agents' or consultants') deliberations or considerations of the Proposal submitted by [the named company] in response to the RFQ and in response to the RFP, including any comparisons made between [the named company's] Proposal and proposals submitted by other Proponents;

e. Any scoring of [the named company's] Technical Submission, including any notes, manuals or guidance documents relating to such scoring and any questions arising from the Technical Submission;

f. Any scoring of [the named company's] Financial Submission, including any notes, manuals or guidance documents relating to such scoring, any questions arising from the Financial Submission, any comparisons made between [the named company's] Financial Submission and the Financial Submission submitted by other Proponents;

g. Any correspondence between [the named company] (or any of its agents or consultants) and Infrastructure Ontario (or any of its agents or consultants) in which [a second named company] or any of its principals is/are discussed and/or their participation in [the named company's] Proposal (whether such participation was to be direct or indirect) is considered;

h. Any internal communications, notes, research or other record regarding [the second named company] or its principals, including any such records in which [the second named company] or any of its principals is/are discussed and/or its participation in [the named company's] Proposal (whether such participation was to be direct

> or indirect) is considered, including any analysis of the [the second named company's] proposed participation in the Proposal; and
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> i. A copy of the Project Agreement and any other agreement entered into to carry out the terms of the RFP, and all drafts of said agreements as exchanged between the parties thereto (and/or their agents or consultants).

[4] IO issued an interim decision and fee estimate of $7,440.00 to the requester, on October 24, 2012, advising that once IO had identified and reviewed the records, some information contained in them may be withheld pursuant to sections 17(1) (third party information) and 18 (economic and other interests) of the *Act*. On November 23, IO contacted the requester again to advise that its search and review of the records was complete and, further, that it would be notifying third parties of the request to provide them with an opportunity to make representations about the release of the records affecting their interests. Some of the notified affected parties submitted signed consents to IO for the full disclosure of the records relating to them. Some affected parties did not respond. Six of the affected parties submitted written consents for partial disclosure of the information relating to them; and some of these consents were accompanied by submissions to IO.

[5] IO then issued a final access decision to the requester and the affected third parties on December 21, 2012, in which it granted partial access to the records. The decision letter stated that records, or portions of records, were withheld pursuant to the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemption for solicitor-client privilege in section 19 of the *Act*.

[6] The requester (now the appellant) appealed IO's access decision to this office and a mediator was appointed to explore the possibility of resolution. During the mediation stage of the appeal, IO issued a revised access decision and index to the appellant on June 14, 2013. Additional information relating to one of the affected parties, the successful proponent, was disclosed as that party no longer objected to its disclosure.[3]

[7] Upon receiving the revised access decision and disclosed records, the appellant confirmed that it wanted to pursue access to all of the withheld information. In addition, after reviewing the index of records provided, the appellant expressed the belief that more responsive records should exist. In response to the appellant's concern that the search conducted had not been adequate, IO conducted another search. An additional 181 records were identified by this search. IO issued a supplementary access decision on August 15, 2013, granting partial access to the newly identified records.

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[3] The "successful proponent" is the party named in the request. There are several related entities that, together with that named party, comprise the successful proponent.

Access was denied to the withheld portions of the records pursuant to sections 13(1) (advice or recommendations), 17(1) and 19 of the *Act*.

[8] The appellant appealed the supplementary access decision and also continued to challenge the adequacy of the searches conducted by IO. In response, IO conducted yet another search and identified further records. As a result of the additional searches conducted and the information provided by IO, the appellant accepted that a reasonable search had been performed. This removed the issue of reasonable search from the scope of the appeal.

[9] On October 4, 2013, IO notified the successful proponent that it had located two additional records and intended to grant full access to them. IO also advised the successful proponent that it was "assuming that [it] will object to the release of these Additional Records, and thus the Additional Records will form part of the ongoing appeal (as Records 182-43 and 183-44)." Subsequently, the successful proponent advised IO that it objected only to the disclosure of Record 183-44.[4] Since the appellant wishes to pursue access to this record, it remains at issue.

[10] As it was not possible to reach a mediated resolution of this appeal, it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator who had carriage of the appeal at the time offered Infrastructure Ontario and 18 affected parties an opportunity to provide representations in response to a Notice of Inquiry that outlined the background of the appeal and the issues for determination. IO and five affected parties[5] submitted representations to this office. The other affected parties either did not respond to the Notice of Inquiry or indicated that they did not wish to participate in the process. In turn, the adjudicator sent copies of the representations provided, along with a Notice of Inquiry, to the appellant, inviting it to provide representations. Portions of the participating affected parties' representations were withheld, pursuant to the confidentiality criteria in IPC *Practice Direction 7*.

[11] Upon receipt of the appellant's representations, the adjudicator determined that IO and the affected parties who had provided representations at the inquiry's initial stage ought to be given a chance to submit reply representations. Accordingly, the

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[4] The second of these hyphenated numbers arises in the context of the dual numbering system used to identify records that IO concluded would engage the interests of the third party/successful proponent. In this case, for example, 183 is IO's record number and 44 is the successful proponent's number. In the remainder of this order, I use only the first number. No separate third party appeal was opened regarding this record because it was not located until after the appeal moved to the adjudication stage, but the issue of access to Record 183 is addressed in this order regardless.

[5] Two of the affected parties that provided similar services to the successful proponent as part of the PAAV Project are represented by one lawyer and their representations are attributed in this order to the "second affected party." The other three affected parties are related corporations that are represented by the same lawyer. As noted above, the latter grouping of three affected parties is referred to collectively as the "successful proponent" in this order.

appellant's representations were sent to IO and the participating affected parties.

[12] At this point in the inquiry, IO conducted another search that located five additional records (184, 185, 185a, 185b and 186) and it issued a supplementary access decision denying access under sections 13(1), 17(1) and 19.

[13] IO and the participating affected parties submitted reply representations. In its reply representations, IO claimed the application of the discretionary exemption in section 18(1)(d) (economic and other interests). The appellant was given the opportunity to respond not only to the representations of IO and the affected parties, but also to the new issues raised by IO's section 18 claim, including whether it ought to be permitted to make this late discretionary exemption claim. The appellant submitted sur-reply representations.

[14] The appeal was subsequently transferred to me. During the preparation of this order, I discovered that IO had not provided copies of two of the schedules to the Project Agreement; namely, Schedule 15 (Output Specifications) and Schedule 32 (Financial Model). In both cases, there was a blank page that stated: "Please see attached CD," but no CD had been provided. It took some time for IO to locate these records and during this time, I contacted the appellant to confirm that they wished to pursue access to both schedules.[6] The appellant advised this office that it did not seek access to Schedule 15, so this record was removed from the scope of the appeal.

[15] The representations in this complex appeal are lengthy and the circumstances are complicated. While only the relevant portions of the parties' representations are excerpted or summarized in this order, I have considered them in their entirety.[7]

[16] In this interim order, I do not allow IO's late claim to the discretionary exemption in sections 18(1)(a), (c) or (d); nor do I permit the second affected party to raise section 18(1)(c). I partly uphold IO's claim of the mandatory exemptions in sections 17(1)(a), 17(1)(c) and 21(1). I also find that the discretionary exemption in section 13(1) applies, and that sections 19(a) and 19(b) apply, in part. I also find that IO properly exercised its discretion in applying them. However, I find that solicitor-client privilege has been waived over the draft versions of the PAAV Project Agreement because the drafts were shared with the successful proponent during negotiation of the final agreement. IO claimed only section 19 to withhold the draft versions of the PAAV Project Agreement, but since information I concluded was exempt under the mandatory

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[6] As described to the appellant, Schedule 15, "Output Specifications," is extremely large, consisting of approximately 750 pages plus a CD with numerous drawings and images. Schedule 32, titled "Financial Model," is also about 750 pages. This closing Financial Model is different from the financial model included in the original records package sent to the IPC, which was apparently disclosed to the appellant.

[7] "Relevant" submissions are those that address the appellant's access appeal under FIPPA, not any matters related to IO's decision making on the PAAV Project participants, which are matters clearly falling outside the scope of my authority.

exemption in section 17 may also be included in those drafts, I remain seized regarding the determination of its possible application to them. I order disclosure of all other non-exempt information in the records to the appellant.

RECORDS:

[17] The records consist of evaluation records, 12 versions of the PAAV Project Agreement,[8] RFQ financial information, RFQ technical information, RFP correspondence and financial information, RFP technical information (including resumes), variation notice (#2), emails and correspondence. The records are extremely voluminous (over 10,000 pages) and (for the most part) were provided to this office on CD-ROM, rather than hard copy.

ISSUES:

A. Should IO be permitted to claim a new discretionary exemption at the inquiry or order stages of the appeal process?

B. Should the affected party be permitted to raise a discretionary exemption?

C. Do the records contain "personal information" as defined in section 2(1)?

D. Would disclosure of the information result in an unjustified invasion of personal privacy under section 21(1)?

E. Does the mandatory exemption for third party information in section 17(1) apply?

F. Does the discretionary exemption for advice or recommendations in section 13(1) apply?

G. Does the discretionary exemption for solicitor-client privilege at section 19 apply to the records?

H. Did IO properly exercise its discretion under sections 13 and 19?

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[8] There are two sets of six versions of the PAAV Project Agreement: blackline and clean. A blackline version shows the information that has been redacted (severed) with a line through it, while a clean version shows the word "REDACTED" in place of that information.

DISCUSSION:

A. Should IO be permitted to claim a new discretionary exemption at the inquiry or order stages of the appeal process?

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

> 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.

[19] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the process or unduly prejudicing the interests of the appellant.[9] The Confirmation of Appeal that this office sent to IO after opening Appeal PA12-552-2 advised IO of the 35-day deadline set by this office for claiming additional discretionary exemptions.

[20] Although IO's interim decision letter referred to the possibility that section 18 would be claimed to withhold information, the decision letters that followed (final, revised and supplementary) did not mention this exemption. At the reply stage, however, IO indicated in its representations that it was now seeking to rely on the discretionary exemption in section 18(1)(d) of the *Act*. IO's submissions on this point refer to both "the Project Agreement" and the "Model for the Project." IO's representations clearly identify the "blackline" final version of the Project Agreement[10] (version "B)11"), which is in addition to its previous claims of sections 17(1) and 19 to this version. The model, presumably the closing Financial Model at Schedule 32, is the only schedule specifically identified by IO as being of concern and the only one in relation to which arguments under section 18(1)(d) were provided. Next, when IO

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[9] The IPC's 35-day discretionary exemption claim 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.). Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.

[10] The executed versions of the agreement are Versions B11) and B12), identified by IO as "Project Agreement, Amended and Restated, Execution Version, Redacted for Website." B11) is identified as "BLACKLINE" and B12) is identified as "CLEAN." See footnote 8.

provided a CD copy of Schedule 32 during the preparation of this order, it annotated the table of contents provided with the CD with additional claims of sections 18(1)(a) and (c). No submissions were made in support of those exemptions by IO at any time during the inquiry; nor were the other parties asked to provide representations on them.

[21] IO submits that it is asking me to vary the usual procedure in this appeal under the *Code of Procedure* because,

> … after further review of the Project Agreement and internal discussions, IO realizes that it erred in the first instance by not advancing a section 18 claim to the Project Agreement. The Crown will suffer prejudice to its financial interests if the request is not granted and the Project Agreement is released. This harm to the Province's financial interest … outweighs any prejudice to the Appellant.

[22] In response, the appellant argues that IO is seeking to add section 18 "without providing any reasonable justification" for its failure to raise this exemption within the specified period and without having demonstrated a real risk of prejudice to IO that would outweigh the presumed prejudice to the appellant. The appellant submits that the 35-day policy is in place to facilitate early resolution of appeal issues and to prevent an institution from trying to change and improve its case as the appeal progresses. The appellant notes that IO "delivered four responses to the Appellant's initial information request, only raising the section 18(1)(d) exemption in its latest set of representations." According to the appellant, simply "not catching it" is an inadequate and unreasonable explanation for IO's previous failures to claim the exemption and this explanation does not reveal that there were "extenuating circumstances" that might justify the late claim.

[23] The appellant submits that the compromised integrity of the appeal process caused by allowing IO to make this late claim can be measured by comparing the relative prejudice to the parties. In this matter, the appellant notes the passage of time without a resolution of the issues around access to the requested records, the three times the appellant has already had to respond to IO's representations and the attempt to claim an additional discretionary exemption requiring a fourth response. The appellant states that the late claim requires it to incur "unnecessary legal costs" to respond, which is "precisely the kind of prejudice against which section 11 of the Code is supposed to protect [against]."[11] Furthermore, according to the appellant, the potential prejudice IO alleges would result if it were prevented from relying on section 18 is "speculative and does not relate to the purpose of section 18(1)(d)." Therefore, the appellant submits that the alleged prejudice to IO does not outweigh the real prejudice to the appellant if IO's new exemption claim were permitted to stand at this

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[11] The appellant relies on *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*, cited above.

late stage of the appeal process.

Analysis and findings

[24] In deciding whether to allow an institution to claim a new discretionary exemption outside the 35-day period, an adjudicator must consider the relative prejudice to the institution and to the appellant,[12] an exercise that must necessarily also consider the specific circumstances of the appeal.[13]

[25] The circumstances surrounding IO's apparent claims to sections 18(1)(a) and (c) to Schedule 32, long after the close of submissions in this appeal, are clear. As noted, IO provided Schedule 32 during the preparation of this order because it had not been provided previously. No submissions were offered on those exemptions by IO at the time the schedule was provided and none were sought. In my view, this reliance on sections 18(1)(a) and (c) was more clearly an afterthought; allowing IO to add these exemption claims would not be appropriate. As Adjudicator Laurel Cropley noted in Order MO-2468-F,

> End of the day decision-making regarding the applicability of possible exemptions is contrary to the access provisions of the *Act*, which require that a decision be given within 30 days of receiving the request (or any time extension contemplated by the *Act*), and strains the bounds of the IPC policy regarding the late raising of new discretionary exemptions.

[26] I agree. In these circumstances, I conclude that allowing IO to rely on sections 18(1)(a) and (c) at this late stage would compromise the integrity of the appeal process. Correspondingly, I find that the appellant would be unjustifiably prejudiced if I were to allow IO's very late claim to section 18(1)(a) and (c) in relation to the closing Financial Model at Schedule 32 of the executed Project Agreement.

[27] Similarly, regarding section 18(1)(d), I share the appellant's view that IO had several earlier opportunities to specifically rely on section 18(1)(d) in relation to the final version of the Project Agreement in its access decisions. I also agree with the appellant that the value of the information sought can diminish with time and that in such a situation, an appellant may be especially prejudiced by delays arising from the late raising of new exemptions.[14] On the other hand, the need to invite representations on section 18(1)(d) following IO's reply representations did not by itself contribute significantly to the time required to adjudicate the appeal. At sur-reply, the appellant was given an opportunity to make representations on the late raising of section 18, as well as the application of section 18(1)(d) to the record and did so. I also note that the

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[12] Order PO-1832.
[13] Orders PO-2113 and PO-2331.
[14] See Order PO-2113, where Adjudicator Donald Hale reviewed the rationale that was provided by Inquiry Officer Anita Fineberg for limiting late discretionary exemption claims in Order P-658.

facts that would have to be considered in determining section 18(1)(d) are similar to those before me for determining the application of section 17(1). In sum, the circumstances of IO's request to rely on section 18(1)(d) are more equivocal than those relating to sections 18(1)(a) and (c). Generally, however, I cannot accept "mere inadvertence" as a reasonable explanation for the failure to claim section 18(1)(d) at the proper time, taking the circumstances of this appeal into consideration. It appears that IO only ventured to claim section 18(1)(d) after its legal counsel became involved in the process, as perhaps it did with the other parts of section 18 that IO tried to invoke even later in the inquiry. Having balanced the competing interests in this particular case, I will not permit IO to rely on section 18(1)(d) in relation to version B11) of the Project Agreement, and I will not review it further in this order.

[28] Further, I conclude below that the mandatory exemption in section 17(1) applies to the closing financial model (Schedule 32) and other withheld portions of version B11) of the Project Agreement. In this context, neither the representations provided on section 18(1)(d), nor the content of the *non-exempt records*, would have established that harm in the form of injury to the financial interests of the provincial government or its ability to manage Ontario's economy could reasonably be expected to result from their disclosure.

B. Should an affected party be permitted to raise a discretionary exemption?

[29] In this appeal, under the heading for the third party information exemption, the second affected party provided representations suggesting that the discretionary exemption in section 18(1)(c) of the *Act* might also apply to the records withheld under section 17(1). Accordingly, I will address the issue of whether the second affected party is entitled to rely on section 18(1)(c).

[30] As discussed above, section 18(1)(c) was not advanced as an exemption claim by IO in making the decision on access to the records under the *Act*, at least not before the orders stage. Section 18(1)(c) states:

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

[31] 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.[15]

[32] Past decisions of this office have considered the issue of third parties claiming discretionary exemptions with reference to the nature of the interests being protected. In Order P-257, former Assistant Commissioner Tom Mitchinson stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. …
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> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

[33] In Order PO-3032, Senior Adjudicator John Higgins had the following to say about an affected party (pharmaceutical manufacturer) seeking to claim sections 18(1)(c) and 18(1)(d) in addition to section 17(1), where the Ministry of Health and Long-Term Care had not made such a claim:

> Given the purposes of these exemptions, to protect the government's ability to compete in the marketplace and to protect the broader economic interests of Ontarians, it would only very rarely be appropriate to support a claim for these exemptions by a private party, whose arguments are directed at protecting their own interests, and not those of the government or the public.
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> In my view, the circumstances of this appeal do not constitute one of these rare exceptions. The position taken by the drug manufacturers in these appeals is fundamentally concerned with protecting their own interests. Any perceived overlap with the interests of the government or

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

> the public arises from arguments that the drug manufacturers' interests would be damaged by disclosure, and that this would have a spill-over effect that could reasonably be expected to be prejudicial to the interests of the government or the public.

[34] In keeping with Orders P-257 and PO-3032, I affirm that the broader purpose of the section 18 exemption is to protect the economic interests of government institutions like IO, not private sector companies, such as the second affected party. I also note that as Orders MO-2363 and PO-2758 have established, 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. IO is the party in the best position to assess whether the harms described in section 18(1)(c) could reasonably be expected to result from disclosure of the information. Prior to making the (various) access decisions, IO sought and received submissions from the affected parties on disclosure. Therefore, IO had an adequate opportunity to consider whether disclosure would give rise to the harm to its own economic interests or competitive position contemplated by section 18(1)(c) and did not claim it, even when it raised paragraph (d) of section 18(1) at the reply representations stage. It stands to reason that IO considered the possible application of the discretionary exemption in section 18(1)(c) to the records at issue at the decision-making stage and did not rely on it. I say this even though IO annotated the Schedule 32, Financial Model, table of contents with section 18(1)(c) when it provided the record to me during the order preparation stage, a claim I disallowed above, for the reasons given. Ultimately, I find that the circumstances do not justify a finding that this appeal represents a "rare exception" to the general rule that a third party is not entitled to claim a discretionary exemption. The second affected party cannot claim section 18(1)(c). Given this conclusion, it is not necessary for me to determine whether it applies to any of the information at issue.

C. Do the records contain "personal information" as defined in section 2(1)?

[35] IO and the affected parties submit that disclosure of some of the records at issue, mainly related to the work experience and qualifications of the affected parties' Project team members, would result in an unjustified invasion of personal privacy pursuant to the mandatory exemption at section 21(1) of the *Act*. In order to determine whether section 21(1) might apply, however, I must first decide whether the records contain "personal information" and, if so, to whom it relates since section 21(1) can only apply to "personal information."

[36] To fit within the definition in section 2(1) of the *Act*, the information must be "recorded information about an identifiable individual," and it must be reasonable to

expect that an individual may be identified if the information is disclosed.[16] Section 2(1) provides the following non-exhaustive list of the types of information that qualify as "personal information:"

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[37] Information that does not fit within paragraphs (a) to (h) may still qualify as personal information.[17] Notably, however, sections 2(3) and (4) exclude certain information from the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

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[16] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[17] Order 11.

> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[38] To qualify as personal information, the information must be *about* the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[18] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[19]

Representations

[39] IO submits that the portions of records withheld under section 21(1) contain personal information that fits within paragraph (b) of the definition of the term in section 21(1). IO acknowledges that information about an individual in a professional or business capacity is not considered to be "about" an individual, but maintains that the severed portions of the main affected party's successful proposal are "clearly related to the employment history of individuals employed by [the successful proponent] and therefore constitute personal information."

[40] The successful proponent agrees with IO's decision to sever certain information as "personal information" on the basis of section 21(1). The main affected party provided two schedules to its representations where the records withheld, in part, on the basis of personal privacy are identified[20] and submissions offered. The successful proponent claims that the resumes contain personal information and should be "redacted in line with the IO Access Decision … Specifically, financial information relating to past projects should be redacted." This particular submission is explained further in reference to the resumes included with Part B of the RFP – Technical Information, regarding which this party states: "If resumes are to be partially disclosed, the cost of the referenced projects should be redacted pursuant to section 17."

[41] The second affected party refers to an appendix to the RFP submission titled "Projects and Manhours"[21] and suggests that its content could be construed as personal information because it consists of "highly confidential safety statistics and personal medical information" related to worker incidents and injuries at its sites across Canada. Specifically, workers' names associated with the injury and the corrective action taken

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[18] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[19] Orders P-1409, R-980015, PO-2225 and MO-2344.
[20] RFQ – Financial Information, section 2.2.4(c)(ii) (Past Experiences – Projects and Team Experience); RFQ – Technical Information, sections 2.1.4(b) (Development Experience – Developer and Key) and 3.1.4 (Design Team Resumes); RFP Technical Information, Part B – Section 1.0 (Resumes).
[21] RFP Technical Information, Part B Section 1.0, Appendix B Projects and Manhours.

could fall under paragraph (b) of the definition. However, the second affected party states that "this issue is not being seriously pursued."

[42] In responding to the positions of the parties opposing disclosure of resume-type information, the appellant argues that because the resumes were provided to IO as part of a public tendering process, they cannot qualify as "personal information." As part of the "Brief Factual History" provided, the appellant refers to section 3.8 of the RFP which "warns all participants that information submitted in response to the RFP may be disclosed pursuant to the *Act.*" The appellant relies on the analysis in Order PO-2987, where the information at issue related to an individual acting as an employee or in a business capacity, as opposed to a personal one. The appellant submits that in Order PO-2987, the following information was found not to qualify as "personal information": the names of individuals who are intended to work on a project, their professional designations, their job titles and any general descriptions of their assigned tasks or responsibilities for aspects of the project.

[43] In reply, IO maintains that the employment and educational histories of the individuals whose resumes are at issue fit within paragraph (b) of the definition of personal information in section 2(1). To illustrate why some of the information in the resumes is "personal information," IO submits:

> … at the end of this submission, the author includes her name and her business title. This submission is prepared by the author in her business and professional capacity, and [it] is therefore not personal information for the purposes of FIPPA. However, [if] the author attached to this submission her resume, including her employment and educational histories, this historical information would qualify as personal information, notwithstanding that the author attached the resume to a submission prepared in her business capacity.

[44] Furthermore, IO submits that even if the names of the individuals were severed, the records contain sufficiently detailed information about the individuals that it is reasonable to expect that each of the individuals may be identified.

[45] In their reply representations, the affected parties reiterate their agreement with IO's position on there being personal information fitting within paragraph (b) of the definition in the resumes of their "employees and associates."[22] The successful proponent refutes the appellant's argument that the content of the resumes cannot be considered "personal information" because they were submitted as part of the RFP process, submitting that:

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[22] Here, the main affected party also refers to Order PO-2987, as well as Orders M-1084, MO-1257, PO-2733, P-727 and P-766.

> While section 2(3) of the *Act* does provide that certain information identifying an individual in a "business, professional or official capacity" cannot be considered "personal", this exception explicitly states that it only applies to "name, title, contact information or designation of an individual." The exception does not apply to content describing the individual's education, employment history or involvement in financial transactions.

[46] In sur-reply, the appellant restates the position that "employment history that is submitted in the context of an RFP, specifically for the purpose of demonstrating the employees' qualifications to perform professional services required by the RFP, are necessarily of a business or professional context, and as such, cannot be exempt…"

Analysis and findings

[47] Information that qualifies as "personal information" according to the definition of the term in section 2(1) of the *Act* cannot be disclosed to any person other than the individual to whom the information relates, unless the personal information fits within certain exceptions contained in section 21(1), which is the mandatory exemption that exists to protect personal privacy.

[48] As I noted previously, "personal information" is defined in section 2(1) of the *Act*, and encompasses "recorded information about an identifiable individual" that fits within the categories listed in the provision, including the category identified by IO and the affected parties as relevant in this situation; i.e., paragraph (b). The definition contains several exceptions, the relevant one here being section 2(3).

[49] I have reviewed the records that have been withheld by IO, in part or in their entirety, to determine whether they contain "personal information" and, if so, to whom it relates. Pursuant to section 2(3) of the *Act*, I find that the names, titles and designations of the main affected party's employees and consultants that appear in their resumes[23] do not qualify as their "personal information." This information simply identifies these individuals in their professional or business capacities and would, therefore, reveal nothing of a personal nature about them. This finding is consistent with many previous orders.[24] As this particular information does not qualify for exemption under section 21(1), and no other exemptions are claimed in relation to it, I will order it disclosed to the appellant.

[50] Although not specifically identified as being withheld under section 21(1), Schedules 6 (Appendix C – Independent Certifier Personnel) and 9 (Key Individuals) to

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[23] I note that the format of the information about these individuals appears in the style of a professional profile. For simplicity, however, I refer to them as "resumes" in this order.
[24] See, for example, Orders PO-3186, PO-3512, MO-2151 and MO-2283.

the Project Agreement[25] are withheld nearly entirely. In Schedule 6, it is only the names of individuals providing certification services to the project, while in Schedule 9, the names, titles and business contact information of individuals who provided services to "Project Co." for the project have been withheld. Under section 2(3) of the *Act,* this information does not constitute "personal information" and it cannot therefore be exempt under section 21(1). However, since the Project Agreement and its schedules have been withheld in full or in part, I will review whether section 17(1) applies to this same information in Schedules 6 and 9, and wherever else it is duplicated.

[51] IO and the affected parties also correctly observe that this office has consistently found that the content of resumes includes "information relating to the education or … employment history of the individual" as outlined in paragraph (b) of the definition of personal information. Based on my review of the records, I find that the information contained in the resumes that relates to the education, past job experience, affiliations and project experience of those same employees or consultants fits within paragraph (b) of the definition of "personal information" in section 2(1) of the *Act*.[26] Therefore, with respect to the personal information of individuals in the resumes included in the RFQ and RFP records,[27] I must still review whether it is exempt under section 21(1).

[52] However, I make a distinction for the information contained in the resumes or professional profiles that relates to the financing for, or capital cost of, past projects in which the individuals were involved. In my view, this information is about the projects, not about the individual in a personal capacity. Accordingly, I find that the financial information related to financing or capital costs of past projects does not qualify as personal information and cannot be exempt under section 21(1). It will be reviewed under section 17(1) as part of the successful proponent's RFQ and RFP submissions.

[53] Additionally, although the second affected party states that the issue of whether the information identified in the RFP appendix titled "Projects and Manhours" is "personal information" is not being "seriously pursued," since section 21(1) is a mandatory exemption, I must consider it. On review of the appendix, I find that it does contain personal information about employees according to paragraphs (b) (medical information) and (h) (name and other personal information) of the definition in section 2(1). Specifically, the table at pages 11-13 of this 14-page appendix lists the following personal information that fits within the definition: employee name, together with the date and location of their injury, a description of that injury and the action taken to address it. As this table contains personal information about individual employees of the second affected party, I will review whether it is exempt under section 21(1) of the *Act.*

[54] The remaining pages of the Projects and Manhours appendix consist merely of

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[25] Withheld, variously, under sections 17(1), 18 and 19.
[26] See Orders P-727, MO-2151, MO-2856, MO-3093 and PO-2987.
[27] The resumes are located in the sections of the RFQ and RFP that are itemized in the footnote to the successful proponent's representations, above.

aggregate information or statistics about projects, rather than the personal information of any single, identifiable individual. Accordingly, I find that this additional information does not qualify as personal information for the purposes of the definition in section 2(1) of the *Act*. However, I will review whether this appendix is otherwise exempt under section 17(1), as was also claimed by IO in withholding it.

D. Would disclosure of the information result in an unjustified invasion of personal privacy under section 21(1)?

[55] Where a requester seeks the personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only exception that could possibly apply in the circumstances of this appeal is section 21(1)(f)[28] which states:

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

[56] If a record contains the personal information of an individual other than the appellant, the only way that such a record can be disclosed is if I find that disclosure would not constitute an unjustified invasion of personal privacy of that individual. For the section 21(1)(f) exception to apply, it must be established that disclosure would not be an unjustified invasion of personal privacy. Doing so requires a consideration of additional parts of section 21. In particular, the factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[57] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[29]

[58] Given my findings in the previous section of this order, at issue under section 21(1) are portions of the resumes of the successful proponent's employees and consultants engaged for the project. Also at issue is the segment of the Projects and

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[28] Section 21(1)(a) of the *Act* also provides that personal information can be disclosed "upon the prior written request or consent of the individual." IO received written consent to the disclosure of some of the resumes of individuals who were notified of the access request. I have therefore addressed this issue as though these resumes were disclosed in accordance with section 21(1)(a). These resumes are identified in the Index of Records under "RFP - Technical Information, Part B, Section 1.0 – Resumes."

[29] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div Ct).

Manhours appendix to the Technical Information component to the successful proponent's RFP submission.

Representations

[59] Regarding the application of section 21(1) to the resumes and biographical profiles, IO submits that "the exemption in section 21(3) of *FIPPA* clearly applies" to the educational history, project experience and employment qualifications of individuals which were included in the RFP submission.

[60] The successful proponent echoes IO's position that the 30 or so resumes contained in the RFP submission (in several different places) are exempt. The second affected party alludes to one of the presumptions in section 21(3) prohibiting disclosure of personal information about the appendix containing employee incidents and injuries because it "relates to medical history or treatment." The second affected party also submits that none of the exceptions in section 21(4) apply.

[61] According to the appellant,

> Although the Commissioner has taken the position that resumes are generally exempt under the presumed invasion of privacy under section 21(3)(d), as they contain employment or educational history of an individual, this general exemption cannot be applied to employment information supplied in response to a public RFP. Each of the resumes … were submitted to IO … in the context of a public RFP. The resumes are included in the RFP materials to bolster and convey the array of expertise that [the successful proponent] would bring to the project. The resumes are solely for the purpose of securing a business contract which is inherently a professional, official or business context. There is nothing personal about this RFP.

[62] Noting that many of these resumes are publicly available online through professional networking sites using a "simple internet" search, the appellant argues that applying section 21 to them would be an "absurd result;" that is, the information cannot be exempt because it is already, at least to some extent, known to the appellant.

[63] In reply, IO submits that the purpose for which the proponent supplied the records containing personal information does not determine whether the records are subject to the exemption from disclosure under FIPPA. Rather, it is the nature of the information that is determinative. Although the information was provided to IO in response to an RFP, "IO protects and maintains the confidentiality of personal information supplied to IO in confidence, subject to IO's obligation to disclose … under FIPPA." Regarding the appellant's "publicly available" argument, IO states:

> IO fiercely protects the privacy of individuals whose personal information is in the custody or under the control of IO. Where it cannot be confirmed

> if the individuals to whom the information relates consented to the personal information in question, which has nonetheless made its way [into] Internet search results, IO views such disclosure [as] an unjustified invasion of privacy.

[64] The successful proponent states that although the appellant acknowledges that the contents of resumes are protected under section 21(3)(d) – citing various orders including Order PO-2987 – no authority has been provided to support the position that "personal information" submitted pursuant to an RFP is no longer "personal information." Further, the successful proponent points out that the appellant has also failed to provide evidence rebutting the application of section 21(3)(d) to the resumes, the full contents of which have not been proven to appear online as argued by the appellant.

[65] In sur-reply, the appellant contends that IO has not provided any satisfying rationale for why information that may qualify as private but has been made public should not be disclosed. The appellant submits that the individuals were given an opportunity to respond to the request for disclosure and "do not appear to have provided any evidence to support the contention that the publication of employee information on the internet or otherwise was not authorized."

Analysis and findings

[66] As stated above, where a requester seeks the personal information of another individual, section 21(1) of the *Act* prohibits IO from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. Thus, the application of the mandatory exemption in section 21(1) to information in IO's custody or under its control is not determined by the purpose for which the personal information was submitted to the institution. I reject the appellant's argument in this respect accordingly.

[67] As I also indicated previously, some of the resumes were to have been released, pursuant to the written consent of the individuals to whom they relate, and in accordance with section 21(1)(a). There are still thirty or so resumes that are still at issue.

[68] In this appeal, two of the presumptions against disclosure in section 21(3) are relevant.

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
>> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation; …
>>
>> (d) relates to employment or educational history;

[69] Respecting the "Projects and Manhours appendix," I find that the presumed invasion of privacy in section 21(3)(a) applies to the personal information on pages 11-13 because of the details provided about each individual's injury, medical diagnosis and treatment.

[70] As for the resumes or professional profiles of the successful proponent's project team members, I am satisfied that these records contain detailed employment and educational history about the individuals so as to fit within the scope of section 21(3)(d). As the parties opposed to disclosure argued, many past orders have determined that information contained in resumes[30] and work histories[31] falls within the scope of section 21(3)(d). I agree and, consequently, I find that the presumption against disclosure in section 21(3)(d) applies to the personal information in the resumes. I will review the information in these records that does not qualify as personal information, such as project capital costs and financing, under section 17(1) below, since this same information appears in other formats.[32]

[71] Once a section 21(3) presumption against disclosure is established, it can only be overcome if the personal information at issue fits within section 21(4) or if the "compelling public interest" override at section 23 applies.[33] In this appeal, I find that section 21(4) does not apply and the appellant has not raised the possible application of the public interest override provision in section 23.

[72] Therefore, I find that disclosure of the personal information contained in the resumes and the portion of the Projects and Manhours RFP appendix described previously, would result in an unjustified invasion of the personal privacy of individuals other than the appellant. The information is therefore exempt under section 21(1) of the *Act.*

E. Does the mandatory exemption for third party information in section 17(1) apply?

[73] IO and the affected parties claim that various records related to the agreement reached between them for the design, construction and financing of the Athletes' Village for the 2015 Pan/Parapan American Games, as well as post-games development of the lands, are exempt from disclosure pursuant to the mandatory exemption in section 17(1) of the *Act.*

[74] It ought to be noted that the affected parties either provided written consent to the disclosure of considerable portions of the responsive records under section 17(3) of

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[30] Orders M-7, M-319, M-1084 and PO-3420.
[31] Orders M-1084, MO-1257 and PO-3277.
[32] See section RFQ, section 2.2.4(c)(ii).
[33] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

the *Act*[34] when notified in the first instance, or did not appeal IO's access decisions in other respects.

[75] The records withheld under section 17(1), in whole or in part, consist of emails, email attachments, evaluation records, the executed Project Agreement,[35] and financial and technical information from both the RFQ and RFP.

[76] The following parts of section 17(1) are relied upon to oppose disclosure:

> 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;
> >
> > (a) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or …

[77] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[36] 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.[37]

[78] Third parties who rely on section 17(1) of the *Act* to oppose disclosure of information share the onus of proving that the exemption applies with the institution.[38] To establish that section 17(1) applies, the parties opposed to disclosure must provide sufficient evidence to satisfy each part of the following three-part test:

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[34] Section 17(3) provides that "A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure."
[35] The executed versions are Versions B11) and B12), identified by IO as "Project Agreement, Amended and Restated, Execution Version, Redacted for Website," either "BLACKLINE" or "CLEAN." For the purpose of my review under section 17(1), versions B11) and B12) are considered identical.
[36] *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.) (*Boeing Co.*).
[37] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[38] Order P-203.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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

Part 1: Do the records reveal information that is a trade secret or scientific, commercial, financial or labour relations information?

[79] IO takes the position that the "third party records" contain information relating to the buying, selling and exchange of services, in both tender and contract form, which qualifies as "commercial information" for the purpose of section 17(1). IO also argues that the records also contain monetary and pricing information, which fits within the definition of "financial information" developed by past orders.

[80] The successful proponent submits that the records contain not only commercial and financial, but also technical information, as those terms have been defined by past orders of this office, such as Orders PO-2010 and P-1621. The second affected party agrees with this submission, elaborating on the presence of technical information in the withheld records by describing certain records that it claims contain "construction means and methods."

[81] The appellant's representations do not address part 1 of the section 17(1) test.

Analysis and findings

[82] The types of information in section 17(1) relevant in this appeal have been defined by previous orders, as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[39]
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to

[39] Order PO-2010.

> both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[40] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[41]
>
> *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.[42]

[83] I adopt these definitions for the purpose of this appeal.

[84] On my review of the records, and together with the definitions set out above, I agree with IO's and the affected parties' characterization of the withheld information.

[85] In particular, I find that the Project Agreement and its schedules define and outline the arrangements between IO and the successful proponent for the PAAV Project, including the provision of services to IO by the affected parties according to the terms contained in the various schedules. Many of the records reflect the terms and provisions of IO's buying, and the affected parties' selling, of services, and there are other records created in the course of negotiating those agreements. I find that this information meets the definition of "commercial information" for the purposes of part 1 of section 17(1). Furthermore, as some of the withheld portions of the RFQ, RFP and evaluation records, as well as the Project Agreement and its schedules, consist of financial terms, data, costs or modeling, I am also satisfied that the records contain financial information for the purpose of part 1 of the test. Finally, some of the withheld information consists of plans and maps related to the construction of the PAAV, which were prepared by architects and engineers. Accordingly, I find that the records contain technical information fitting within the definition of the term in section 17(1) of the *Act.* Given my conclusion that the records contain commercial, financial and technical information, I find that part 1 of the test for exemption under section 17(1) has been met.

[86] These findings are sufficient for me to proceed to part 2 of section 17(1); however, I will address IO's severance of names and business addresses of signatories to the agreement and its schedules. In some records, this information about the signatories is the only information that has been withheld. These particular severances were not addressed by IO in its representations so the purpose behind doing so is unclear. It is questionable that this information by itself satisfies part 1 of the test for exemption under section 17(1). Past orders have held that even though such information may appear in a commercial agreement, it does not have sufficient

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[40] Order PO-2010.
[41] Order P-1621.
[42] Order PO-2010.

commercial import to meet the definitions in part 1 for commercial or financial information.[43] Having said that, this type of information ultimately fails to meet the requirements of part 3 of section 17(1), and so I will continue to review it where it appears in the records as a whole without eliminating it at this point in my analysis.[44] In part, this is important because severance of this information relating to corporate signatories in many of these records involves severance of the legal corporate identity of the successful proponent.

Part 2: were the records supplied in confidence?

[87] In order to satisfy part 2 of the test under section 17(1), the parties opposing disclosure must provide sufficient evidence to establish that the information was "supplied" to IO in confidence, either implicitly or explicitly.

[88] 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.[45] 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.[46]

[89] It has consistently been held in past orders that the contents of a contract between 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 are generally considered to have been mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was upheld by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* cited above, and many other more recent decisions, including *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al*. and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario.*[47]

[90] 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

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[43] Orders PO-2200 and PO-3607.
[44] Adjudicator Justine Wai took the same approach in her recent order PO-3607.
[45] Order MO-1706.
[46] Orders PO-2020 and PO-2043.
[47] *Miller Transit*, 2013 ONSC 7139 (CanLII), upholding Order MO-2738; *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776, upholding Orders PO-3011 & PO-3072-R; and *Aecon Construction,* 2015 ONSC 1392, upholding Order PO-3311.

as the operating philosophy of a business, or a sample of its products.[48]

[91] In order to satisfy the "in confidence" component of part 2, it must be established that the third parties had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[49] 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.[50]

Representations

[92] IO submits that Order PO-2371 establishes that the intention of section 17(1) is to protect the information of a third party that is not susceptible to change in the negotiation process. In this context, IO states that the third party records can be divided into two subcategories: those that form part of the successful proposal and those that form part of the project agreement.

[93] Respecting the components of the proposal, IO relies on Order PO-2755, where "the IPC found that the winning proposal was 'supplied' because it was not based on negotiation and the contractual terms were proposed solely by the affected party." IO submits that the circumstances and issues in Order PO-2755 are analogous to the ones here and that the withheld portions of the proposal records should, therefore, also be found to be "supplied" by the affected parties.

[94] IO submits that the project agreement records should also be considered to have been supplied because they contain information that was directly supplied to IO by the affected parties or information that could be used to infer proprietary and confidential components of the third party's business model. Relying on *HKSC Developments*, cited above, IO argues that although some of the information was not directly supplied, its

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[48] Orders MO-1706, PO-2371, PO-2384, PO-2435 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* 2008 CanLII 45005 (Div Ct) *(CMPA)*, and *Miller Transit*, cited above.
[49] Order PO-2020.
[50] Orders PO-2043, PO-2371 and PO-2497, upheld in *CMPA,* cited above.

disclosure would permit a reasonably informed observer to draw accurate inferences about underlying confidential information of the affected parties, even if the information is not itself expressly contained in the actual PAAV Project Agreement. IO refers to Order MO-2494, in which the adjudicator found a schedule to the agreement at issue exempt because it contained "specific technical details for samples of the product including the actual designs" which were found to be immutable, along with certain suppliers' names and their services, the size of the team, the background of the third party, the number of employees, revenues and total market capitalization.

[95] According to IO, the withheld information was supplied in confidence because in the usual course of its procurement process, IO does not disclose the proprietary commercial and financial details of a proposal. According to IO, this office has previously found that IO's practice in this regard supports a finding of a reasonable expectation of confidentiality. Further, IO submits that the large scale of this particular project and the competitive nature of the project management and construction industries weigh in favour of concluding that the successful proponent's expectation of confidentiality was reasonable in this case.

[96] The successful proponent provides submissions on section 17(1)[51] identifying the information it says was confidentially provided and is of the greatest concern in terms of disclosure: financial statements, financing structure figures, project-specific financial information in resumes, representation letters, sources of risk capital, capital costs for past projects, the financial commitment of lenders in contingency equity letter of credit support letters, and other "sensitive third party information" belonging to the successful proponent's project partners, including the second affected party.[52]

[97] The second affected party refers to, and adopts, submissions made to IO by legal counsel for each of its two partners during the notification period. These earlier representations are supplemented by additional arguments, some of them confidential,[53] aimed at establishing that the undisclosed information was either directly supplied to IO by the second affected party, is immutable, or is of a nature or quality that its disclosure would permit the drawing of accurate inferences about its confidential information.

[98] The information identified as having been supplied to IO by the second affected party and being of specific concern to this party includes: financial statements, internal documents outlining corporate and financial structures involving its parent entities, project site maps, teaming agreements, Services Heads of Terms (HOTs), and Design

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[51] These representations expressly incorporate the submissions made in four letters sent by the successful proponent to IO in the earlier stages of the appeal. I have considered these earlier submissions.

[52] An identified example of this is section 2.1.6 of the RFQ – Technical Information – listing Development Experience of the General Contractor.

[53] Confidential under the terms of the confidentiality criteria set out in *IPC Practice Direction Number 7.*

Build HOTs, the latter two of which contain "commercially sensitive and confidential information regarding pricing."[54] According to the second affected party, other supplied information identifies lenders and financial advisors to these private companies, certain "patently proprietary" items outlined in the confidential portions of its representations, and information disclosing the overhead and profits of this privately-held corporation in the Variation Notice (#2). According to the second affected party, its status as a privately, not publicly, held corporation, provides the justification for withholding records that would disclose its financial position and corporate structures, among other information:

> The significant distinction between public and private entities is that the financial statements in private companies, including the capitalization of the parent company and the annual balance sheets, remain confidential. Private companies should not be deterred from competing on public contracts because of the risk that their financial statements will be publicly disclosed. The Financial Statements … are clearly labelled at the top of the first page as "Commercially Sensitive and Confidential."

[99] The second affected party relies on Order PO-2676 where the adjudicator (under section 18) "recognized that pricing information regarding the generation and sale of electricity … was of value to the institution's competitors and deserved protection from disclosure," arguing that similar protection should be afforded to contractors providing construction services.

[100] The second affected party acknowledges that past IPC orders, such as Order PO-2632, establish that agreements between institutions and third parties are generally regarded as "negotiated" rather than "supplied," even when the third party submits a draft to the institution and adopts a "take it or leave it" position on that draft. This party submits, however, that the immutability exception to the "supplied rule" is triggered on the facts of this appeal in respect of information embedded in the agreement at issue that is "not susceptible of change in the negotiation process," including:

- fixed costs, such as overhead or labour costs already set out in a collective agreement;
- Teaming, Design Build and Services Agreements between external parties (i.e., in which IO is not a party);
- Safety record of a non-contracting party;[55]
- Construction sequencing and methodology;

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[54] Identified as being located in Schedule B, Cash Flow Schedule.

[55] Specifically, "Building Canada Statistics 2006-2010" at Part B, Section 1.0, Appendix B of the RFP's Technical Information.

- Step-by-step identification of the licensing and permitting required for the project; and

- Project manhours.[56]

[101] According to the second affected party, this information, even if it forms part of the agreement, is not susceptible of change before the contract is finalized, because it is an existing fact which has already occurred. Further, this party submits that some of the immutable information is also proprietary or confidential and it therefore constitutes an "informational asset" that is protected by section 17(1) of the *Act.*

[102] The second affected party refers to the "extensive confidentiality provisions" of the teaming agreements and its expectation that these records and the others it provided to IO as part of the RFP process would remain confidential. This party argues that Variation Notice #2 is "subject to the confidentiality provisions of section 49 of the Project Agreement." According to the second affected party, the sensitive information at issue would never have been disclosed publicly and its provision to IO was assumed to be for the limited purpose of assessing the qualification submission.

[103] The appellant argues that information of the kind at issue in this appeal is not considered "supplied" because it is "produced independently by the institution" or is the product of negotiation between IO and the successful proponent. The appellant submits that past orders have confirmed that even where the information in an RFP originated from a single party, it is not considered "supplied" when it forms part of an agreement with an institution because the institution had the opportunity to accept or reject the proposal.[57] The appellant submits that appendices and schedules to the agreement must be treated in the same manner as the agreement itself because they could also have been accepted or rejected by IO when entering into the contract. According to the appellant, schedules are considered "wholly incorporated into a contract by reference" and are therefore not "supplied."

> Here, there can be no dispute that upon selecting [the successful proponent's] bid as the preferred bid, IO and [the successful proponent] negotiated extensively, over the terms of the ultimate contract, known as the "Project Agreement." It is the Appellant's understanding that at very least, these negotiations would have taken place over the course of several months, likely between September, 2011 and January, 2012.
>
> In fact, the manner in which negotiations were to take place was also prescribed by section 8.1 of the RFP, entitled: "Competition, Negotiations and the Identification of a Preferred Proponent". …

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[56] The second affected party cites Orders PO-2384 and PO-3266, among others.
[57] Citing various decisions, including Orders MO-2801 and PO-2467.

[104] The appellant sums up by saying that IO has claimed section 17(1) in relation to a negotiated agreement between it and the successful proponent (version B)11), which it is not entitled to do. Further, the appellant argues that IO also cannot apply section 17(1) to the draft agreements, since they represent the "considerable 'give and take' of the process of negotiating the development of the agreements."[58] However, IO appears not to have claimed section 17(1) to the draft agreements at B1) to B10).

[105] Regarding the "in confidence" aspect of part 2 of the section 17(1) test, the appellant states that the presence of a term inserted by the institution that expressly acknowledges that the *Act* applies to a record has been given "considerable weight" by this office. The appellant relies on Orders MO-2435 and PO-2453 to support its assertion that an express acknowledgment in an RFP is a significant factor in determining that a third party did not have a reasonable expectation of confidentiality in submitting its RFP response to the institution. The appellant also relies on the Divisional Court decision in *CMPA*, stating that the Court "found that this express provision trumped other factors favouring confidentiality, including the existence of a confidentiality clause in the agreement at issue." In the appellant's view, IO could not give, and had no authority to give, the successful proponent any assurance that information submitted as part of the RFP process would be kept confidential; rather, bidding parties were specifically warned that submissions could be subject to disclosure under the *Act.*

[106] In reply, IO responds to the appellant's arguments about the FIPPA notice provision by stating that "the FIPPA language included in the RFP does not create a right of access to RFP documents," but rather simply informs third parties that in contracting with the government, commercial arrangements are subject to the *Act.* IO refers to Order PO-1688 where the adjudicator concluded that the affected parties had a reasonable expectation of confidentiality notwithstanding the presence of a term advising that proposals were subject to the *Act.* Additionally, IO notes that the FIPPA notice provision in this Project Agreement acknowledges that IO will not disclose information that is properly exempt under section 17(1), unless the public interest override in section 23 applies. The clause at 49.4(a) of the Project Agreement reads:

> For greater certainty, the parties acknowledge and agree that the Project Agreement and related information are public documents, subject to the removal of any information which the parties are (or would be) entitled to refuse to disclose pursuant to section 17(1).

[107] IO challenges the appellant's submission that past orders have uniformly held that winning proposals are not "supplied," noting that Orders PO-2371, PO-2453 and PO-2632 have all involved the application of section 17(1) to non-negotiated information from a bid. According to IO, costs and pricing details supplied by the

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[58] Relying on Orders MO-1684 and MO-2474, upheld in *Kitchener v IPC*, 2012 ONSC 3496 (CanLII).

successful proponent were fixed and could not change, nor were they changed, through negotiation. Further, the financial model submitted by the successful proponent "disclosed fixed, underlying costs and agreements struck between the affected party and other third parties and/or were not negotiated…" IO argues that, "the information in question likely would have been generated by the affected party separate from any negotiations with IO." Relying on Order PO-3311,[59] IO submits that exhibits to a negotiated project agreement can be "supplied" for the purpose of section 17(1) when "the commercial and financial information contained in them relat[es] to fixed fees for a project, includes cost overheads and other details derived from the affected party's bid materials," as in this case.

[108] IO also submits that the proposal records were provided by the successful proponent on the basis that "they are strictly private and confidential," as communicated to IO by that party. The same information over which IO has maintained this confidentiality was also redacted from the published version of the RFP and Project Agreement, thereby supporting the reasonableness of the successful proponent's expectation of confidentiality. IO adds that under the Project Agreement, each party must hold in confidence, not disclose or permit any person any manner of access to, directly or indirectly, any "Confidential information" (so defined) of the other party, except as other authorized under the Project Agreement.

[109] In reply, the successful proponent relies on section 3.8.1 of the RFP, which acknowledges the *Act*'s protection for confidential and proprietary business information and gives IO's commitment to use reasonable commercial efforts to safeguard such information. The successful proponent refers to section 49.1(b) of the Project Agreement, which states that all information contained in, or derived from, the agreement is protected under section 17(1) of the *Act.*

[110] Furthermore, while admitting that not all portions of the agreement are protected by section 17(1), the successful proponent relies on the "immutability" and "inferred disclosure" exceptions. In the former category is financial and technical information, such as cost and price estimates, financial models, annual financial statements and lender representations letters, all of which were used as inputs in the generation of elements of the Project Agreement and did not change during the negotiation process. As an example of information fitting within the inferred disclosure exception, the successful proponent states:

> The Project Agreement contains models and references to other financial, technical and commercial information derived from information provided to IO by [the successful proponent]. Of particular concern … is "Schedule 32 – Financial Model". This schedule and any other portions of the Project Agreement which would allow an accurate inference to be made

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[59] Upheld in *Aecon Construction*, cited above.

> concerning the contents of confidential records are subject to the "inferred disclosure" exception and were thus "supplied" to IO for the purposes of section 17.

[111] The successful proponent contends that IO's express recognition that disclosure of submissions may be required under the *Act* confirms that there is a presumption of confidentiality, except in the limited circumstances where disclosure of such information is prescribed by the *Act.*

[112] Also in reply, the second affected party challenges the appellant's interpretation of Order PO-2497,[60] and two "propositions" in particular: first, that schedules to a negotiated agreement are, as a matter of principle, "considered wholly incorporated into a contract by reference and are therefore not exempt;" and, second, that the existence of a confidentiality clause in an agreement is trumped where it is "expressly contemplated that confidential information may be required to be disclosed under FIPPA."

[113] Regarding the first point directed at the "supplied" requirement of part two of the test, the second affected party explains why Order PO-2497, and the Divisional Court decision upholding it, do not stand for the broad proposition suggested by the appellant, as follows:

> At best, attachments to agreements will be treated as negotiated if they are subject to change during the negotiations surrounding the agreement but not otherwise. The Court in *CMPA* acknowledges this to be the case. At paragraph 55 of the reasons of the Divisional Court, the Court points out that there was nothing immutable about any of the information provided by the CMPA in any appendices or schedules. … [T]he Court points out that [the] issue of immutability wasn't even raised before the adjudicator … In contrast, the issue of immutability has been squarely raised in the original redacted representations in the present appeal.

[114] In reply to the appellant's submissions on the "in confidence" requirement under part two, the second affected party submits that in Order PO-2497 and the judicial review decision that followed it, the reasonableness of the expectation of confidentiality was held to depend upon an objective assessment of a number of factors. The main considerations are the nature of the information at issue and the degree to which the information has been treated as confidential up to, and including, the finalization of the agreement. The second affected party submits that in this situation, the records at issue have been consistently treated as confidential and are objectively of a confidential nature, for the reasons previously given in its initial representations.

[115] With regard to the presence of a FIPPA notice provision in the agreement, the

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[60] Upheld in *CMPA*, cited above.

second affected party states:

> … an institution's acknowledgement that a record may be required to be disclosed under FIPPA is a neutral term, similar to one which binds the parties to 'comply with the law.' The fact is that Infrastructure Ontario is an institution under FIPPA and as such, its records are accessible, subject to the application of the exemptions in FIPPA in any individual case. The acknowledgement hardly determines whether the exemption will actually apply. That is the very issue to be decided on appeal.

[116] The appellant's sur-reply representations focus on the immutability and confidentiality in the context of section 17(1), commencing with a lengthy quote from Order PO-2987, which outlines the accountability rationale for transparency in the public procurement processes offered by Commissioner Ann Cavoukian in her 2006 Annual Report.[61] Relying on Order PO-3011,[62] the appellant disputes IO's suggestion that the withheld information was supplied to it and not negotiated, a claim noted as being "repeated in the [successful proponent's] submissions under the heading of 'immutability'." The appellant refers to section 8.1 of the RFP which "provided IO with extensive negotiation rights" that could be exercised in respect of the proposals submitted or the project agreement after the selection of the preferred proponent. The appellant cites several examples, including section 5.5 which "required proponents to submit their financial modeling as part of their RFP proposal" and various other (identified) provisions that afforded IO the discretion to require amendments or resubmissions of financial components of the bid in the areas of innovation, financing plan or debt strategy. According to the appellant, section 8.1 of the RFP sets out the negotiation process IO would have engaged in with the successful proponent. The appellant submits that the records that are at issue here – the communications and draft agreements, in particular – would reveal that extensive negotiation took place.

[117] The appellant also argues that IO has not provided evidence to support the position that prices contained in the proposals or project agreement were actually "fixed" and not subject to negotiation. Further,

> The fact that these costs may not have changed during the process does not mean that they were not negotiable – at most, the continuity of the identified costs suggests that they were acceptable to IO and therefore did not require further negotiation.

[118] The appellant challenges IO's reliance on Order PO-1688 and the notion that cautionary language in an RFP "should be given no weight in determining whether information was provided with an expectation that it would be kept confidential." The appellant outlines the factors and conditions that provided persuasive evidence of an

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[61] At page 27 of Order PO-2987; also citing Order MO-2468-F.
[62] Followed by Reconsideration Order PO-3072-R and upheld in *HKSC Developments*, cited above.

expectation of confidentiality in that appeal that do not exist in this appeal. Further, the appellant argues that IO has not demonstrated that the requisite "significant, independent steps" were taken during the RFP process to preserve confidentiality. The appellant points to several factors suggesting that confidentiality has not been established here, including the argument that merely marking documents as confidential and relying on section 3.8.1 of the RFP (which indicates that certain confidential information is protected under the *Act)* does not constitute "substantial" evidence of a reasonable expectation of confidentiality.

Analysis and findings

[119] Prefacing the appellant's sur-reply representations on section 17(1) is an excerpt from the IPC's 2006 Annual Report, in which former Commissioner Ann Cavoukian emphasized the importance of transparency and accountability in the public procurement process to permit meaningful scrutiny of government expenditures by the public. This office continues to promote open and accountable government by encouraging institutions to proactively disclose procurement information related to tenders, RFPs and bidders, including the full contracts, apart from information that fits within limited and specific exceptions.[63]

[120] Many past orders of this office have addressed the treatment of information provided in response to RFP processes under section 17(1) of the *Act*. The result, in terms of disclosure of the information in an RFP, will naturally differ from one appeal to the next, based on the evidence before the adjudicator, including the parties' submissions, the content of the records and other circumstances. In Order PO-2987, I described it this way:

> As past orders of this office have acknowledged, the disclosure of information relating to a procurement process must be approached thoughtfully, with consideration of the tests developed by this office, as well as an appreciation of the commercial realties of a procurement process and the nature of the industry in which the procurement occurs (Order MO-1888). In each case, the quality and cogency of the evidence presented, including the positions taken by affected parties, the passage of time, and the nature of the records and the information at issue in them must be considered. Furthermore, the strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability (see Order MO-2496-I).[64]

[121] Additionally, although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with

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[63] *Open Contracting: Proactive Disclosure of Procurement Records* (IPC, September 2015).
[64] See also Orders PO-3055, MO-2856 and PO-3420.

the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1).[65]

[122] Section 49.1(b) of the Project Agreement, mentioned by the parties, binds Her Majesty the Queen (represented by IO) not to:

> … disclose portions of this Project Agreement, any terms hereof, including any contractual submissions or other records kept in accordance with this Project Agreement, any information related to the performance of Project Co (or any Project Co Party) or any information derived from this Project Agreement or the information related to the performance of Project Co (or any Project Co Party) *which would be exempt from disclosure under section 17(1) of FIPPA* [emphasis added].[66]

[123] To suggest that section 49.1(b) of the Project Agreement protects all information contained in, or derived from, the Agreement under section 17(1) overstates the reach of that provision. As Adjudicator John Higgins recently noted in Order PO-3601,

> *Miller Transit* (cited above) describes the way the "supplied" element of the test is applied to contractual information as an "interpretive principle," and summarizes this principle as follows: "that contractual information is *presumed to have been negotiated, not supplied*."[67] [Emphasis added.]
>
> Significantly, *Miller Transit* also states that "[a] party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the 'inferred disclosure' or 'immutability' exception applies."[68] Accordingly, information in the Agreement will not be found to be exempt unless one of these exceptions applies.

[124] *Miller Transit* and the other cited cases reflect the IPC's well-tested approach to the "supplied" question, and I have applied the reasoning in these cases in my analysis of the PAAV Project Agreement records at issue before me. In setting out my findings, I use the two categories suggested by IO: those records forming part of the successful proposal and those associated with the Project Agreement. For clarity, the first category includes technical and financial information from the RFQ and RFP stages, evaluation records, and correspondence, while the second category consists of the Project Agreement and its schedules.

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[65] Orders PO-2018, PO-2632 and PO-3311, upheld in *Aecon Construction*, cited above.

[66] Section 49.1(c) permits IO to disclose information described in paragraph (b) if the public interest in disclosing it "clearly outweighs the public interest in limiting the disclosure," a clear reference to section 23 of *FIPPA*.

[67] at para. 30.

[68] at para. 31.

"Supplied" - Successful Proposal records

[125] Past orders of this office have held that RFP proposals provided to an institution as part of the competitive selection process undertaken to choose a supplier of goods or services are "supplied" for the purposes of part 2 of the test under section 17(1).[69] In particular, information contained in RFQ or RFP documents that remains in the form originally provided by a proponent is not necessarily viewed as the product of negotiation between the institution and that party.[70] It may be that some of the terms proposed by a successful proponent are included in the resulting contract between that party and the institution. However, the possible incorporation of those terms does not serve to transform the original proposal from information "supplied" to the institution into a "mutually generated" contract.[71]

[126] In this context, I am satisfied that most of the withheld portions of the RFQ and RFP records qualify as "supplied" in that they reflect the approach taken by the successful proponent and the second affected party to address and fulfil the RFP requirements. Similarly, although the evaluation records may have been created by IO employees, some contain information taken directly from the successful proponent's proposal, including, for example, the financing summary of one of the project partners. Indeed, much of the information that meets the supplied requirement based on the reasoning given above appears in precisely the form submitted by the successful proponent to IO. This includes financial information, such as financial statements, financing structure figures, project-specific financial information, representation letters, sources of risk capital, capital costs for past projects, and lenders' financial commitments.

[127] Further, the successful proposal records also include the commercial and financial information of the project partners who did not contract directly with IO, but rather participated in the bid through the venture arrangements used for this particular AFP project. There are financial statements of the second affected party and information related to the corporate and financial structures of its parent entities, teaming agreements between non-contracting parties, and other similar records, all of which I find meet the definition of "supplied."

[128] With some elaboration provided below, I find that the withheld information in the following records was "supplied" to IO for the purpose of part 2 of the test for exemption under section 17(1):

> *a) Evaluation:* page 4 (financing summary) of Presentation to the Evaluation Committee;

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[69] See, for example, Orders MO-1706, PO-2637 and PO-2987.
[70] Orders MO-1368, MO-1504, PO-2637 and PO-3186.
[71] Order MO-3058-F.

b) RFQ – Financial: sections 2.2 (appendices A, B, C, E, F, H, I), 2.2.1, 2.2.2, 2.2.3, 2.2.4(a), and 2.2.4(b);

c) RFQ – Technical: sections 2.1.1, 2.1.2(e), 2.1.4(a), 3.1.2, 3.1.2(i), 3.1.3, and 5.5;

d) RFP – Correspondence and Financial Information: Appendices 1A, 1B,[72] 2 (Parts 1 and 2), 3B, 3C, 6A, 7A (Design Build HOTs with Schedules A-G), 7A (Service HOTs with Schedules A-C), 8B, 9A, 9B, 11A, 11B, and section 1.0 (Description of Financing Plan).

e) RFP – Technical Information: Part B – Section 1.0, Appendices A (Maps), B(1) and B(2) (Building Canada Statistics and Projects and Manhours)

[129] Of special note is Schedule G to the Design Build HOTs at Appendix 7A to the RFP, which includes an annotated Permits, Licences, Approvals and Agreements (PLAA) Table as "Appendix 1." There is also a PLAA Table at Schedule 1 of the Project Agreement. The version appearing as part of Appendix 7A to the RFP is version 17, whereas the executed version that forms part of Schedule 1 to the Project Agreement is version 30. This draft version of the PLAA Table in Schedule G to Appendix 7A is "supplied," whereas the final, executed version is not, as I discuss below.

[130] Also included in this category of records are emails and attachments. Record 6, an email dated June 13, 2011 at 1:07 p.m., relates to the financial evaluation of the successful proponent. The withheld information includes scoring comments and details of the financial position of project partners, including a document titled Financial Summary. Record 183 is an opinion letter dated from September 2011 that was provided by the successful proponent to IO, which contains commercially confidential information.[73] Record 185 is email correspondence from the successful proponent to IO dated November 10, 2011 at 3:08 p.m. and it also contains details about the financial arrangements of that party. Based on the content of the emails, I find that they were supplied to IO for the purpose of part 2 of the test under section 17(1).

[131] The withheld attachments of several other emails, identified as records 10 and 16,[74] consist of information related to the appellant. In fact, it consists of the appellant's financial and commercial information in the form originally provided to IO by the successful proponent. Describing this information in any greater detail could disclose

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[72] Also referred to as Schedule B to Mandate and Commitment Letter.

[73] IO's access decision was to disclose Record 183, a decision that was opposed by the successful proponent, who argues that it is exempt under section 19. Given its content, I also considered whether it might be exempt under section 17(1).

[74] The withheld information in Record 16 is duplicated in Record 18. For the purpose of this discussion, I refer only to Record 16.

confidential submissions or the content of the records themselves. However, I am satisfied that these specific records were prepared by the appellant and provided to the successful proponent for the purpose of the bid. I note that in correspondence provided during the inquiry, the successful proponent indicated that this particular information may be disclosed.[75] IO's approach to the information was that it was not responsive to the appellant's request, likely because IO concluded that the appellant was not seeking access to records that they had either contributed to, or had been solely responsible for preparing. I have decided not to deal with these particular records further. In the circumstances, disclosure of these withheld attachments to their author could not reasonably result in the harms contemplated by sections 17(1)(a), (b) and (c). However, since this information would not be of any substantive value to the appellant, I will not order IO to disclose it.

<u>"Supplied" - Project Agreement records</u>

[132] According to the IPC's longstanding approach to the "supplied" issue, which has been approved by the courts on numerous occasions, my finding is that the Project Agreement is a negotiated contract between IO and the successful proponent. In this context, therefore, the Project Agreement, its specific contractual terms and its schedules are not considered to have been supplied, even if they essentially reflect the successful proponent's tender documents. The appellant argues that appendices and schedules to the agreement should be treated as "wholly incorporated" into the contract and not "supplied," since IO was free to accept or reject them when contracting with the successful proponent. However, the two exceptions to the supplied rule have been squarely raised in this appeal, and I will consider whether the withheld information in the Project Agreement and schedules was "supplied" by the successful proponent to IO by reason of it fitting with the "immutability" or "inferred disclosure" exceptions.

[133] The "immutability" exception arises in relation to information actually supplied by a third party which appears in a contract or its schedules but which is not susceptible to change in the "give and take" of the negotiation process. Examples of information that fits within this exception are financial statements, underlying fixed costs and product samples and designs. It is not sufficient that information in a contract is "relatively unchanged" from what the third party provided to the institution; rather, the important point is that the information is not susceptible to change.[76] The onus is on the parties resisting disclosure to show immutability.[77]

[134] The second affected party's submissions on the immutability exception directed me to specific information "embedded in the agreement at issue that was 'not susceptible of change in the negotiation process'," including various agreements between non-contracting parties, fixed costs, such as overhead or labour costs,

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[75] In this analysis, I find it unnecessary to decide the relevance of section 17(3) of the *Act.*
[76] Order PO-3601 at para. 57.
[77] *CMPA* and *Miller Transit*, both cited above.

construction sequencing and methodology, and permitting and licensing. This same party also referred to other records, such as the safety record of one of the non-contracting parties, the Teaming, Design Build and Services agreements, and project manhours, all of which I already concluded were supplied as part of the successful proponent's bid.

[135] To begin, I note that the Project Agreement and some of its schedules contain banking information, including account numbers and addresses,[78] and HST registration numbers,[79] which are themselves immutable and not subject to change during the negotiation process. Accordingly, I find that this information was supplied to IO because it fits within the immutability exception.

[136] In addition, there is information withheld from some of the Project Agreement schedules that is, as IO notes, derived from the successful proponent's bid materials. As was the case in Order PO-3311, cited by IO in its reply representations, I am satisfied that the following schedules contain information that meets the requirements of the immutability exception, such that the information is considered to have been supplied to IO for the purpose of part 2 of section 17(1):

- Schedule 6 – Independent Certifier Agreement, Appendix C only
- Schedule 8 - Provincial Loan Agreement, Schedules 3.1, 3.2 and 7.01(12)[80] only
- Schedule 9 - Key Individuals
- Schedule 11 – Design Quality Plan and Construction Quality Plan, Annexes A, B and C only
- Schedule 13 – Project Co Proposal Extracts
- Schedule 22 – Variation Procedure, Appendix B only
- Schedule 31 – Project Co Information
- Schedule 32 - Financial Model
- Schedule 38 – Project Co Stage 2 Lands Development Agreement

[137] Next, as affirmed in *Miller Transit,* the "inferred disclosure" exception arises where disclosure of the information in a contract would permit accurate inferences to

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[78] For example, in Schedules 1 (1.43 and 1.206), 4, 30 and 33 to the Project Agreement.
[79] For example, section 5.1 of the Project Agreement and in Schedule 17 (Stage 1, s. 11; Stage 2, s. 10).
[80] Schedule 7.01(12) to Schedule 8 of the Project Agreement is duplicated at Record 185b, which was identified (as an attachment to an email, Record 185) in IO's final supplementary access decision of May 9, 2014.

be drawn with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[81]

[138] On my review of the records, in conjunction with the parties' submissions, there is information that fits within this category in several definitions in Schedule 1 of the Project Agreement (1.31 and 1.430) and in section 1.6(a)(vii) of Schedule 22. This information appears as part of what is otherwise considered a negotiated agreement. However, I am satisfied that disclosure of these terms (percentages) could reasonably permit accurate inferences to be drawn about underlying non-negotiated confidential information, including that contained in the successful proponent's closing Financial Model, Schedule 32. Therefore, I find that this information qualifies as having been supplied to IO.

[139] Additionally, Variation Notice #2 contains an estimate of costs for a specific repair and consists of tables, maps, and correspondence relating to the estimate. I find that this record[82] contains information about the second affected party's overhead and profits, both expressly and by inference, thereby fitting within the inferred disclosure exception. Accordingly, I am satisfied that this record was supplied to IO.

Not "supplied" - information that does not qualify

[140] As suggested by the discussion above, the Project Agreement is not considered to be supplied because it is a negotiated agreement that sets out the mutually agreeable obligations and processes by which the parties intended to carry out the PAAV Project. The Project Agreement outlines how the parties intended to address issues that would or could arise, including scheduling, payments, reporting, submittals, delay, damages, warrantees, default, liability, termination, audit and dispute resolution. The PAAV Project Agreement contains terms and provisions of the kind to be expected in a normal contractual relationship of this magnitude. Therefore, with the exception of the information identified under my "supplied" finding, above, the evidence is not sufficient to satisfy me that any other terms or provisions of the Project Agreement were "supplied" to IO by the successful proponent or second affected party. In view of this conclusion, I find that the remaining withheld portions of the Project Agreement, Versions B11) & B12), do not meet the test for exemption under section 17(1), and I will order their disclosure.

[141] In keeping with this conclusion, the brief severances made to the Project Agreement that consist of numbers representing unit quantities,[83] dollar figures,[84]

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[81] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[82] This record includes duplicated documents.
[83] Pages 107 and 108.
[84] Pages 6, 7, 9, 11, 26, 46, 62, 63, 79, 80, 114, 121, 136, 142, 143, 164, 167, 168 and any other instances of dollar figures not listed here.

percentages[85] or dates[86] that were agreed-upon between IO and the successful proponent do not qualify as information that has been "supplied" by the successful proponent to IO. Similar types of information were withheld from certain schedules, such as corresponding dollar figures in definitions in Schedule 1. The occurrences of that type of information are more completely identified below in conjunction with the listing of the schedules.

[142] Before listing the schedules, however, I will address certain other brief severances applied throughout the records as a whole – in recitals or in provisions - that I conclude do not consist of "supplied" information. First, there is the name of the successful proponent's corporate identity acting as "Project Co," the legal entity created for the purpose of the PAAV Project.[87] In some places, it is merely the name of the successful proponent or related entities that is severed. There is simply no persuasive evidence before me to establish that the identification of the successful proponent or Project Co as a specific legal entity would reveal confidential business strategy or otherwise qualify as the "informational assets" of that third party, thereby rendering that particular information "supplied;" nor does it fit within the exceptions for immutability or inferred disclosure, even where, as in section 5.1(a)(i)-(iii) of the Project Agreement, some description is given of the Project Co entity. If I am wrong about that conclusion, I adopt the reasoning of Assistant Commissioner Sherry Liang in Order PO-3158 where, writing about standard recitals in a legal document, she concluded that disclosure of descriptions of the affected party's corporate structure in them could not reasonably be used to harm its competitive position, particularly in light of the fact that some of that same information (the Articles of Amalgamation) was publicly available.

[143] Second, the names, titles and business addresses of witnesses or signatories to the PAAV Agreement or schedules have been redacted in a similar manner to the name of the successful proponent's created legal entity.[88] In some instances, the signatory lines are not even completed. IO provided no explanation. There being no evidence tendered to suggest how this particular information qualifies as "supplied" under part 2 of section 17(1), I find that this information was not supplied.

[144] Many of the schedules to the Project Agreement are sub-agreements. Others document or outline provisions, processes or forms for carrying out the PAAV Project. I provide several examples here. First, Schedule 11 is the Design Quality Plan and

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[85] Pages 13, 41, 61, 62, 63, 66, 92, 107, 108, 170 and any other instances of percentages not listed here, except those identified as "supplied" pursuant to the inferred disclosure exception, above.
[86] Pages 38, 64, 134 and other instances of dates not listed here.
[87] For example, pages 1, 14, 15, 16, 171 of the Project Agreement, in Schedules 1, 2, 4, 5, 6, 8, 17, 30, 33, 36, 39 and 41, and in other parts of the records not listed here.
[88] For example, page 174-175 of the Project Agreement, Schedules 4, 5, 6, 8, 17, 30, 33, 36, 39, 41 and in any other places not listed here. Witness information is redacted from pages 183-188 of the Project Agreement.

Construction Quality Plan, which IO withheld in its entirety, except for the title.[89] The opening provision of this schedule refers back to the successful proponent's RFP technical submission, portions of which, although not identical, appear to have been disclosed by IO earlier in this process.[90] As acknowledged by the second affected party, past orders establish that even where a third party submits a draft of terms or provisions to the institution and adopts a "take it or leave it" position on that draft, once the agreement is signed between the parties, such provisions are considered to reflect all the parties' interests. In other words, even if the design and construction quality plans outlined in the main part of Schedule 11 were provided by one of the project partners, IO had the option of accepting or rejecting its terms and this, by itself, represents a "form of negotiation."[91] As a further example, Schedule 25 outlines the insurance and security commitments required of Project Co prior to financing closing. Some of the withheld terms include the value of the insurance or security commitment. Past orders have established, and I agree, that even where a party is required to provide insurance or security or other guarantees to an institution pursuant to the terms of the RFP or as a precondition to an agreement, the amount of that requirement is not *supplied*.[92] In this context, since these two schedules and the others listed below represent the negotiated intentions, responsibilities and obligations of IO and the successful proponent in seeing the PAAV Project through to completion, they are not considered to be "supplied" for the purpose of section 17(1).

[145] Therefore, I find that the following withheld schedules, or the identified withheld portions of them, were not "supplied" for the purpose of part 2 of section 17(1) (with other parts identified under my supplied finding, above, appearing in italics):

- Schedule 1, Appendix 1, (final version "PLAA") & schedules A to A1.
- Schedule 1 – Definitions & Interpretations. Although some definitions[93] refer to other documents that could, themselves, be considered to be "supplied," the reference to those other documents in a negotiated agreement does not disclose their contents.
- Schedule 2 – Completion Documents
- Schedule 3 – Revenue Sharing
- Schedule 4 – Lender's Direct Agreement with HMQ
- Schedule 5 – Construction Contractor's Direct Agreement with HMQ

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[89] Except Annexes A to C, which I found above were "supplied."
[90] Specifically, Part B, Section 1.0 – B(c) Design Quality Plan, B(d) Construction Management Plan, B(f) Construction Quality Plan, B(h) Environmental Plan, and others.
[91] Orders PO-2632 and PO-2435.
[92] Orders PO-2476 and PO-3607.
[93] Sections 1.18, 1.44, 1.68, 1.72, 1.75, 1.126, 1.212-1.214 and 1.453.

- Schedule 6 – Independent Certifier Agreement, in part (*except Appendix C*)
- Schedule 8 - Provincial Loan Agreement, in part (*except Schedules 3.1, 3.2 & 7.01(12)*)
- Schedule 11 – Design Quality Plan and Construction Quality Plan, in part (*except Annexes A, B & C*)
- Schedule 12 – Refinancing
- Schedule 14 – Outline Commissioning Program
- Schedule 17 – Project Co Stages 1 & 2 Lands Agreements of Purchase and Sale
- Schedule 21 – HMQ Project Security
- Schedule 22 – Variation Procedure, in part (*except section 1.6(a)(vii) and Appendix B*)
- Schedule 23 – Compensation on Termination
- Schedule 25 – Insurance and Performance Security Requirements
- Schedule 27 – Dispute Resolution Procedure
- Schedule 29 – Letters of Credit (non-executed form)
- Schedule 30 – Insurance Trust Agreement
- Schedule 33 – Trust Account Agreement
- Schedule 36 – Project Co Services Agreement
- Schedule 39 – Ontario New Home Warranties Plan Act Compliance Agreement
- Schedule 41 – Agreement and Direction re Cost to Complete Cash Equity

[146] As the records, or portions of records, identified in this section do not meet part 2 of the test for exemption under section 17(1), the information cannot be withheld on this basis, and I will order it disclosed. I must now determine if the information I found to be supplied was also supplied *in confidence.*

<u>In confidence</u>

[147] In order to meet the "in confidence" requirement of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the "supplied" information was provided

to IO. This expectation must have an objective basis.[94]

[148] The appellant's position is that there is insufficient evidence to establish that "significant, independent steps" were taken during the RFP process to preserve confidentiality – merely marking documents as confidential and relying on section 3.8.1 of the RFP does not support a reasonable expectation of confidentiality. However, based on the evidence provided by IO, by the other parties and by the contents of the records themselves, I am satisfied that the withheld information was, in fact, treated in a manner that supports a conclusion that it was communicated to the institution on a confidential basis. I accept IO's evidence that its practice is not to disclose proprietary proposal information. I also accept the successful proponent's evidence that the financial statements of privately-held parties participating in the bid would not otherwise be disclosed or available from sources to which the public has access. The financial statements are marked "Commercially Sensitive and Confidential" and, in my view, were prepared for a purpose that would not entail disclosure.[95] The content, as well as the circumstances surrounding the creation of, emails and other correspondence that were supplied to IO also strongly support the conclusion that they were provided in confidence. Finally, I accept the second affected party's evidence that the "extensive confidentiality provisions" of the teaming agreements convey a concern for its protection from disclosure in advance of the records being communicated to IO.

[149] The appellant had argued that where an institution has included a FIPPA notice provision, this inclusion has been given considerable weight against a finding of a reasonable expectation of confidentiality. However, on this point, I agree with the second affected party's characterization of such a provision: "… an institution's acknowledgement that a record may be required to be disclosed under FIPPA is a neutral term, similar to one which binds the parties to 'comply with the law'." Disclosure under the *Act* is expressly contemplated by the FIPPA notice provision, but the provision is but one of the considerations in determining whether information was supplied in confidence. Since the *Act* explicitly protects the confidential informational assets of third parties, a FIPPA notice provision does not negate the expectation of confidentiality regarding a proposal or other supplied documents.[96]

[150] In the circumstances of this appeal, considering the evidence of IO and the third parties and the records themselves, I am satisfied that the information was supplied with a reasonably-held expectation that it would be treated in a confidential manner by IO. Accordingly, part 2 of the test for exemption under section 17(1) is met for the information identified as supplied in the previous section, above.

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[94] Order PO-2020.
[95] Orders PO-2043, PO-2371 and PO-2497.
[96] Order MO-3058-F.

Part 3: could disclosure of the records reasonably be expected to result in the harms contemplated by section 17(1)(a), (b) or (c)?

[151] The onus rests on IO and the third parties to provide sufficient evidence to establish that disclosure of the information could reasonably be expected to result in one of the harms section 17(1) seeks to prevent. The evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not be proven 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.[97]

[152] The failure of a party resisting disclosure to provide cogent 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*.[98] 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).[99]

Representations

[153] IO states that it recognizes its legislated responsibility to operate in an open, transparent and accountable manner, but adds that it must balance this transparency with protecting the confidential "informational assets" of businesses that provide information to it in the course of pursuing public projects. IO submits that the project management and construction industries are very competitive and that businesses in these industries frequently compete for projects similar to the PAAV Project. Further, since the successful proponent is selected through a competitive bidding process, competing proponents will "seek any advantage they can use against their competitors in future procurements for similar projects." IO argues that given the size and complexity of the PAAV Project, the withheld pricing, financial modeling, financial statements, project delivery methodologies and information about the business relationships with other third parties, is useful and valuable to the successful proponent's competitors. According to IO, this context especially supports its position that the identified confidential information is legitimately withheld under section 17(1) of the *Act*.

[154] The successful proponent argues that disclosure of the withheld information will result in harm because it could reasonably be expected to prejudice its competitive

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[97] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[98] Order PO-2435.
[99] Order PO-2435.

position or interfere with future negotiations. Mainly, this position applies to financial information supplied by the successful proponent to IO during the RFQ and RFP stages, including financial statements and other financial information, including representation letters, commitment letters, contingency equity letters, sources of risk capital, and past project capital costs. The successful proponent also refers to financial and commercial information belonging to non-contracting project partners that is contained in record 6, an attachment to a June 2011 email relating to the financial evaluation of the successful proposal. The successful proponent seeks to protect the positions it took in negotiations leading up to closing based on the assertion that records revealing those positions could reasonably be expected to harm its competitive position in the future or cause it undue loss. An example of this is Record 183, over which section 19 was also asserted by the successful proponent.

[155] Regarding technical information supplied to IO as part of the RFQ and RFP stages, the second affected party submits that the IPC has previously upheld sections 17(1)(a) and (c) in relation to "unexplained raw data;" in past decisions, this party says, it was accepted that prejudice to the third party's competitive position could reasonably be expected to result due to the real potential of misinterpretation or manipulation of the data. Additionally, the second affected party relies on Order PO-2195 where arguments about the harms said to be attendant upon disclosure of financial information, including valuations, cash inflows and outflows, business plan forecasts, pricing and operating information were accepted and section 17(1)(a) found to apply. The second affected party argues that disclosure of similar information in this appeal, included in records such as the Design Build and Services HOTs and the Variation Notice (#2), could reasonably be expected to inhibit its future negotiating leverage by providing counterparties with strategic insight into margins and other commercially sensitive methodologies. The second affected party also expresses concern about the corporate structure of project partners who are not themselves signatories to the Project Agreement, arguing that disclosure of such commercially and financially sensitive information must be protected to limit collusion and anti-competitive behaviour. Regarding section 17(1)(c), the second affected party submits that disclosure of records containing construction methodologies, such as the maps and the Design Build HOTs, would deprive it of the value of "many years of industry experience and expertise" and result in undue gain to competitors. The remaining portions of this party's submissions were withheld as confidential.

[156] In opening comments, the appellant submits that section 17(1)(a) requires that there be a reasonable expectation of *significant* prejudice to a third party's competitive position, a threshold IO has failed to meet based on the evidence tendered in this appeal. The appellant points out that IO has not identified or explained why disclosure of any particular records withheld under section 17(1), either in part or in their entirety, would lead to the alleged harms. As the appellant notes, "surely general assertions of this nature … cannot be used to overcome the presumption in favour of disclosure."

[157] In reply, and as identified previously in this order, IO sought a variation in the

IPC's *Code of Procedure* to raise section 18(1)(d) in relation to the Project Agreement. As part of IO's arguments on that issue, IO said the following about the Financial Model at Schedule 32 to the Project Agreement that are relevant to the harms analysis under section 17(1):

> The [successful] proponent prepared this confidential computer-based Model in order to provide the financial projections for the design, construction, financing and maintenance of the Project as part of its RFP submission. For example, the Model includes revenue forecasts for the conversion and sale of the Athletes' Village units. The Model contains information designed to inform the government about expected costs of the Project and for obtaining a fair price on conversion under different circumstances. …

[158] The successful proponent submits in reply that in the context of a highly competitive bidding process such as the PAAV Project, significant harm to its competitive position can reasonably be anticipated to result from disclosure of the withheld information. The successful proponent argues that:

> Parties participating in an RFQ and RFP must make strategic decisions concerning price and cost estimates, and knowledge of the financial, commercial and technical constraints within which other participants operate is valuable information to competitors, the disclosure of which not only undermines the competitive bidding process under consideration, but also future bids where competitors could make use of such information to gain an unfair advantage.

[159] In disputing the late claim to section 18(1)(d), but with some relevance to section 17(1) harms, the appellant submits that to the extent the Project Agreement provides that the successful proponent will be responsible for, and bear the risk of, converting, marketing and selling the housing units after the games, any possible resulting harm with disclosure of the information would be to the successful proponent, not IO.

Analysis and findings

[160] The information remaining at issue is mainly financial and commercial information contained in portions of the successful proponent's RFQ and RFP submissions, the evaluation records, and also in the schedules to the PAAV Agreement. As I noted above, the parties resisting disclosure must demonstrate a risk of harm under part 3 of section 17(1) that is well beyond the merely possible or speculative. The evidence required will naturally depend on the type of issue and seriousness of the

consequences.[100]

[161] Past orders have also observed that determining disclosure under the tests developed by this office must be accompanied by an appreciation of the commercial realties of the specific context and the nature of the industry in which it occurs.[101] In this appeal, the large scale of this particular project and the competitive nature of the project management and construction industries are factors, but they do not diminish the importance of applying the exemptions in a limited and specific manner to serve the *Act*'s accountability and transparency purposes. As acknowledged, only information that properly fits within section 17(1) of the *Act* must be withheld.

Harms established

[162] Based on my review of the records remaining at issue and the representations, I am satisfied that the following identified portions of them meet the third part of the test for exemption under section 17(1):

- *Evaluation:* page 4 (financing summary) of Presentation to the Evaluation Committee;
- *RFQ – Financial -* section 2.2: Appendices A-C representation letters (in part), E and F – financial statements (full), H - lender support letters (full) and I - financing amounts (in part);
- *RFQ – Financial -* sections 2.2.1, 2.2.3 and 2.2.4(a) and (b) (in part), representing the financial information of "prime team members" in the form of risk capital, assets and financing raised;
- *RFQ – Technical:* section 2.1.2(e) (teaming agreement);
- *RFP – Correspondence and Financial Information:* Appendices 1A, 1B, 2 (Parts 1 and 2), 3B, 3C, 6A, 7A (Design Build HOTs with Schedules A-G), 7A (Service HOTs with Schedules A-C), and part of section 1.0 (Description of Financing Plan, financial position overview (table form) on page 11 and funding terms - fees and credit spread on page 21);
- *RFP – Technical Information:* Part B – Section 1.0, Appendices A (Maps), B(1) (Building Canada Statistics) and B(2) (Building Canada Statistics and Projects and Manhours, pages 1-10 and 14 only);

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[100] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[101] See Orders MO-1888, MO-2496-I, PO-2987 and PO-3479.

- *Email records or attachments: Record 6*, email dated June 13, 2011 at 1:07 p.m., *Record 183*, legal opinion dated September 14, 2011, and *Record 185*, email dated November 10, 2011 at 3:08 p.m.;

- *Stage 3* - Variation Notice #2, dated June 2012;

- *Project Agreement Schedules* - 1 (definitions 1.31 and 1.430), 8 (Schedules 3.2[102] and 7.01(12)), 11 (Annexe C), 13 (pages 6-12, Appendices 1-3), 31 (full) and 32 (full).

[163] I note here that many of the records identified as responsive in this appeal were disclosed by IO or will be disclosed pursuant to my finding under part 2, above, including the execution version of the (Amended and Restated) Project Agreement, B11) and B12).

[164] Of what remains, I accept the submissions of IO and the affected parties as to the reasonable expectation of significant prejudice to their competitive positions with disclosure of the commercially and financially sensitive information in the records listed above. In this category of records, I include corporate ownership and organizational structures,[103] financing, financing plans, and the financial statements of the successful proponent, the second affected party and other non-signing project partners in the appendices to the RFQ and RFP financial submissions and the evaluation records. I reach the same finding regarding the rates of return in Schedule 1 to the Project Agreement[104] and the information about partnership interests in Schedule 31.

[165] Further, the financial, commercial and technical knowledge, methodologies or strategies in these records belonging to the affected parties is characterized by the requisite degree of detail that harm in the form of undue loss to them could reasonably be expected to result if it were to be disclosed.[105] I accept that a reasonable connection has been established between these harms and disclosure of information giving insight into the affected parties' margins, methodologies and embedded knowledge gained through industry experience. Included in this category of information is information such as price and cost estimates in the Variation Notice (#2), the teaming agreements in section 2.1.2.(e) of the RFQ technical submission describing the relationships between the joint venture parties and other non-signatory project partners, consultants and service providers and the two HOTs supplied during the RFP stage, both identified as Appendix 7A, one being the Design Build HOTs with seven schedules (A-G) and the other being the Service HOTs with three schedules (A-C). Also included in this finding are withheld appendices and portions of the technical submissions, the disclosure of which would, I agree, reveal "commercially sensitive information regarding the

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[102] Page 173 of Schedule 8.
[103] Order PO-2607.
[104] Order PO-3072-R, upheld in *HKSC Developments, supra.*
[105] See *HKSC Developments, supra,* paragraph 34, and Order MO-2233.

sequencing of the project." Annexe C of Schedule 11, as well as pages 6-12 and Appendices 1-3 of Schedule 13 and to the Project Agreement contain design drawings and detailed outlines of steps, tasks and processes for the PAAV Project as supplied by the successful proponent and its project partners.[106]

[166] Schedule 32, the closing Financial Model, represents the successful proponent's comprehensive outline of the design, construction, financing and maintenance of the PAAV Project. It both contains and reflects the successful proponent's informational assets, and I am satisfied that its disclosure could reasonably be expected to lead to the harms in either section 17(1)(a) or (c). This finding is consistent with past orders, such as Order PO-3011, which was upheld in *HKSC Developments,* cited above. Further, I considered whether IO had complied with its obligation under section 10(2) of the *Act* to disclose as much of a responsive record as can reasonably be severed without disclosing exempt information. IO acknowledged its obligation to sever and maintained that it only reasonably withheld the information "given the requirements of section … 17." Given the nature of Schedule 32 and the harms that I accept could reasonably be expected to result with disclosure under sections 17(1)(a) and (c), I find that this record is not reasonably severable.[107]

[167] I also find that the communications in Records 183 and 185 would reveal financial, commercial and other positions taken by the successful proponent in negotiations leading up to closing and that disclosure of this information could reasonably be expected to result in undue loss to this party.

[168] In sum, I find that disclosure of the particular information identified above could reasonably be expected to significantly interfere with the successful proponent's or second affected party's competitive position or ability to negotiate under section 17(1)(a) and also to result in undue loss to them under section 17(1)(c). Therefore, I find that the mandatory exemption in section 17(1) applies to this information and that it is exempt.

No harms proven

[169] On the other hand, I am not persuaded by the parties' representations or the content of the following withheld portions of the records that disclosure could reasonably be expected to result in the harms contemplated by section 17(1):

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[106] Order PO-3574.

[107] See Order PO-3572, where Adjudicator Jenny Ryu considered this issue with regard to the question of applying severance to a university's operating budget at the line-item level. The adjudicator accepted "that this severing exercise would require an inordinate amount of staff time and resources. I am also satisfied that, even if some small portions of the records could be severed and disclosed, disclosure would in many instances yield only disconnected snippets of information. As affirmed on many previous occasions, such records are not reasonably severable, and are not required to be disclosed;" see Orders PO-1735 and PO-1663, PHIPA Decision 17, *Ontario (Minister of Finance) v Ontario (Information and Privacy Commissioner)* (1997), 102 OAC 71 (Div Ct), and many others.

- *RFQ – Financial:* sections 2.2.2, 2.2.3, 2.2.4(a), and 2.2.4(b), in part;
- *RFQ – Technical:* sections 2.1.1, 2.1.4(a), 3.1.2, 3.1.2(i), 3.1.3, and 5.5;
- *RFP – Correspondence and Financial Information:* Appendices 8B, 9A, 9B, 11A, 11B, and section 1.0, in part;
- *Project Agreement*: banking and HST information; and
- *Project Agreement schedules:* 6 (Appendix C), 8 (Schedule 3.1), 9, 11 (Annexes A and B), 13 (pages 1-6), 22 (section 1.6(a)(vii), Appendix B) and 38.

[170] To begin, a reasonable expectation of harm cannot be established in the absence of a plausible link between the information and the harm alleged under section 17(1). Unlike the information I described in the previous part of this order, I conclude that the records identified directly above are not of such a quality or nature that harm could reasonably be expected to follow upon disclosure.

[171] As I noted previously, many of the severances to records (that were otherwise fully disclosed) consisted of very brief portions containing dollar figures, dates, or similar information. Where these severances were made to the Project Agreement (version B11) and B12)) itself, they failed to qualify for exemption under section 17(1) because such terms are not considered "supplied." Some of the information remaining at issue is similar, but appears in RFP or RFQ records and so must be evaluated under part 3 of the test. In this context, the evidence is simply not sufficient to establish that disclosure of this information could reasonably be expected to result in the alleged harms. With consideration of the passage of time, including the completion of nearly all aspects of the PAAV Project, I have no specific evidence that the information provided during the RFQ and RFP stages related to past projects, such as square footage costs, capital costs, project value, and project team composition, holds sufficient *current* value that it could be extrapolated for any purpose or somehow render reasonable any expectation of harm with its disclosure.[108]

[172] The same reasoning applies to the minutiae withheld from Schedules 22 and 38 to the Project Agreement. From section 1.6(a)(vii) of the Variation Procedure, the projected internal rate of return (IRR) not to be exceeded is severed. From Appendix B to the same schedule, the "applicable margin" percentages for Project Co, contractor and sub-contractors have also been severed. From Schedule 38, the Stage 2 Lands Development Agreement, dollar and percentage values associated with the successful proponent's agreement with Waterfront Toronto are withheld. Some of this information has already been ordered disclosed where it appears at section 18.16 (b) & (c) of the Project Agreement. Regarding the rest of that information, the evidence does not convey *how* disclosure of the information at issue could reasonably be expected to lead

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[108] Orders MO-2496-I and MO-3058-F.

to the alleged harms, and I find that it does not surmount the level of speculation.

[173] Regarding section 5.5 of the RFQ technical submission, which is the WSIB CAD 7 (Calculations), although the second affected party attested to the "highly confidential" nature of this information, I have been provided with no direct evidence that disclosure of this outdated WSIB information (ending 2009) could reasonably be expected to reveal commercial strategies or sensitive business information such that significant prejudice to the second affected party's competitive position or significant interference with its contractual or negotiations for other agreements could be the result.[109]

[174] Regarding letters of credit from lender partners, I found above that they were supplied. Under the part 3 harms analysis, however, I note that the withheld dollar and percentage amounts are required pursuant to the mutually generated terms of the PAAV agreement between IO and the successful proponent. The amount and percentage is unique to this particular development and is specifically, in the portion disclosed, said to be in satisfaction of a requirement of the RFP. Other records, such as the remaining withheld parts of section 1.0 of the RFP Financial Submission (Description of Financing Plan), do not meet the harms threshold under part 3 because they similarly contain information that represents a value or a term required by the negotiated PAAV Project Agreement between IO and the successful proponent. This includes interest earned on investment accounts, descriptions of security documents, and even items that will otherwise be (or have been) disclosed in other records, such as the construction contract price or equity capital contribution.

[175] The first six pages of Schedule 13, Project Co Proposal Extracts, consists of tables of "applicable proposal elements" (from the Technical RFP, Section 1.0), which were themselves almost disclosed in their entirety at the request stage. This portion of Schedule 13 is distinct from the listing and appendices of design drawings and architectural plans in the latter half. Rather, the proposal elements tables identify and cross-reference relevant parts of the RFP proposal with certain documents. I find that the evidence does not draw a line between disclosure of this part of Schedule 13 and a reasonable expectation of harm to the successful proponent's competitiveness or future negotiations or a gain to other parties, specific as these elements are to the PAAV Project.

[176] Some portions of the RFQ (e.g., Technical, section 2.1.1) and RFP submissions and Project Agreement schedules contain information about various PAAV Project team members. Appendix C to Schedule 6 lists personnel to be used by the independent certifier. Schedule 9 lists the names and business contact information of "Key Individuals." As noted under my "personal information" finding previously in this order, these individuals are identified only in a professional capacity and this information therefore does not qualify for exemption under section 21(1). Moreover, there is no

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[109] See Orders MO-2884 and MO-3093.

specific evidence that disclosure of the names and business contact information of individuals who were involved in the PAAV Project, or information about their anticipated roles, could reasonably be expected to result in the harms section 17(1) seeks to avoid. Also falling into this category are Annexes A and B to Schedule 11, the PAAV Project Organization Chart and the Responsibility Matrix, which contains roles and responsibilities with descriptions akin to ones contained in other disclosed documents. Indeed, much of the withheld information of this type (personnel and roles) appears to have been made publicly available at the time the Project Agreement was executed. On a similar note, the withheld information in schedule 3.1 of Schedule 8 to the Project Agreement consists of the registered office and place of business of the successful proponent. There is no evidence before me at all that disclosure of this particular information could reasonably lead to section 17(1) harms, although this does raise the question of whether there is any useful purpose to be served by disclosing it in the circumstances.

[177] This observation also applies to the bank account and HST information that I concluded above were supplied to IO. For example, bank account information is found in Schedules 4, 30 and 33: the HST number is in the Agreements of Purchase and Sale in Schedule 17 and the WSIB number is in Schedule 17, as well as in section 5.5 (RFQ Technical), where it appears along with other identifying information about the second affected party's WSIB clearance. The evidence does not establish that such information can be used (by itself) to access any of the related accounts and I find accordingly that its disclosure could not reasonably result in any of the harms contemplated by section 17(1).[110] In light of this conclusion, I find that this information does not satisfy the third part of the test. I acknowledge that I could order its release on the basis that section 17(1) does not apply; however, in my view, disclosing this information would not be of any substantive value to the appellant and, accordingly, I will not order IO to disclose it.[111]

[178] All three parts of the test under section 17(1) must be satisfied for the exemption to apply. Based on the evidence provided and the content of the records themselves, I conclude that the harms contemplated by section 17(1) could not reasonably be expected to result with disclosure of the portions of the records listed and described in this section, and I find that section 17(1) does not apply to them. Accordingly, I will order the non-exempt information disclosed. Since IO has also claimed that section 19 applies to B11), the blackline version of the PAAV Project Agreement, I will consider its possible application below.

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[110] See Order MO-2070.

[111] See Order PO-2965, where Adjudicator Bernie Morrow also declined to order disclosure of similar information, even though it did not qualify for exemption.

F. Does the discretionary exemption for advice or recommendations in section 13(1) apply?

[179] IO claims that section 13(1) applies to portions of several emails exchanged between IO employees, some of which are duplicated throughout the various email chains identified as Records 10, 12, 13, 14, 23, 24, 27 and 28.

[180] Section 13(1) states:

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

[181] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[112]

[182] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[183] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [113]

[184] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

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

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[114]

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[112] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[113] See above at paras. 26 and 47.
[114] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd

[186] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[115]

Representations

[187] IO submits that the records at issue constitute advice or recommendations provided by its employees during the procurement process, including various courses of action from which to choose. IO also maintains that none of the exceptions in section 13(2) apply.

[188] The appellant submits that IO's submissions are not sufficient to establish the advice being given or the recommendations being made. The appellant cites past decisions of this office that required that the advice or recommendation must indicate that it will ultimately be accepted or rejected by its recipient in the deliberative process. The appellant further submits that the exceptions in sections 13(2)(a) and (l) may also apply.

[189] Regarding the exception in section 13(2)(l), the appellant states that IO made several "final decisions" during the course of the RFP and she submits that the reasons for these decisions should be disclosed. The appellant explains that:

> Whether [the appellant] would be allowed to participate in [the successful proponent's] bid, and the terms on which such participation would be granted, was one such decision. In an email dated November 8, 2011, IO render[ed] a final decision in which it excluded [the appellant] from participation in [the successful proponent's] bid. IO's discretionary decision making powers in relation to this issue, were derived from the terms of the RFP, in particular sections 3.6(b), 6.3.1 and 7.01 thereof.

[190] In reply, IO submits that there is no requirement under section 13(1) for the institution to demonstrate that the record went to the ultimate decision-maker. Further, IO explains that the records at issue contain the advice and recommendations of public servants employed by IO that were sent to other public servants working in IO relating to the procurement for the PAAV Project. IO submits that the context in which the records were prepared and communicated further supports that they contain information that could advise the decision-maker regarding the project or that

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[2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[115] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

disclosure would allow accurate inferences to be made about a suggested course of action in the absence of an express recommendation.

[191] The appellant asks that I consider the following arguments and queries in making my determination of the application of section 13(1):

- Correspondence between an institution and an outsider to the deliberative process cannot qualify for exemption.
- Whether any record that sets out options can be severed to disclose factual information?
- Whether the record, if an email, only contains the email author's views or evaluations and thus cannot be found to contain "advice or recommendation?"
- That IO's representations only state that the information in the records "could" be used to advise the decision-maker and are not unequivocal that the information was used in the deliberative process.

Analysis and findings

[192] The records at issue consist of a series of emails between public servants at IO regarding the procurement process in response to the RFQ. IO submits that the withheld information relates to advice given by the public servants to other public servants regarding the consideration and evaluation of the proponents' submissions. Based on my review of the withheld information, I find that section 13(1) applies to all of the records for which it is claimed.

[193] Records 10, 12, 13 and 14 are part of the same email chain and some of the withheld information is duplicated over the course of it. Based on my consideration of it, I am satisfied that the withheld information relates to a suggested course of action regarding the next steps in the consideration of a proponent's submission. The suggested courses of action are being made by various public servants at IO who are tasked with overseeing the procurement process for the PAAV Project. Disclosure of this information would not only reveal the deliberative process within IO with respect to this procurement, but would also permit inferences to be made about the actual recommendations given. Accordingly, I find that the withheld information is exempt under section 13(1), subject to my finding on IO's exercise of discretion.

[194] Record 23 is an email chain between public servants at IO related to consideration of a proponent's submission. In particular, the withheld information is directly concerned with the evaluation and assessment of that proponent's submission. I find that disclosure of the severed portions of this email would permit an accurate inference to be made of the actual advice given and this information is also exempt under section 13(1).

[195] Record 24 is also an email chain and it contains a reference to information withheld in Record 23 regarding the assessment of the proponent's submission. Similar to Record 23, the withheld information is related to an assessment of the proponent's claim, as well as a recommended action. I find that disclosure of this information would disclose the advice given as well as the recommended course of action. Accordingly, the information withheld from Record 24 is also exempt under section 13(1).

[196] IO claimed that section 13(1) applies to Record 27, but as I have found this record exempt under section 19 for reasons of solicitor-client privilege, I will not review the application of section 13(1) to it.

[197] Record 28 is a series of emails. The withheld information relates to the review by IO staff of evaluations of RFP submissions. Based on its content, I find that the withheld portion of this record contains advice about the evaluations conducted, which would allow accurate inferences to be made of the actual advice given if it were disclosed.

[198] Regarding the appellant's position that IO equivocated in its description of the withheld information in the records, the appellant submits that only records that actually provided advice or recommendations can be withheld under section 13(1) of the *Act*. However, section 13(1) is intended to prevent the disclosure of information that would either reveal actual advice or recommendations or permit an accurate inference of the advice or recommendation given. In the present appeal, the information that I have found exempt under section 13(1) falls under both categories.

The exceptions in section 13(2)

[199] The appellant submits that the mandatory exceptions in sections 13(2)(a) and (l) of the *Act* ought to apply to the information that I found exempt under section 13(1). These sections state:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > (a) factual material;
> >
> > (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
> >
> > > (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

> (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

[200] The exceptions in section 13(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.[116] The first four paragraphs in section 13(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature. The remaining exceptions in section 13(2), paragraphs (e) to (l), will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

[201] Based on my review of the information I have found exempt under section 13(1), I find that the exceptions do not apply.

[202] Factual material does not refer to occasional assertions of fact in a record, but to a coherent body of facts separate and distinct from the advice and recommendations the record contains.[117] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) will not apply.[118] In these email records, the factual information that is withheld is interwoven with the advice itself and it cannot be severed from the actual advice; further, its disclosure would permit accurate inferences to be made of the advice. Therefore, I find that the exception in section 13(2)(a) does not apply.

[203] Furthermore, I also find that the exception in section 13(2)(l) does not apply. It is unnecessary for me to make a finding as to whether IO's employees were exercising a discretionary power conferred by, or under, an enactment or scheme administered as the appellant suggests, because I conclude that these records do not contain the "reasons for a final decision, order or ruling of an officer of an institution," IO, as the introductory wording to this exception requires. Rather, the withheld information in the emails is concerned with the intermediate review of the successful proponent's submission and with making recommendations about what next steps ought to be taken. In this context, I find that the exception in section 13(2)(l) does not apply.

[204] Accordingly, subject to my review of IO's exercise of discretion under sections 13(1) and 19, below, I uphold IO's decision to withhold portions of Records 10, 12, 13, 14, 23, 24 and 28.

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[116] *John Doe v. Ontario (Finance)*, cited above, at para. 30.
[117] Order 24, where examples of a "coherent body of facts" include an appendix or a schedule to a policy document.
[118] Order PO-2097.

G. Does the discretionary exemption for solicitor-client privilege at section 19 apply?

[205] IO claims that the discretionary exemption for solicitor-client privilege in section 19 applies to the draft versions of the PAAV Project Agreement [B1)-B10)], the "blackline" version of the executed Project Agreement [B)11], emails and various other records attached to those emails.

[206] In total, there are over 160 records at issue under section 19, in part or in their entirety. There is considerable duplication in these records, particularly in the email chains, and also in the records identified through additional searches conducted by IO. Notwithstanding the duplication, each record is treated individually in this order.

[207] The relevant parts of section 19 of the *Act* state:

> A head may refuse to disclose a record,
>
> > (a) that is subject to solicitor-client privilege;
> >
> > (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation …

[208] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In this appeal, IO argues that both the common law and statutory privileges apply. The successful proponent's representations also assert that the statutory litigation privilege at section 19(b) applies to some of them.

Branch 1: common law privilege

[209] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[210] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[119] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[120] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at

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[119] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[120] Orders PO-2441, MO-2166 and MO-1925.

keeping both informed so that advice can be sought and given.[121]

[211] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[122]

[212] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[123] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[124]

Litigation privilege

[213] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[125] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[126] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[127] The litigation must be ongoing or reasonably contemplated.[128] Common law litigation privilege generally comes to an end with the termination of litigation.[129]

Branch 2: statutory privileges

[214] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

Statutory litigation privilege

[215] This privilege applies to records prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "in contemplation of or

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[121] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[122] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[123] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[124] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[125] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[126] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[127] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[128] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.
[129] *Blank v. Canada (Minister of Justice)*, cited above.

for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[130]

[216] The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[131]

[217] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[132]

Loss of privilege by waiver

[218] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.[133] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[134]

[219] Although disclosure to outsiders of privileged information generally constitutes waiver of privilege,[135] waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[136] This exception to waiver has been raised in this appeal.

[220] Ontario courts have limited the application of branch 2 of section 19 on the following grounds: waiver of litigation privilege by the *head of an institution* (*Big Canoe (2006)*) and the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.[137]

Representations

[221] IO submits that both the first and second branches of section 19 apply and that its rationale and reasons for claiming section 19 are the same under both the common law and statutory solicitor-client privileges.

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[130] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) (*Big Canoe (2006))*; *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[131] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[132] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.
[133] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[134] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[135] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[136] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[137] *Big Canoe* (2006), cited above.

[222] IO states that according to *Descôteaux*, and many IPC orders, the common law solicitor-client communication privilege in Branch 1 and the statutory solicitor-client communication privilege in Branch 2 protect information that would directly or indirectly reveal communications of a confidential nature between solicitor and client, or their agents or employees, made for the purpose of giving or obtaining professional legal advice. According to IO, the information that it has identified as legal advice sought and given was necessary for IO to analyze and opine on its legal options with respect to the PAAV Project. IO acknowledges that confidentiality is an essential component of the privilege and submits that it exists in this case, such that disclosure of the identified records would compromise the privilege by revealing protected communications.

[223] IO submits that there was a "continuum of communications" between solicitor and client in this matter to keep both informed so that advice could be sought and given as required, as described in *Balabel,* cited above. IO refers to the treatment of emails and email chains in past orders, such as Order PO-3078, where such records were found to form part of the continuum of communications, as described in *Balabel*. IO maintains that most of the records over which it claims section 19 consist of email chains between IO employees and IO internal and external legal counsel (both of which are considered to be "Crown counsel"), which were sent for the sole purpose of seeking or giving legal advice related to the PAAV Project.

[224] IO maintains that Branch 1 may apply to a legal advisor's working papers if they are directly related to the seeking, formulating or giving of legal advice. IO submits that the working drafts of the project agreement should be considered part of counsel's working papers. According to IO, "the suggested changes contained in the drafts were made by IO counsel and amount to not only privileged communication but also constitute counsel's notes in preparing advice for the clients."

[225] With regard to many of the emails that are at issue, the successful proponent supports IO's decision to withhold them, but also argues that "all correspondence prepared in connection with, as well as the actual Amended and Restated Release and Indemnity document, are records to which the provisions of section 19(b) of FIPPA apply because they were prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." The successful proponent identifies a strict confidentiality clause contained in the release and indemnity record and sets out its wording, which I do not reproduce here. The successful proponent also asserts that many of the emails withheld under section 19 contain third party information which would also qualify for exemption under section 17(1) because disclosure could reasonably be expected to result in significant prejudice to its competitive position or interfere with its negotiations.[138]

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[138] All of the emails to which these two exemptions are said to apply are identified in an index provided to IO during the initial appeal stage with one of the four letters written to IO during the initial decision and

[226] The appellant submits that following the successful proponent's bid being accepted by IO, there were extensive negotiations between those two parties over the final terms of the PAAV Project Agreement. As part of the negotiations, the appellant states that IO: corresponded with the successful proponent's representatives and advisors; communicated internally about the bid; and communicated with its external advisors about the bid. Within a specific stated time period of May to November 2011, it is asserted, these communications would have included discussions about the appellant or its principals, given that the successful proponent had initially proposed that the appellant would participate in the bid, although this did not occur. The appellant seeks access to the draft versions of the PAAV Project Agreement in order to understand what the final agreement was based on and what was negotiated. The appellant seeks access to the email communications and correspondence at issue under section 19 for similar reasons. The appellant's position is based on the following three arguments: that the records are not a communication between a solicitor and client; that they do not exist for the purpose of giving legal advice; and if any privilege in them did exist, such privilege has been waived through disclosure to an outsider, because no common interest is established.

[227] Under Branch 1, the appellant submits that since confidentiality is an essential component of the privilege, a record does not qualify as privileged simply because it was reviewed by a lawyer; further, disclosure of privileged material to those outside of the privileged relationship constitutes waiver unless a common interest exists.[139] The appellant submits, therefore, that if any of the records over which IO asserts privilege were shared with people not employed by IO, privilege in them has been waived and the same holds true if any "working drafts" of the Project Agreement were shared with third parties, including the successful proponent or their counsel.

[228] Regarding the application of Branch 2 in the circumstances, the appellant relies on Order PO-3154 for the finding that information exchanged between negotiating parties in the course of a commercial transaction lacked a "cognizable zone of privacy sufficient to resist the application of the principle of waiver" under section 19(b). The appellant submits that earlier orders have referred to the intent of the legislators in interpreting Branch 2, with the courts upholding the following view:

> The second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, **Branch 2 of section**

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appeal stages, which were shared with the appellant and provided to me. Some of these email records are addressed in my finding under section 17(1), above.

[139] Citing Order PO-3086, which refers to *S.&K. Processors Ltd.*, cited above.

> **19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.**[140] [emphasis added]

[229] According to the appellant, the solicitor-client privilege exemption is designed to protect the interests of a government institution in obtaining legal advice, and not the interests of other parties outside government. Relying on Order MO-1547, the appellant submits that where the client in respect of legal advice in a particular communication is not an institution under the *Act,* the exemption cannot apply. The common interest exception is the limited circumstance where waiver of the privilege may not occur, but the appellant cites Order PO-3154 in arguing that the exception cannot apply in the context of an agreement that is the product of negotiation between two parties. The appellant asserts, therefore, that the mere existence of negotiations between IO and third parties in this commercial transaction is not sufficient to establish the common interest exception to waiver of solicitor-client privilege since the parties were, "at all material times operating at arm's length, each advocating for and seeking to advance their own interests during the negotiation of the transactions."[141] The appellant also challenges IO's claim that section 19 applies to B11), the final "blackline" version of the PAAV Project Agreement, arguing that IO could not reasonably have held an expectation of confidentiality with respect to it.

[230] IO's reply representations are brief and argue mainly that common interest privilege permits parties to disclose their "privileged evidence" between themselves without losing privilege, if they share a common interest in the underlying subject matter. IO submits that since it shared a common goal with the successful proponent, sought a common outcome and had a "self-same interest," IO cannot be considered to have waived privilege on issues of "true commonality," including with regard to the records withheld under section 19 that were disclosed to the successful proponent.

[231] In sur-reply, the appellant emphasizes that since common interest privilege is a form of solicitor-client privilege, the communication itself must consist of legal advice or opinions; it is not enough to say that the parties were engaged in negotiations.[142] The appellant suggests that IO merely asserts that it shared a common goal with the successful proponent, without explaining what that goal would be.

Analysis and findings

[232] Having considered the circumstances of the creation of these records, I find that the lawyers for IO, both internal and external legal counsel, were in a solicitor-client relationship with members of IO's PAAV Project team for the purpose of section 19(a).

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[140] Citing Order P-1342 at page 7, upheld on judicial review in *Big Canoe 1997*.
[141] Order PO-3154 at para 187.
[142] The appellant relies on *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510.

In some instances, legal counsel and staff for IO are in communication with lawyers from the Legal Services Branch of the Ministry of Finance (Ontario Financing Authority), and in the circumstances of this appeal, I find that a solicitor-client relationship also existed between them. Further, I accept and find that these lawyers are also "Crown" counsel for the purpose of section 19(b).

[233] Next, I must determine whether the records reflect a written record of communication between a solicitor and his or her client, and then whether each record is subject to privilege because of the giving or seeking of confidential legal advice.

[234] For the most part, the records consist of emails or email chains, many of which include duplicates of various emails, and some that have attachments. Some of these records were severed and partially disclosed by IO. All of these emails were sent to or from legal counsel for IO, both internal and external, and IO's employees, particularly members of the PAAV Project team and IO senior management involved in the project.

[235] I will begin my analysis with the communications exchanged between IO actors only; these are the emails that do not involve individuals outside IO, apart from its external legal counsel. Based on my review, I am satisfied that all of the communications withheld either in part, or fully, from Records 19, 27, 31, 32, 34-56, 60-76, 80-83, 94-98, 101-105, 110, 128, 133-147, 155-163, 184, 185a and 186 relate to legal issues pertaining to the PAAV Project Agreement evaluation, selection and negotiation processes. These e-mails reflect direct communications of a confidential nature between IO lawyers and their clients within IO. Further, I am satisfied that these communications were sent in the course of giving and receiving legal advice and, further, that they form part of the continuum of communications aimed at keeping both informed so that advice may be sought and given as required. Accordingly, I find that section 19(a) applies to them.

[236] I note that several of the records included in my finding above consist of attachments to emails.[143] Past orders have established that draft records prepared by counsel for a client attract solicitor-client privilege and therefore qualify for exemption under section 19. Examples of records in this category include draft correspondence (Order PO-1855), draft briefing notes (Order PO-2707) and draft versions of agreements (Order PO-2704).[144] Where the confidential legal advice of counsel for an institution could reasonably be inferred from disclosure, such records will be exempt, just as records from the client that are clearly prepared and provided to counsel for the purpose of obtaining legal advice will be. Some of the draft records feature notations or commentary by IO legal counsel, but others do not. Regardless of the notations, based on the context, I accept that legal advice was sought and provided in connection with

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[143] Records 27, 40-42, 48-50, 64-70, 95-97 and 102. Record 185a is an attachment to Record 185 and is a duplicate of Record 42.

[144] In Order PO-2704, the adjudicator upheld the Ministry of Health and Long-Term Care's decision to deny access to draft agreements related to drug programs and benefits under section 19.

them and that they form part of the solicitor-client continuum of communications for the purposes of Branch 1 of section 19 of the *Act*. I confirm that they are exempt under section 19(a).

[237] Several of the emails within the email chains that passed between legal counsel or between counsel and IO employees could be characterized as merely informational in nature, because they confirm details about meetings being set up or consist of forwarded emails.[145] Past orders have recognized that not all records are privileged simply because legal counsel is copied or included in an email exchange.[146] However, in the circumstances, I am satisfied that these portions of the e-mail chains also form part of the continuum of communications aimed at keeping both the solicitor and client informed so that advice may be sought and given as required. On a similar footing are several other emails in this group, such as Record 39, that do not include a lawyer as an initiating sender or recipient, but reflect IO staff forwarding an email, which was itself sent by counsel, and attaches privileged materials. In my view, these emails also form part of the continuum of communications, which advises other members of the client group of the solicitor-client privileged material received.

[238] There are further chains of emails subject to IO's section 19 exemption claim that consist of emails passing between IO counsel and/or IO employees, but which also incorporate emails that originated with other involved parties external to IO. In respect of all of these records, it is clear that "continuum of communications" remains the key justification for finding that solicitor-client communications privilege attaches to them. In some of these records, a request for legal advice may not be evident, but it is clear nonetheless that this is the purpose of the communication. In others, the client (IO management) has passed information on to counsel, or vice-versa, for the purpose of keeping both client and counsel informed so that legal advice could be readily accessed as the situation developed. These are part of a continuum of communications between various counsel and their clients on the legal issues related to the PAAV Project, which was the complex commercial transaction IO was pursuing to completion. Accordingly, I find that Records 84, 86, 87, 89-93, 106-109, 111-115, 123-127, 129-132, 148-154, 164-181 are subject to common law solicitor-client communication privilege and are exempt under Branch 1 of section 19.

[239] Records 99, 100, 116-122 are emails consisting of communications passed between external legal counsel acting for IO and for the successful proponent. Generally, they relate to the release and indemnity matter. IO claims that these emails, like all the others, are exempt on the basis of solicitor-client communication privilege.[147] The successful proponent argues instead that the emails are litigation privileged under

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[145] For example, Records 51, 52, 145 and 146.
[146] Orders PO-3078, PO-3248 and PO-3615.
[147] IO also claimed section 17(1) respecting part of the successful proponent's email (December 8, 2011 at 3:14 p.m.), which is repeated throughout the chain of Records 116-122. Given my finding under section 19(b) respecting the full record, however, this portion was not reviewed under section 17(1).

section 19(b) because they were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." I note that some of the "release and indemnity" emails did qualify for exemption under Branch 1 as solicitor-client communication privileged, but on my review of the remaining records, I prefer the position advanced by the successful proponent. To begin, I am satisfied that the records were prepared by or for Crown counsel. Further, I acknowledge that more than a vague or general apprehension of litigation is required,[148] and I am also satisfied that litigation was reasonably contemplated at the time these records were created.

[240] The appellant relies on Order PO-3154 in submitting that information exchanged between negotiating parties in the course of a commercial transaction lacks a "cognizable zone of privacy sufficient to resist the application of the principle of waiver" under section 19(b). The adjudicator in Order PO-3154 was referring to solicitor client, not litigation, privilege and as I noted previously, litigation privilege under Branch 2 is limited by only two things: waiver by the *head* of the institution and the lack of a "zone of privacy," such as communications between opposing counsel.[149] The distinction to be made in this case is that *at the material time*, these communications could not be characterized as taking place between *opposing* counsel. Rather, these were communications between lawyers for parties whose interests in reaching agreement on the indemnity issue may not have been identical, but had certainly dovetailed. As such, I am satisfied that at the relevant time, IO and the successful proponent were acting within a zone of privacy in exchanging the emails. Accordingly, I accept that these particular records were prepared by or for counsel for IO in contemplation of, or for use in litigation, and are, therefore, subject to the statutory litigation privilege of Branch 2 of section 19. On this basis, I find that Records 99, 100 and 116-122 are exempt under section 19(b) of the *Act.*

[241] Next, there is IO's claim that the final blackline version of the executed Project Agreement, version B11), is exempt under section 19. In this regard, I agree with the appellant that any expectation of confidentiality IO might assert it has in a signed and executed version of the PAAV Project Agreement is not reasonable. I find that this version represents the culmination of the drafting process – a point in time when the advisory role of IO legal counsel was complete. The blackline version shows only what was marked as "REDACTED" on the final, clean version that was posted on IO's website. In the absence of a finding of confidentiality, I reject IO's claim that version B11) of the Project Agreement is a confidential solicitor-client privileged record. I find that version B11) is not exempt under section 19 of the *Act* and that it cannot be withheld on this basis. I will order version B11) disclosed, subject to the severances that are to be made to the Project Agreement and its schedules pursuant to my findings on the application of section 17(1).

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[148] Orders PO-2323, MO-2609 and MO-3161.
[149] *Big Canoe (2006)* and *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.

[242] Finally, there are the draft versions of the Project Agreement, identified as versions B1) through B10).[150] Past orders have found that, in certain circumstances, draft agreements prepared while negotiations were ongoing constituted "a confidential communication between a lawyer and a client made for the purpose of providing advice on the negotiations toward reaching an agreement."[151] Based on my review of the series of draft agreements, I am prepared to accept that they were created and received in confidence by IO employees and legal counsel (both internal and external) and, therefore, that they constitute privileged communications.[152] Further, I accept that confidential legal advice is evident, or may reasonably be deduced, by their disclosure. In saying this, I also accept IO's evidence that suggested edits to the drafts by its own legal counsel constitute counsel's notes in preparing advice for the clients and are evidence that the working drafts of the PAAV Project Agreement form part of counsel's working papers.[153] Accordingly, I find that these records satisfy the requirements for exemption under Branch 1 of section 19 of the *Act.* Given my finding on the waiver issue, below, I will not consider whether it would have been possible for IO to sever the draft agreements pursuant to section 10(2) of the *Act* in order to disclose any portions that are not exempt under section 19.

Waiver

[243] The appellant argues that IO has waived privilege over versions B1) to B10) of the PAAV Project Agreement because the drafts were shared with the successful proponent in the process of negotiating it. In the appellant's opinion, the mere fact that IO and the third party engaged in negotiations to finalize the agreement is not sufficient to establish a common interest. In response, IO maintains that since it shared a common goal, and had a "self-same interest," with the successful proponent, privilege was not waived over the records that were disclosed to the successful proponent in pursuing this goal. Based on my review of the existing law on the subject and the circumstances of this appeal, I agree with the appellant.

[244] The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor in respect of litigation.[154] Subsequently, a broader application of the principle to situations involving solicitor-client communication privilege has developed, such that common interest privilege may apply to communications by one party's counsel with a third party in the context of a commercial

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[150] As noted previously, these 10 versions consist of two sets of five successive drafts of the PAAV Project Agreement in "clean" and "blackline" forms.
[151] See, for example, Order PO-1864.
[152] Since IO appears to have disclosed these draft agreements to the successful proponent during negotiations, it could be argued that the requisite degree of confidentiality for a finding of privilege in the first instance never existed. However, I do not scrutinize the confidentiality issue further because I conclude, below, that privilege in the draft agreements was waived in any event.
[153] *Susan Hosiery Ltd.*, cited above.
[154] See *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31 and *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), as discussed in Order PO-3154.

transaction.[155] The test for determining the existence of a common interest sufficient to resist waiver of solicitor-client privilege under Branch 1 was articulated by Adjudicator Steven Faughnan in Order PO-3154. Based on his review of the authorities, the adjudicator outlined the following conditions that must be satisfied to establish it:

a. the information at issue must be inherently privileged in that it must have arisen in such a way that it meets the definition of solicitor-client privilege under section 19(a) of the *Act*, and

b. the parties who share that information must have a "common interest", but not necessarily identical interest.

[245] This approach has been adopted in subsequent orders and cases that discuss the various considerations relevant to the analysis and determination of the second requirement, in particular.[156] As a starting premise, the determination of the existence of a common interest is known to be highly fact dependent.[157] The following principles or factors have also been recognized: the parties' mutual interest in "seeing the deal done"[158] may include benefitting financially from the transaction;[159] the parties may have a common interest, even if they do not have identical interests;[160] the possibility that parties might at some future point in time become adverse in interest is not sufficient to deny a common interest at present;[161] and "there can be a common goal … despite different rationales for that goal."[162]

[246] Previously, I concluded that the draft versions of the PAAV Project Agreement originated in privilege. The question is whether IO's disclosure of the draft agreements to the successful proponent in the course of negotiating the final terms falls within a common interest privilege shared by them. As suggested, I conclude that both the nature of the records and the circumstances of the appeal resist such a finding.

[247] The appellant relies on Order PO-3154 for the discussion of the common interest exception to waiver of privilege and for the finding that it did not apply in that case. In Order PO-3154, records related to the restructuring of General Motors Canada Limited were at issue. The adjudicator reviewed whether there had been waiver of solicitor-client privilege respecting records created by legal counsel within the institution or by

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[155] Order PO-1678 reviewing *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.); also discussed in Order PO-3154 at para. 164.
[156] See, for example, Interim Order MO-3253-I.
[157] *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747 (Fed. T.D.). See also BC IPC Order 03-02: *University of British Columbia, Re*, 2003 CanLII 49166 (BC IPC), reviewing similar authorities.
[158] *Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 98 D.T.C. 6456 (Alta. Q.B.).
[159] *Maximum Ventures Inc. v. De Graaf*, cited above.
[160] Order MO-1678.
[161] *CC & L Dedicated Enterprise Fund (trustee of) v. Fisherman*, [2001] O.J. No. 637 (SCJ).
[162] See *Trillium Motor World v. General Motors et al*, 2014 ONSC 1338.

counsel representing other parties to the General Motors restructuring transaction, which was shared with other third parties. Characterizing the records as "common communications," the institution argued that they "were shared to allow Ontario to conduct its due diligence to assess loan risk, as well as to provide ministry counsel with the ability to provide legal advice to their client … in order to facilitate and further the common interest of all the parties – the successful completion of the loan transaction." This order reviews *Maximum Ventures Inc.,* cited in the appellant's representations in this appeal, in which the British Columbia Court of Appeal observed that:

> Recent jurisprudence has generally placed an increased emphasis on the protection from disclosure of solicitor-client communications, including those shared in furtherance of a common commercial interest. In the instant case the [draft legal opinion] was produced within the recognized solicitor-client privileged relationship. The common interest privilege issues arise in response to a plea of waiver of that privilege. The common interest privilege is an extension of the privilege attached to that relationship. **The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them**. … [emphasis added]

[248] In Order PO-3154, the institution relied on *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*[163] to support its position that the parties' shared goal of successfully completing the transaction was the element that gave rise to the common interest there. In reaching his finding, Adjudicator Faughnan considered the justification for the expansion of the waiver exception to commercial transactions set out in *Fraser Milner*, which included ensuring that parties engaged in commercial transactions are "free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice."[164] Ultimately, however, Adjudicator Faughnan concluded in Order PO-3154 that no common interest sufficient to resist the waiver of the privilege existed. Although he accepted that the parties may have had a shared interest in seeing the transaction through to completion, "they were at all material times operating at arm's length, each advocating for and seeking to advance their own interests during the negotiation of the transactions." This is clearly borne out by the records that document the ebb and flow of the negotiations between the various parties."[165] In so finding, the adjudicator rejected the institution's position that the records represented the "draft common work product of the corresponding legal counsel."[166]

[249] Another decision with records similar to those at issue in this appeal is BC IPC

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[163] 2002 BCSC 1344 (CanLII).
[164] At para. 14, and as discussed at para. 173 of Order PO-3154.
[165] Para. 187.
[166] Order PO-3154 at para. 194.

Order 03-02,[167] where the former BC Commissioner reached the same conclusion on waiver respecting a draft version of exclusive marketing agreements between the University of British Columbia (UBC) and two banks. Following his review of the authorities, Commissioner David Loukidelis acknowledged that "a copy of a draft contract may be privileged depending on the relevant circumstances" and determined that the draft agreement in that case was, in fact, a solicitor-client privileged document. At paragraphs 140 and 141 of the decision, however, he concluded that:

> UBC's privilege argument falls short, however, when it comes to the circulation of the draft agreement to the banks and their respective legal counsel. UBC says the draft agreement was provided to the banks and to their respective counsel "for the purposes of negotiation among the parties and to receive comment by legal counsel on the draft agreement." The evidence does not establish that the draft agreement was created to provide common legal advice for UBC and the banks. Nor does it establish, alternatively, that, having been created as a privileged communication to UBC, it was circulated to the banks for the purpose of giving and receiving common legal advice for UBC and the banks.
>
> It strains matters, and is I think unreasonable, to view the fact that UBC solicited comments from the banks and their respective banks' legal counsel as supporting a common interest privilege between UBC and the banks in legal advice that had been prepared by counsel for UBC. …

[250] I find Order PO-3154 and BC Order 03-02 instructive for my analysis in this appeal. In both cases, records (including draft agreements) that were created in the course of negotiating complex commercial arrangements were shared with the third parties with whom the institutions were negotiating. In each of these cases, the overlapping interests of the institution and the contracting third parties was found not to be sufficient to withstand the waiver of privilege over those particular records. Certainly, the authorities do not rule out a finding that the common interest exception to waiver can be established in the context of a large commercial transaction, but they appear to be distinguishable on the basis of the kind of record that will be protected. We see, for example, Mr. Justice O'Reilly in *Pitney Bowes* finding the exception to waiver established in relation to parties who "were neither adversaries nor brothers-in-arms," a characterization that is at least arguably available here to describe the relationship between IO and the successful proponent. However, a crucial factor in determining that there had been no waiver of privilege in *Pitney Bowes*, as with the other reviewed cases where the common interest privilege was established, is that the records consisted of legal opinions. One law firm represented all of the parties at various times because these multiple parties needed legal advice in areas where their interests were not adverse. The court in *Pitney Bowes* observed that "the sharing of

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[167] University of British Columbia, Re, 2003 CanLII 49166 (BC IPC).

legal opinions will ensure that each party has an appreciation for the legal position of the others and negotiations can proceed in an informed and open way."[168] In other words, the documents that have been protected from disclosure under the common interest privilege exception to waiver are readily characterized as discrete "common communications," or a means of delivering legal advice to the negotiating parties where sharing joint legal advice to clarify certain matters makes sense to both.

[251] In this appeal, there is no reasonable basis to support a finding that IO shared a "self-same interest" with the successful proponent in the drafting of the PAAV Project Agreement,[169] notwithstanding a shared determination to see this complex commercial arrangement through to completion. Ultimately, while both parties may have wanted to see the deal completed, each sought terms that would be most beneficial to their own interests. I am neither satisfied that the existing law supports extending the common interest exception to waiver of privilege to situations where draft agreements are shared between negotiating parties; nor do I accept on the facts of this appeal that the draft versions of the PAAV Project Agreement are common communications as between IO and the successful proponent intended to deliver legal advice to them both. Simply put, IO has not persuaded me of the "true commonality" it claims was shared with the successful proponent and, in my view, this is not a case where it would have been reasonable for one lawyer to act for both IO and the successful proponent on the transaction.[170] The evidence provided by IO does not establish that versions B1) to B10) of the PAAV Project Agreement were either created to provide common legal advice to IO and the successful proponent *or* that these versions were then shared with the successful proponent for the purpose of giving and receiving common legal advice for them.

[252] I find that no common interest has been established that would permit IO to maintain its claim of solicitor-client privilege over draft versions B1) to B10) of the PAAV Project Agreement in spite of them having been shared with the successful proponent. In this context, IO's disclosure of the draft agreements to the successful proponent during negotiations resulted in waiver of solicitor-client communication privilege, and I find that these records are not exempt under section 19.

[253] As noted previously, the discretionary exemption in section 19 was the only exemption IO claimed in withholding the draft agreements, and I have concluded that it does not apply. In the normal course, these draft agreements would be ordered disclosed to the appellant. However, under my review of the mandatory third party information exemption in section 17(1), above, I found that section 17(1)(a) or (c)

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[168] *Pitney Bowes,* cited above, para. 20.
[169] "Self-same interest" is an allusion to Lord Denning's characterization of the common interest exception in *Buttes Gas & Oil Co. v. Hammer (No. 3)*, [1980] 3 All E.R. 475 (C.A.), at p. 483, quoted by Major J. in *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31; see also Order PO-3154, page 44.
[170] *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research),* cited above.

applied to information from the RFQ, RFP and evaluation stages, as well as portions of certain schedules to the final PAAV Project Agreement. Accordingly, given this finding and the likelihood that information substantially similar, or equivalent, to the exempt information is also contained in draft versions B1) to B10) of the PAAV Project Agreement, its disclosure could affect the interests of the successful proponent or second affected party.

[254] Therefore, I will reserve my final decision on the disclosure of versions B1) to B10) of the PAAV Project Agreement in order to seek representations from the parties on disclosure, including the application of section 17(1) to these records. I remain seized of all related matters in the interim.

H. Did IO properly exercise its discretion under sections 13 and 19?

[255] After deciding that a record or part of it falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. The section 13 and 19 exemptions are discretionary, which means that IO could choose to disclose information, despite the fact that it could withhold it. IO was required to exercise its discretion under these exemptions.

[256] On appeal, the Commissioner may determine whether IO failed to do so. In addition, the Commissioner may find that IO erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to IO for an exercise of discretion based on proper considerations.[171] According to section 54(2) of the *Act,* however, I may not substitute my own discretion for that of IO.

[257] In view of the fact that I have upheld IO's decision to withhold information under sections 13(1) and 19, I must also consider whether IO properly exercised its discretion to withhold the information under these discretionary exemptions.

[258] IO submits that as a matter of practice, it usually treats the majority of information contained in project proposals received in response to RFPs in a manner consistent with IO's obligations under *FIPPA*, which is to operate in an open, transparent, and accountable manner and to provide a right of access to information under the control of IO in accordance with the principles that information should be available to the public and necessary exemptions from the right of access should be limited and specific. IO maintains that in exercising its discretion, it did not act in bad faith or for an improper purpose. Specific to the exercise of discretion under section 13(1), IO claims that it considered the purpose of protecting the decision-making process within government as intended in *Ontario (Finance)*, cited above, including the

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[171] Order MO-1573.

advice and recommendations exchanged within IO during the procurement process. IO maintains that it only withheld information that would disclose actual advice. IO submits that it disclosed to the appellant as much of the responsive records as could reasonably be severed without disclosing the information that fits within the claimed exemptions.

[259] The appellant submits that IO failed to take into account the following relevant considerations:

- heightened public scrutiny
- information to be made public
- that exemptions from disclosure ought to be limited and specific to fulfil the purpose of the *Act*;
- identity of the requester (as not a competitor)

Analysis and findings

[260] I have considered IO's submissions on the factors it took into consideration in exercising its discretion to not disclose the records, or portions of records, for which it claimed exemption under sections 13(1) and 19. I have also considered the circumstances of this appeal, including IO's other disclosures in response to the request.

[261] The evidence before me is sufficient to support a finding that IO exercised its discretion regarding disclosure of records responsive to the appellant's access request in good faith and that it considered relevant factors in doing so. Based on the manner in which IO applied the exemptions, I am satisfied that it also considered the interests sought to be protected under them, as well as the nature of the information and its significance to IO overall. On the whole, I see no basis for interfering with IO's exercise of discretion.

[262] I find that IO properly exercised its discretion to withhold information under sections 13(1) and 19 in this appeal, and I uphold this exercise of discretion.

ORDER:

1. I uphold IO's decision, in part, to deny access under section 21(1).
2. I uphold IO's decision to deny access to the following records, or portions of them, under section 17(1)(a) or (c) of the *Act*:
    a. *Evaluation:* page 4 (financing summary) of Presentation to the Evaluation Committee;

b. *RFQ – Financial -* section 2.2: Appendices A-C representation letters (in part), E and F – financial statements (full), H - lender support letters (full) and I - financing amounts (in part);

c. *RFQ – Financial -* sections 2.2.1, 2.2.3 and 2.2.4(a) and (b) (in part), representing the financial information of "prime team members" in the form of risk capital, assets and financing raised;

d. *RFQ – Technical:* section 2.1.2(e) (teaming agreement);

e. *RFP – Correspondence and Financial Information:* Appendices 1A, 1B, 2 (Parts 1 and 2), 3B, 3C, 6A, 7A (Design Build HOTs with Schedules A-G), 7A (Service HOTs with Schedules A-C), and part of section 1.0 (Description of Financing Plan, financial position overview (table form) on page 11 and funding terms - fees and credit spread on page 21);

f. *RFP – Technical Information:* Part B – Section 1.0, Appendices A (Maps), B(1) (Building Canada Statistics) and B(2) (Building Canada Statistics and Projects and Manhours, pages 1-10 and 14 only);

g. *Email records or attachments: Record 6*, email dated June 13, 2011 at 1:07 p.m., *Record 183*, legal opinion dated September 14, 2011, and *Record 185*, email dated November 10, 2011 at 3:08 p.m.; and

h. *Stage 3 -* Variation Notice #2, dated June 2012;

i. *Project Agreement Schedules -* 1 (definitions 1.31 and 1.430), 8 (Schedules 3.2[172] and 7.01(12)), 11 (Annexe C), 13 (pages 6-12, Appendices 1-3), 31 (full) and 32 (full).

3. I uphold IO's decision to deny access to the records withheld in part, or in their entirety, under section 13(1) of the *Act*.

4. I partly uphold IO's decision to deny access under section 19, *with the exception of* the draft versions of the PAAV Project Agreement, numbered B1) – B10), regarding which the inquiry will continue to determine the possible application of section 17(1) to them.

5. I order IO to disclose the other responsive records or portions of records which I have found do not qualify for exemption under sections 17(1) and 21(1) to the appellant by 35 days**, October 19, 2016** but not before 30 days**, October 14, 2016**.

[172] Page 173 of Schedule 8.

6. In order to verify compliance with this order, I reserve the right to require IO to provide me with a copy of the records disclosed to the appellant pursuant to provision 5.

7. I remain seized of the issues related to the application of the mandatory exemption in section 17(1) to draft versions B1) to B10) of the PAAV Project Agreement.

Original Signed by:	September 13, 2016
Daphne Loukidelis	
Adjudicator	