

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3974

Appeal PA17-497

Ministry of Transportation

July 22, 2019

Summary: The Ministry of Transportation (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* for copies of the submissions made in response to the ministry's Request for Qualifications concerning the reconstruction of a portion of a highway. The ministry denied access to the records in part under the mandatory third party information exemption in section 17(1) and the requester appealed the decision.

In this order, the adjudicator finds that the information in the records is exempt under section 17(1), other than the information that does not reveal the affected parties' submissions to the ministry. The adjudicator partly upholds the ministry's access decision, but orders disclosure of the non-exempt information.

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

Orders Considered: Orders MO-3058-F and PO-3310.

OVERVIEW:

[1] The Ministry of Transportation (the ministry or MTO) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), which was later clarified to read:

1. Copies of all expressions of interest, and all enquiries, records, documents, notes, information and/or communications (paper or electronic), including deleted electronic correspondence, relating to all expressions of interest

received, for the Design-Build Expression of Interest [DB-EOI]¹ for the reconstruction of Highway 401 [at a specific location] DB Contract Number [#].

2. A list of the short-listed Respondents, and their respective scores, for [this contract].
3. A copy of the Request for Proposal issued to all short-listed Respondents for [this contract].

[2] The requester also clarified with the ministry that he is seeking access to both the expression of interest and the submissions submitted in response to the expression of interest.

[3] The ministry notified five affected third parties of the request, pursuant to section 28(1)(a) of the *Act*.

[4] Following the receipt and review of the affected parties' representations, the ministry issued a decision to each of them stating that access to the information about which they were notified would be denied pursuant to the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

[5] The ministry also issued a decision to the requester, granting partial access to the records responsive to the request. Access to the withheld information was denied pursuant to sections 17(1), 18(1) (economic and other interests), 19 (solicitor-client privilege) and 21(1) of the *Act*.

[6] The requester (now the appellant) appealed the ministry's decision.

[7] During the course of mediation, the appellant advised the mediator that he only wished to pursue the information withheld under section 17(1). Since the ministry did not claim any other exemptions in the alternative for the information it withheld under section 17(1), no other exemptions are at issue in this appeal.

[8] As no further mediation was possible, this appeal proceeded to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[9] Representations were sought and exchanged between the ministry, the five affected parties² and the appellant in accordance with section 7 of the IPC's *Code of*

¹ An EOI is also known as an RFQ or a Request for Qualifications.

² Referred to in this order as affected parties #1 to #5.

*Procedure and Practice Direction 7.*³

[10] In this order, I find that the information at issue in the records is exempt under section 17(1), other than the information that does not reveal the affected parties' EOI submissions to the ministry. I order the ministry to disclose the latter information to the appellant.

RECORDS:

[11] At issue are the following records, for which the ministry has claimed the application of section 17(1):

Record #	Description	Affected party	Withheld in part/full
1	Debriefing Notes	Affected party #1	full
18	Debriefing Notes	Affected party #2	full
133	Expression of Interest (EOI) ⁴ submission email	Affected party #3	part
134	EOI submission	Affected party #3	full
136	EOI submission email	Affected parties #1 & #4	part
137	EOI submission	Affected parties #1 & #4	full
140	EOI submission email	Affected party #5	part
141	EOI submission	Affected party #5	full
142	Transmittal Letter to MTO	Affected party #5	full
144	EOI submission email	Affected party #2	part
145	EOI submission	Affected party #2	full

³ Many of the parties provided confidential representations in addition to their non-confidential representations. In this order, I will only be referring to these parties' non-confidential representations although I have considered their representations in their entirety.

⁴ An EOI is also known as an RFQ or a Request for Qualifications.

DISCUSSION:

Does the mandatory third party information exemption at section 17(1) apply to the records?

[12] The ministry and the affected parties rely on sections 17(1)(a) to (c), which read:

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

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

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[13] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁵ 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.⁶

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

⁵ *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.*).

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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: type of information

[15] The ministry only provided representations on four records, the EOI submissions. It submits that the information contained in Records 134, 137, 141 and 145 is technical and commercial information within the meaning of section 17(1) of the *Act*.

[16] Affected party #1 and affected party #4 did a joint EOI submission in Record 137. Both these affected parties provided separate representations, but essentially provide similar information in their representations. They submit that their EOI submission contains trade secrets, technical information, commercial information and financial information. They state that this submission details various aspects of its operating and business practices. This includes their approach to:

- managing relationships with their project partners,
- project and environmental management,
- communications and public relations plan and philosophy, and
- design and construction quality management.

[17] They state that their EOI submission includes detailed financial and technical information related to their past project experience. They further state that their submission contains commercial and technical information as it includes their approach to completing the project in accordance with the ministry's objectives and their plan for providing services in a manner that addresses the unique issues that may arise in connection with the project.

[18] Affected parties #1 and #4 state that their EOI submission contains information concerning key personnel, including details of their current positions, qualifications, education and industry experience. They submit that as the highway construction and design-build industry is highly competitive, their competitors are always seeking qualified personnel, and they, therefore, consider this information to be confidential and proprietary, i.e. a trade secret.

[19] Affected party #2 states that its EOI submission contains trade secrets and technical, commercial and financial information.

[20] Affected party #3 states that its EOI submission contains trade secrets because it has developed its strategy for responding to MTO EOIs over many years. It also states that it contains financial information.

[21] Affected party #5 states that the headings in its EOI submission include the

following:

- Organizational Structure
- Project Team Experience
- Key Personnel
- Project Management Approach

[22] Affected party #5 maintains that these headings make it clear that its EOI submission contains commercial and technical information. It submits that its approach and methodology to managing and executing projects such as this one, and as documented in its EOI submission, constitute commercial and technical information.

[23] In response to the affected parties' representations on the type of information in the records, the appellant relies on Order PO-3310, where the adjudicator stated:

In addition, I am not satisfied that the record contains technical information for the purpose of section 17(1). Based on my review of the definition set out above and the affected party's representations, I find that the affected party's corporate structure, proposed working relationship with the hospital, support resources, the tools and technology proposed for this project, its approach to delivering the services, its references and sample documentation are not "technical information" under section 17(1). Based on my review of the record, I find that it does not involve information prepared by a professional in a technical field and does not describe the construction, operation or maintenance of a structure, process, equipment, or thing. Rather, the records relate to the technical and project management services that individual employees will provide, if the affected party's proposal is accepted. [Emphasis in original].

[24] In light of the above, the appellant submits that any information contained in the records pertaining to the affected parties' corporate structure, proposed working relationships with the ministry, the tools and technology they propose for the project, or their approach to delivering services, does not fit any of the definitions of technical, commercial, or financial information.

[25] In reply, the ministry relies on the finding in Order PO-3310 that, although the information at issue did not qualify as technical information, it did qualify as commercial information. It also relies on Order MO-3080-I which found that records related to a Request for Proposal (RFP) for a construction management services project including a copy of the winning submission, all score cards, meeting minutes, evaluation notes and interview notes pertaining to the award of the project, constituted commercial information.

[26] Similarly, in reply, the affected parties submit that even if some of the information at issue is not technical information, it is still commercial or financial information or trade secrets and qualifies under part 1 of the test under section 17(1).

Analysis/Findings

[27] The types of information in section 17(1) listed in the parties representations have been discussed in prior orders, as follows:

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

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁷

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.⁸

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹⁰

⁷ Order PO-2010.

⁸ Order PO-2010.

⁹ Order PO-2010.

¹⁰ Order P-1621.

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.¹¹

[28] Records 133, 136, 140, and 144 are all EOI submission cover page emails. None of the parties provided representations on the information at issue in these emails. The entirety of these emails have been disclosed, except for the name of the bidder on the part that lists the attachment. The name of the bidder, however, has been disclosed in other parts of the records. Nevertheless, I find that the name of the bidder at issue in these four emails does not meet part 1 of the test as it does not reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

[29] Accordingly, I find that the withheld information in Records 133, 136, 140, and 144 is not exempt under section 17(1), as part 1 of the test under section 17(1) has not been met. As no other mandatory exemptions would apply for this information and no discretionary exemptions have been claimed, I will order it disclosed.

[30] Records 1 and 18 are forms completed by the ministry in anticipation of debriefing meetings with affected parties #1 and #2 regarding their EOI submissions. Neither the ministry, nor affected parties #1 or #2, provided representations on these two records.

[31] Nevertheless, as Records 1 and 18 concern the ministry's analysis of affected parties #1 and #2's EOI submissions to sell their services to the ministry to reconstruct a portion of Highway 401, I find that these two records contain commercial information. Part 1 of the test has been met for Records 1 and 18. I will consider whether part 2 of the test has been met for the information at issue in these two records.

[32] At issue in Record 142 is a letter from affected party #5 to the ministry. This is the cover letter to its EOI submission. I find that this record contains commercial information, as it contains some of the details from affected party #5's EOI submission. Part 1 of the test under section 17(1) has been met for this record.

[33] The remaining records, Records 134, 137, 141, and 145 are the affected parties' EOI submissions to the ministry made in response to the ministry's DB-EOI for the reconstruction of a specific portion of Highway 401. There are four EOI submissions between the five affected parties, because two affected parties, affected parties #1 and #4, filed a joint EOI submission at Record 137.

¹¹ Order PO-2010.

[34] I agree with the ministry and the affected parties that the affected parties' EOI submissions contain commercial information as discussed above, as they all contain information regarding the selling of construction services by the affected parties to the ministry.

[35] As well, I find that portions of these same records contain technical and financial information about how the affected parties will fulfill the requirements of the RFP, as those types of information are defined under part 1 of section 17(1), and as described above.

[36] I have considered the appellant's representations that part 1 of the test may not be met for certain information, relying on the findings in Order PO-3310. However, I note that in Order PO-3310, the adjudicator found that although parts of the winning RFP submission, the record at issue in that appeal, may not contain technical or financial information, the records all contained commercial information. Similarly, I find in this appeal that the records remaining at issue contain commercial information.

[37] I also find that these records do not contain trade secrets as submitted by certain affected parties. These parties claim that the records contain their strategy on how to respond to an RFP or details about their personnel. I find that those parties have not provided sufficient evidence that this type of information is not generally known in its trade or business and that there is economic value in it not being known.

[38] Nevertheless, as Records 134, 137, 141, and 145 contain commercial, technical and financial information, I find that part 1 of the test for exemption under section 17(1) has been met for these records.

[39] I will now consider whether part 2 of the test has been met for the records I have found meet part 1 of the test; that is, Records 1, 18, 134, 137, 141, 142, and 145.

Part 2: supplied in confidence

Supplied

[40] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.¹²

[41] 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.¹³

¹² Order MO-1706.

¹³ Orders PO-2020 and PO-2043.

[42] The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.¹⁴

[43] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹⁵ The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.¹⁶

In confidence

[44] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁷

[45] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access

¹⁴ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

¹⁵ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹⁶ *Miller Transit*, above at para. 34.

¹⁷ Order PO-2020.

- prepared for a purpose that would not entail disclosure.¹⁸

Representations

[46] The ministry states that the information was supplied in response the DB-EOI sent to the affected parties.

[47] With respect to the affected parties' expectation of confidentiality, the ministry quotes section 4.4 of the DB-EOI, as follows:

All documents submitted in response to this DB-EOI become the property of the ministry. *Documents will be held in confidence by the ministry*, subject to any and all applicable laws, including the Freedom of Information and Protection of Privacy Act [emphasis added by ministry].

[48] The affected parties reiterate the principles set out about regarding part 2 of the test and submit that their submissions were supplied in confidence.

[49] The appellant did not address part 2 of the test under section 17(1) in his representations.

Analysis/Findings

[50] Records 134, 137, 141, and 145 are EOI submissions made to the ministry by the affected parties. I find that these records were supplied in confidence. The information contained in the EOI submissions was prepared by the affected parties, and supplied to the ministry in response to the DB-EOI.

[51] As set out in the confidentiality clause in the DB-EOI and in the affected parties' representations, I find that the affected parties had a reasonable expectation of confidentiality regarding the information they provided in their EOI submissions.

[52] In support, I also note in its instructions about debriefings, the ministry advises that:

During the DB-EOI debriefing, the evaluation, scoring, and content of any DB-EOI Response will not be disclosed. Only the strengths, weaknesses, specific sections requiring improvement and competitiveness of the Respondent's DB-EOI Response relative to the evaluation criteria for each section will be disclosed and discussed.

¹⁸ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[53] MTO makes it explicitly clear that no EOI Response from other respondents will be disclosed during this debriefing. It is, therefore, reasonable to expect that the ministry intended for all EOIs to remain confidential.

[54] The affected parties all provided their EOI submissions on the understanding that such information was confidential. The EOI submissions are not public or available from sources to which the public has access and were prepared in confidence for MTO.

[55] Therefore, I find that part 2 of the test has been met for Records 134, 137, 141, and 145.

[56] Records 1 and 18 are completed forms regarding the debriefing meeting to be held by the ministry with two affected parties with respect to their EOI submissions. Neither of these two affected parties, nor the ministry, provided representations on these two records.

[57] Certain information in these two records is not at issue, as it consists of personal information and the appellant has indicated that he is not interested in obtaining access to this information. This personal information consists of the ministry's evaluation of the skills of personnel listed in these two records.¹⁹

[58] Of the remaining information in these two records, I find that only certain information at issue in these records was supplied in confidence. This information reveals the information in the EOI submissions that I have found to have been supplied in confidence by the affected parties.

[59] The remaining information is scoring or evaluation information or the ministry's instructions as to how the debriefing is to be conducted.

[60] Previous orders have found that scoring or evaluation information that does not reveal third party information does not come within section 17(1). In Order MO-3058-F, the adjudicator stated:

Although the evaluation materials were created by the town's employees or evaluation committee, they incorporate some information taken directly from the affected parties' proposals, or provided by the proponents during their interviews. This information is contained in the chart at page 1 of the

¹⁹ This information is considered personal information as it falls within paragraph (g) of the definition of personal information in section 2(1) of *FIPPA*, which reads:

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

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.

evaluation materials, in the interview notes of the evaluation committee, and in the spreadsheet. It includes descriptions of the proponents' methodology and approach to the project, examples of prior or current work, descriptions of their workforce, and the financial details of their proposals. It is typical of the type of information submitted by proponents in support of efforts to obtain a contract and constitutes the "informational assets" of the proponents. I find that this information was "supplied" to the town within the meaning of section 10(1).²⁰

[61] Records 1 and 18 were prepared by the ministry prior to any meetings with affected parties #1 and #2. I find that, with respect to Records 1 and 18, only the portions that reveal information from the affected parties' EOI submissions was supplied in confidence by them to the ministry.

[62] I agree with the reasoning in Order MO-3058-F, that these records incorporate some information taken directly from the affected parties' EOI submissions. In this appeal, therefore, I find that only the information in these records that was taken directly from the affected parties' EOI submissions, or contains descriptions of the proponents' methodology and approach to the project, examples of prior or current work, descriptions of their workforce, and the financial details of their EOI submissions, is information that was supplied in confidence and meets part 2 of the test under section 17(1).

[63] I find that the scoring information and the evaluator's comments in these records are not information that was supplied by the affected parties. Rather, I find that this information was generated by the evaluators of the affected parties' bids made in response to the DB-EOI.

[64] Although the scoring information and the evaluator's comments may have been derived, in part, from the affected parties' information submitted through the DB-EOI process, it does not qualify as "supplied" because it was generated through the subjective evaluation of such information by the DB-EOI evaluators.²¹ Moreover, I am not satisfied that the disclosure of this information would reveal or permit the drawing of accurate inferences about information supplied by the affected parties.

[65] Therefore, I find that the scoring information and the evaluator's comments in Records 1 and 18 do not meet part 2 of the test and that they are not exempt under section 17(1). I will order this information disclosed.

[66] Record 142 is the cover letter to affected party #5's EOI submission to the

²⁰ Section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* is the equivalent of section 17(1) of *FIPPA*.

²¹ See Orders MO-3508, MO-2197, PO-1993, MO-1237 and MO-1462.

ministry. This letter sets out details about this affected party's EOI submission. I find that this record contains information that was supplied in confidence by affected party #5. Therefore, I find that part 2 of the test has been met for this record.

[67] In conclusion, other than the scoring information and evaluator's comments in Records 1 and 18, I find that the information at issue in Records 1, 18, 134, 137, 141, 142, and 145 was supplied in confidence to the ministry. Accordingly, I find that part 2 of the test under section 17(1) has been met for this information, and I will now consider whether part 3 of the test has also been met.

Part 3: harms

[68] The party resisting disclosure must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²²

[69] The failure of a party resisting disclosure to provide 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*.²³

Representations

[70] It is the ministry's view that the affected parties are in the best position to assess the harms that might reasonably be expected to result upon disclosure of all the records under appeal. The ministry defers to the affected parties' views on this point, but notes however that it is concerned that requiring the disclosure of these records will have a negative effect on the affected parties and other future proponents for government projects, causing them to be less willing to set out their proposals in sufficient detail, for fear of their information being disclosed to competitors.

[71] All of the affected parties oppose disclosure of their EOI submissions in full, except for affected party #4, which submits that the following limited sections of Record 137 do not qualify for exemption:

²² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²³ Order PO-2435.

- DB Team Overview and Structure on page 1,²⁴
- 1.3.1 on page 4,
- 1.3.2 on pages 4 and 5, and
- 1.3.3 on pages 5 and the top of page 6 (left column).

[72] However, its partner in the EOI submission, affected party #1, opposes disclosure of this information. According to this affected party, section 1 of the EOI submission sets out extensive information concerning its organizational structure and the qualifications and experience of its key team members. Affected party #1 considers this information to be proprietary and confidential and would not want its competitors to "cherry pick" its talented staff, as this would give its competitors immediate access to its methodologies and procedures including proprietary information and cause substantial harm.

[73] Affected party #1 also states that its EOI submission provides a detailed explanation of its business practices and operating procedures and that disclosure would provide its competitors with a blueprint for operating a competing service and undermine its competitive position.

[74] Affected party #1 states that its EOI submission also includes proprietary information related to its partnerships and its methodologies of ensuring collaborative and integrated team functions, since in competing for large-scale and complex projects this affected party has been able to identify and build a strong network of partnerships. It states:

In the highly competitive industry of design build project delivery, disclosure of these specific partnerships and the proponent's methodology of managing and maintaining them would provide its competitors with important proprietary information at [affected party #1's] expense...

[75] Affected party #1 states that it must have a thorough understanding of the customer's requirements and tailor a proposal that mitigates project risks and challenges while meeting the needs and specifications of the applicable project. It submits that it is able to consistently craft successful bids and proposals to the MTO and other governmental institutions based on its significant experience with similar projects and its ability to apply this experience to the specific requirements of the project at hand.

²⁴ With the exception of the project organization chart, which this affected party maintains does qualify for exemption from disclosure as it is tailored to specific DB-EOI rating requirements.

[76] Affected party #2 states that it has invested significant effort and financial resources over the years to develop its pricing practices and construction methods and processes, both generally and in response to this EOI. It submits that its ability to effectively provide competitive EOI submissions is a key component to its ability to qualify for, and win, projects.

[77] Affected party #2 also states that it does not ever provide this information to its competitors or make this information publically available. It claims that doing so would provide insight into how affected party #2 bids for, and wins, projects and would undeniably erode a significant competitive advantage that it has gained through years of experience and its internal expertise.

[78] Affected party #2 submits that disclosing the EOI submission would allow a third party insight into its pricing practices and construction methods and practices, allowing the third party to unfairly benefit from the effort that it has expended to develop those practices and methods, which would result in the harms set out in sections 17(1)(a) to (c).

[79] Affected party #3 states that it has spent decades developing its strategy for staffing, responding, and presenting its response to MTO EOIs and that disclosure would unjustly enrich its competitors for efforts they have not undertaken. It states that disclosure of its EOI submission would also cause it to not only lose its competitive advantage in the market but could also negatively affect its reputation.

[80] Affected party #3 submits that disclosure of its EOI submission could affect its negotiations with other organizations. As well, it would cause it to reconsider what information it provides to the MTO for future EOIs. It states that not having information about other projects undertaken or about staff and partner employees would not give MTO a complete and realistic picture of the costs of similar projects, which could hinder MTO's ability to choose an appropriate contractor for its projects. It states that:

Such information is critical for the MTO and allows it to effectively compare contractors and ultimately select the most cost-effective and skilled contractors for public projects.

[81] Affected party #4 states that it may be that the generalized description of the affected party's business and experience in the following limited sections of EOI submission does not qualify for exemption:

- DB Team Overview and Structure on page 1,²⁵

²⁵ With the exception of the project organization chart, which this affected party maintains does qualify for exemption from disclosure as it is tailored to specific DB-EOI rating requirements.

- 1.3.1 on page 4,
- 1.3.2 on pages 4 and 5, and
- 1.3.3 on pages 5 and the top of page 6 (left column).

[82] However, affected party #4 submits that the remainder of the information in the EOI submission qualifies for exemption, as it is detailed information tailored to the DB-EOI about this affected party's approach to managing the project and the way it intends to provide its particular services.

[83] Affected party #4 states that its approach to project management services could be copied by competitors in future processes, which will significantly prejudice its competitive position by eliminating the competitive advantage that its project management organization and approach for completing construction projects has provided. It states that the project management industry is extremely competitive and that it is more than price that distinguishes an affected party from its competitors, but also the information about the services it provides as set out in its EOI submission.

[84] Affected party #5 submits that disclosure would allow a third party insight into its pricing practices and construction methods and practices, allowing the third party to unfairly benefit from the effort that this affected party has expended to develop those practices and methods.

[85] Concerning section 17(1)(a), the appellant submits that the information in the EOI submissions should be disclosed as it is public information about the affected parties and their history, experience, and qualifications or is information about the "form and structure" of the bid, or its general format, or layout.²⁶

[86] Concerning section 17(1)(b), the appellant submits that the project management market is very competitive, and it seems unlikely that an affected party, as a project management service provider, would refuse to submit further proposals in response to EOIs if the records are disclosed. It submits that companies doing business with public institutions such as the MTO understand that certain information regarding how it plans to carry out its obligations will be made public.²⁷

[87] Concerning section 17(1)(c), the appellant quotes from Order PO-3310, as follows:

In the circumstances of this appeal, I am not satisfied that the information which I have found does not qualify for exemption under section 17(1)(a)

²⁶ The appellant relies on Orders MO-2151 and PO-3310.

²⁷ The appellant relies on Orders MO-2164 and PO-3310.

qualifies for exemption under section 17(1)(c). As identified above, I have found that certain specific information to be exempt under section 17(1)(a). However, as discussed above, the information remaining at issue includes other information about the affected party and its history, experience and qualifications, as well as information that I find to be fairly general about the manner in which the affected party proposes to meet the requirements of the RFP. In my view, the disclosure of information of this nature could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

With regard to the information regarding the affected party's employees, I note that I have found most of the information relating to its employees' qualifications and work history to be outside the scope of this appeal. The information remaining at issue that relates to the affected party's employees concerns the duties that will be performed by the employees. I am not satisfied that the disclosure of this information would reasonably be expected to result in the harms listed in section 17(1)(c). Nor am I satisfied that the disclosure of the names of the affected party's employees would result in these harms, as it is reasonable to expect that the names of employees working on a particular project is information that is publicly available.

With respect to the affected party's concerns that competitors will use the proposal as a template for future proposals, as identified in the discussion under section 17(1)(a), I adopt the approach taken by Adjudicator DeVries in MO-2151 and PO-2478 and apply it to section 17(1)(c) in the circumstances of this appeal. I am not satisfied that the disclosure of general information contained in the proposal which discloses the "form and structure" of the proposal could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. [Emphasis added by the appellant].

[88] The ministry did not provide reply representations on part 3 of the test; however, the affected parties all provided detailed reply representations. The appellant did not provide sur-reply representations in response.

[89] Concerning the two orders cited by the appellant, one affected party points out, as set out in the quote above, that in Order PO-3310, the adjudicator found certain specific information exempt under section 17(1)(a). This affected party also points out that in Order MO-2151, the adjudicator found exempt the specific detailed information relating to the affected party's proposed approach to the project.

Analysis/Findings

[90] Records 134, 137, 141, and 145 are EOI submissions made to the ministry by the affected parties.

[91] Record 142 is the cover letter for the EOI submission for affected party #5 at Record 141. The other affected parties' cover letters to their EOI submissions are included in their EOI submissions. Record 142 contains information from the EOI submission at Record 141.

[92] Records 1 and 18 are debriefing notes about two EOI submissions. These records were prepared by the ministry in anticipation of debriefing meetings with affected parties #1 and #2.

[93] The EOI submissions at Records 134, 137, 141, and 145, as well as the letter at Record 142, were made in response to the DB-EOI Request issued by the ministry. The ministry's request required that applicants (the affected parties) complete a detailed EOI submission in order to be considered to be shortlisted to participate in the RFP process for the reconstruction of a portion of Highway 401.

[94] The EOI submissions do not include the bid price, as it is contained in a separate document and is only looked at by the ministry if the EOI submission is shortlisted.

[95] The information in the four EOI submissions expressly follows the mandatory requirements set out in the ministry's EOI Request, which is organized under the following main headings for the EOI submissions:²⁸

- Organizational Structure and Project Team Experience
- Key Personnel
- Project Management Approach

[96] In their representations, the affected parties specifically address in detail how disclosure of the specific information at issue could result in the harms set out in sections 17(1)(a) to (c). These harms under section 17(1) from disclosure include:

- The affected parties' competitors having access to proposal techniques, expertise and methods developed by employees and consultants who possess unique expertise at significant cost and effort. These techniques, expertise and methods could be copied at no cost and incorporated into their competitors' future submissions;
- The disclosure of information obtained from the affected parties' partners and consultants that is subject to separate obligations to maintain the confidentiality of such third party information; and,

²⁸ Affected party #5 provided a copy of the EOI Request mandatory requirements.

- The negative impact on relationships with the affected parties' partners and consultants. The affected parties submit that these third parties would refuse to supply information for the purposes of responding to an EOI Request, or would conditionally supply confidential information to the affected parties but not permit the affected parties to submit that information to MTO.

[97] Based on my review of the EOI submissions and the affected parties' very detailed representations, I accept the affected parties' argument that the opportunity to be short-listed in this competitive procurement process required the affected parties to demonstrate through the narrative content of their DB-EOI response their project organizational structure, project team experience, key personnel, and project management approach.

[98] Based on my review of the ministry's EOI, which sets out the specific DB-EOI rating requirements for the EOI submission, I agree with the affected parties that the detailed manner in which they address these requirements is just as important in the evaluation and scoring process as the content of its EOI submissions.

[99] The EOI submissions contain detailed information of key personnel who were selected for the particular project, a proposed organizational chart that is project specific, and various proposed project management systems that the specific project could benefit from.

[100] The EOI submissions include not only the manner in which the affected parties carry out design-build projects, but also the manner in which it prepares expressions of interest and design-build proposals for consideration by owners soliciting them.

[101] As well, given the page restrictions set out in the EOI, in order to maximize their potential score for a specific project, the EOI submissions needed to specifically include only the affected parties' relevant history and experience. For example, when it comes to project team experience, the EOI limited bidders to describing a maximum of three projects. I agree with the affected parties that choosing projects, and choosing how to describe those projects, for any particular client or potential job is all done strategically.

[102] I also agree that if this information were disclosed, the affected parties' competitors would gain knowledge as to how the affected parties make their decisions about what to include in their EOI submissions and their strategy when pursuing bids.

[103] I do not agree with the appellant that the information at issue in the records is public or general information. By their very nature, as a response to the detailed and limited requirements of the RFQ, the EOI submissions in this appeal are tailored to focus in a particular way on:

- Organizational Structure and Project Team Experience,
- Key Personnel, and

- Project Management Approach.

[104] I find that the EOI submissions reveal which elements of the affected parties' history and experience they thought were important to emphasize to the MTO, and how they described that history and experience to attempt to get shortlisted for the project. I also agree with the affected parties that teaching their competitors how to improve the "form and structure" of their EOI submissions could reasonably be expected to prejudice the affected parties' competitive position.

[105] As such, I find that part 3 of the test under section 17(1)(a) applies to the EOI submissions at Records 134, 137, 141, and 145, the cover letter to the EOI submission at Record 142 and the EOI submission information at Records 1 and 18. I accept that disclosure of this information could reasonably be expected to prejudice significantly the competitive position of the affected parties as disclosure of their EOI submissions to their competitors could result in the affected parties being less competitive in future EOI submissions.

[106] I also find that part 3 of the test under section 17(1)(c) applies to this information as disclosure could reasonably be expected to result in undue loss to the affected parties or undue gain to their competitors. The affected parties' competitors could reasonably be expected to gain valuable information about how to respond to MTOs EOIs from the affected parties' EOI submissions at no cost resulting in undue gain the affected parties' competitors. This could also reasonably be expected to result in undue loss to the affected parties as the benefit of the skill and cost they put into making their EOI submissions unique from their competitors and effective could be lost.

[107] As I have found that sections 17(1)(a) and (c) apply to exempt Records 134, 137, 141, 142, and 145, as well as the parts of Records 1 and 18 that would reveal the information in the affected party's EOI submissions, there is no need for me to determine whether section 17(1)(b) also applies.

ORDER:

1. I order the ministry to disclose Records 133, 136, 140, and 144 and the information I found not subject to section 17(1) in Records 1 and 18 to the appellant by **August 27, 2019** but not before **August 22, 2019**. For ease of reference, I have provided the ministry with a copy of Records 1 and 18, highlighting the information in those records that should not be disclosed.
2. I uphold the ministry's decision to deny access to the remaining information at issue in the records.

Original Signed by _____

Diane Smith
Adjudicator

July 22, 2019 _____

