Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1504

Appeal MA-010111-1

City of Greater Sudbury

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

In order to assist in understanding the nature of the request and subsequent appeal, it is important to provide some background information respecting the circumstances surrounding the creation of the records at issue in this appeal. The City of Greater Sudbury (the City) has outlined in detail the facts which gave rise to the request which I will set forth in order to provide some context to the appeal which arose from the original request.

In December 1999, the Province of Ontario enacted *The City of Greater Sudbury Act, 1999* which restructured the former municipalities of the City of Sudbury, Town of Valley East, Town of Nickel Centre, Town of Capreol, Town of Rayside-Balfour, Town of Walden, Town of Onaping Falls and the Regional Municipality of Sudbury. The Province also created a Transition Board for the new City of Greater Sudbury which was mandated to implement various transitional matters to ensure the smooth operation of the new City, which came into being on January 1, 2000.

One of the matters undertaken by the Transition Board was to ensure proper insurance coverage for the new restructured municipality beginning on January 1, 2000. The Transition Board engaged the services of a consultant to review the insurance requirements of the new municipality and to assist in the acquisition process by preparing a Request for Proposal (RFP) and an evaluation of the proposals received in response to the RFP. The Transition Board also established a working group which was made up of members of the Transition Board and selected employees who were either on secondment to the Transition Board or were employees of the former municipalities. The records which are the subject of this request and appeal were created or compiled by the Transition Board.

The City then goes on to provide some further information with respect to the nature of an RFP and how the process which gives rise to responses to it differs from the tendering process often used by municipalities in similar situations. I am including this explanation in order to clarify what are, in fact, two very different kind of procedures followed by municipalities when purchasing goods or services. The City explains that a tender outlines the specifications of what and how something is to be supplied in such as way as to leave cost as the only variable for the bidders to submit. In such cases, the lowest bidder is then the one awarded the tender, in most cases.

In the situation where the RFP process is followed, however, price is only one of many variables. An RFP is an invitation to a supplier to submit an offer which provides a solution to a problem or a need that the municipality has identified. The lowest price bid will not necessarily be the most cost effective one or offer the superior product. An RFP is a procurement process in which the judgment of the supplier's experience, qualifications and solution to the problem may take precedence over price alone. This process also gives bidders flexibility to provide alternatives that are, in fact, more economical without being limited to one specification. The City submits that this process is often followed when acquiring banking or auditing services, engineering or architectural consulting and insurance services as they do not lend themselves well to the price focussed tendering process. It adds that the acquisition of insurance services requires a more subjective and judgmental process, well suited to the use of RFPs.

Addressing the specific nature of the acquisition of insurance services, the City indicates that "[M]unicipal insurance programs are not 'off the shelf' products" and that "such an insurance program will be individually designed to meet the needs of the municipality." It goes on to add that:

> Specifically, this means that coverages, policy limits and deductibles, which are all variables in any insurance program are optimally selected to reduce insurance costs and the costs of uninsured losses. Therefore, the successful bidder for municipal contracts will need to demonstrate through its proposal a thorough understanding of the unique nature of the business of local government and the risks associated with those activities, adherence to the municipality's specifications and competitive pricing.

NATURE OF THE APPEAL:

The City received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

1. Copy of the consultant's report (from a named consultant) and the insurance task force report resulting from the initial pre-qualification meeting of insurance brokers of September 15, 2000

2. Copy of the consultant's report resulting from the first Bid Process of November 16, 2000

3. Copy of any correspondence received from the consultant following the first bid process and thereafter the date of November 16, 2000
   Copy of the final bid results of the second bid process dated December 7, 2000 and related correspondence
   Copy of any consultant report as a result of the second bid process dated December 7, 2000
   Copy of any correspondence to the successful bidder subsequent to the awarding of the insurance contract after December 9, 2000
   Copy of the contract for placement of insurance services to [the successful bidder] as a result of the awarding of the contract for Property and Liability Insurance - December 2000 or January 2001
   Copy of the Binders of Insurance issued by [the successful bidder] to effect coverage as of January 1, 2001.

The appellant subsequently sent a facsimile clarifying the request to include the First Bid Results of November 16, 2000 RFP from all bidders.

The City then issued a fee estimate of $1,743.40. On receipt of the full amount of the fee from the appellant, the City disclosed a number of the requested records, but denied access to others in full citing sections 7(1) (advice or recommendations), 10 (a) (b) and (c) (third party information), and 11(c) and (d) (economic or other interests).

The appellant appealed both the amount of the fee and the denial of access to the records, on the basis that the disclosure of these records was in the public interest, within the meaning of section 16 of the *Act*.

During the mediation stage of the appeal, the City reduced the amount of the fee from $1,743.40 to $1,323.40, and provided the appellant with a refund in the amount of $420 to cover the 14 hours spent preparing the Index of Records for the appellant. However, the appellant indicated that she wished to appeal the balance of the fee charged.

The City also determined that section 7(1) did not apply to Records 8, 9, 10, 14, 15, 16, and 17, and Record 5, with the exception of the paragraphs on the pages noted in the index provided to the appellant. As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process.

I decided to seek the representations of the City and eight companies whose interests may be affected by the disclosure of the records (the affected parties), initially. I received submissions from the City and six of the affected parties which were shared, in their entirety, with the appellant, along with an amended Notice of Inquiry reflecting the issues raised and the representations submitted by these parties. The appellant also made representations, the relevant portions of which were shared with the City and the affected parties. The City and three of the affected parties then submitted representations by way of reply.

DISCUSSION:

APPROPRIATENESS OF THE FEE ESTIMATE

As noted above, the appellant has appealed the City's decision to charge a fee of $1,323.40 to cover the cost of search time and the preparation of the records. In support of its fee estimate, the City submits that :

> . . . the records relevant to this request were in the custody and control of fourteen employees and six institutions. Further, these employees and their records were in many cases being physically relocated due to restructuring at the time of the request. Accordingly, the time required to locate all records which could be responsive to the Appellant's request was longer than might be expected if the RFP had been processed within one institution not in the midst of significant upheaval. In order to appropriately respond to the request, it was necessary for the Freedom of Information Coordinator to contact each of the individuals who had records relevant to this procurement and each of these individuals needed to locate records in their custody. The time required by each of these individuals to locate these records has been included in the fee and in total represents 14 hours of search time.
>
> Following the receipt of this substantial volume of materials, it was necessary for the Freedom of Information Coordinator to review individually each of the thousands of pages of records to determine if they were responsive to this specific request. This process took another 7 hours and resulted in the Freedom of

Information Coordinator being able to locate and identify all records which were responsive to the request. This process of searching also caused the Freedom of Information Coordinator to identify other individuals who might have responsive records. These individuals accordingly were also asked to search and locate responsive records. This additional 3 hours and 40 minutes search time has also been included in the fee.

Having finally located all the responsive records, the fee includes the time required to prepare the records for disclosure. This process involved quickly reviewing each page of the records to determine if any exemptions applied to the records and whether information could be severed. The time charged for this preparation is 20 hours and 45 minutes. The number of records reviewed was 255 and the number of pages was 2,451. Applying the standard adopted by the Commissioner in previous Orders of 2 minutes per page, the City could have charged approximately 82 hours preparation time, nearly twice as much as it in fact charged.

No preparation time has been charged for the photocopying of all the documents, or the preparation of the Decision letter or consultation with other staff and third parties. The entire fee is comprised of the actual time required to locate all responsive records and to review the responsive records for the application of the exemptions.

The appellant responded to the submissions of the City, in part, as follows:

Our position regarding this issue can be summarized in the following points:

1. The coordination of documentation would have had to occur in any event as a matter of administration.

2. It is hard to imagine that a centralized document control area had not been established and that we are required to pay an excess fee for the City's lack of organization.

3. The Chair of the Task Force would obviously had [sic]custody of all documents through the exercise of due diligence. Although there may have been 14 employees and six institutions, the Chair of the Task Force is now the current Risk Manager of the City of Greater Sudbury and should have retained centralized documents to support the decisions of the Transition Board.

4. The original estimate was $750.00 for the required documents. We were required to provide a deposit of $350.00. The final releases of documents provided by the coordinator were not done so in what we believe to be a "business like manner".

Findings

The charging of fees is authorized in section 45(1) of the *Act*, and more specific provisions regarding fees are found in section 6 of Regulation 823 under the *Act*.

Section 45(1) of the Act states, in part:

> (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> . . . . .
>
> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> . . . . .
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 823 states, in part:

> The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to a record:
>
> . . . . .
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

In reviewing the City's fee estimate, my responsibility under section 45(5) is to ensure that the estimated amount is reasonable in the circumstances. The burden of establishing the reasonableness of the estimate rests with the City. To discharge this burden, the City must provide me with detailed information as to how the fee estimate has been calculated, and produce sufficient evidence to support its claim.

An institution processing a request is only required to charge a fee for the costs that are specifically listed in section 45(1) of the *Act*, and can only charge the amounts established in the schedule of fees under the Regulation for those costs.

Search Time

As the City makes clear in its submissions, the task of locating all of the responsive records was an onerous one in this case. The record-holdings of a large number of individuals, maintained in several physical locations removed from each other required a time-consuming search. In addition, as the amalgamation of each of the municipal entities was underway at the time the searches were undertaken, the task was made especially difficult. I find that there are a large number of responsive records which required compilation in order to ensure they were not duplicated. In my view, the City has substantiated its claim for the 24.67 hours spent in searching for the records which were responsive to this request. I cannot agree that the record-keeping practices of the City or its predecessor municipalities was the reason behind what the appellant views as an excessive charge for search time. The fact remains that the searches undertaken were required in order to comprehensively locate all of the responsive records.

Preparation of the Records

The City takes the position that it is entitled to charge a fee for the time spent examining the records in order to determine whether the exemptions in the *Act* properly apply to them. In Order 4, former Commissioner Sidney Linden made the following observations about charges for preparation of records for disclosure:

> The fee estimate for preparation included costs associated with both decision making and severing, and I feel this is an improper interpretation of subsection 45(1)(b). In my view, the time involved in making a decision as to the application of an exemption should not be included when calculating fees related to preparation of a record for disclosure. Nor is it proper to include time spent for such activities as packaging records for shipment, transporting records to the mailroom or arranging for courier service. In my view, "preparing the record for disclosure" under subsection 45(1)(b) should be read narrowly.

In Order M-1083, Adjudicator Holly Big Canoe made the following findings regarding preparation time and photocopying:

> In the circumstances of this appeal, time spent by a person running reports from the personnel system would fall within the meaning of "preparing the record for disclosure" under section 45(1)(b) and, therefore, the rate of $7.50 per 15 minutes established under section 6.4 of the Regulation may be charged. It should be noted, however, that the Board can only charge for the amount of time spent by any person on activities required to generate the reports. The Board cannot charge for the time spent by the computer to compile the data, print the information or for the use of material and/or equipment involved in the process of generating the record.
>
> . . . . .
>
> In my view, "preparing the record for disclosure" under subsection 45(1)(b) should be read narrowly (Order 4). It is not appropriate, in my view, to include

> time spent to "assemble information, proof data" within what is chargeable under section 45(1)(b).

I adopt the interpretations cited above in support of the proposition that section 45(1)(b) is to be read narrowly. I find that the City is not entitled to charge a fee for the time it spent examining the records in order to determine if they are properly exempt under the *Act*. Fees for preparation of records normally include such charges as the time spent actually severing the documents or creating a record from other sources, as opposed to the decision-making process of determining whether they are exempt under the *Act*. Based on the submissions of the City, I am not satisfied that the preparation fees charged fall within the ambit of section 45(1)(b). For this reason, I do not uphold the City's decision to charge a fee for the time spent performing this work and will order that it refund the appellant for the 20 hours ($600.00) charged for this item.

APPLICATION OF THE EXEMPTIONS

ADVICE OR RECOMMENDATIONS

The City has claimed the application of the discretionary exemption in section 7(1) of the *Act* to the information contained in Record 2 and to the undisclosed portions of pages 4 and 15 of Record 5.

Record 2

The City submits that Record 2 is a table which summarizes the evaluation of the insurance brokers by members of a sub-committee of the Working Group and two representatives from the consultant retained by the Transition Board. The table consists of the numerical rankings assigned by each evaluator to each bidder. It argues that information which suggests the course of action which will ultimately be accepted or rejected by its recipient during the deliberative process is exempt from disclosure under section 7(1). It concedes that, although advice or recommendations are normally expressed in a narrative form, nothing in section 7 or the previous orders of the Commissioner's office confines advice and recommendations to that format. The City states that by ranking or rating each bidder, the evaluators have indicated their recommendation as to which bidder he or she felt was most qualified and that this advice was presented to the Transition Board for its use in the deliberative process of selecting an insurance broker.

In its Reply submissions relating to the possible application of the exceptions to section 7(1) contained in sections 7(2)(h), (i) and (j), the City submits that Record 2:

> is the record of a ranking tool used by members of a committee reviewing submissions in the context of an RFP process. The ranking tool formed the basis of the recommendation, which was communicated by the committee to the Transition Board. As the committee itself had no decision-making powers, its recommendation was not final.
>
> . . .

> Record 2 was part of the working papers of the committee, i.e. a background document only and therefore, is not "a report" as contemplated by either sections 7(2)(i) or (j) of the *Act*. This document itself was not presented to the decision-making body but it does reveal the substance of the advice which was given.

In my view, the information contained in Record 2 does not qualify as either "advice", or "recommendations" for the purposes of section 7(1). Specifically, I find that Record 2 contains only information, as opposed to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. As conceded by the City, Record 2 was not presented to the Transition Board in the form in which it appears here. While a specific recommendation may have been made by the working group to the Transition Board, I find that this recommendation is not reflected in the information contained in Record 2.

As I have found that Record 2 does not qualify for exemption under section 7(1), and no mandatory exemptions apply to the information which it contains, I will order that it be disclosed to the appellant.

Undisclosed Information on Pages 4 and 15 of Record 5

Record 5 is the report prepared by the consultants retained by the Transition Board with respect to its evaluation of the insurance proposals received in response to its RFP. Record 5 was prepared to assist the Transition Board in its deliberations on the selection of an insurance provider. In my view, the information contained in paragraph 3 of page 4 of Record 5 falls within the ambit of section 7(1). It clearly sets out a recommended course of action to be accepted or rejected by its recipient, the Transition Board, in the course of its deliberations over which insurance provider proposal to accept. As such, I find that this information clearly qualifies for exemption under section 7(1).

Further, I find that the exceptions to the exemption in section 7(1) contained in sections 7(2)(h), (i) and (j), as suggested by the appellant, do not apply in the present circumstances.

The information contained in paragraphs one and two of Page 15 of Record 5 is couched in similar language. It too represents a very specific recommendation to the Transition Committee by the consultants with respect to the appropriate insurance provider. I find that this information clearly qualifies for exemption under the section 7(1) exemption and that none of the exceptions in section 7(2) are applicable.

In summary, I do not uphold the decision of the City to deny access to Record 2 and uphold the decision to deny access to the undisclosed portions of pages 4 and 15 of Record 5.

THIRD PARTY INFORMATION

The City submits that Records 5, which is described above, Records 8, 9, 14, 15, 16 and 17, which consist of the bid forms and the proposals filed in response to the RFP and Record 10, a memorandum containing a summary of the proposals, are exempt from disclosure under the mandatory exemption in sections 10(1)(a), (b) and (c) of the *Act*. For a record to qualify for

exemption under sections 10(1)(a), (b) or (c), the City and/or the affected parties resisting disclosure 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 City 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 (a), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Part 1: Type of Information

The affected parties and the City submit that Records 5, 8, 9, 10, 14, 15, 16 and 17 contain information which qualifies as commercial information as that term has been defined in previous orders of the Commissioner's office. In Order P-493 and in many subsequent decisions, the term "commercial information" has been defined as follows:

> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

I adopt this definition for the purposes of this appeal.

One of the affected parties described in detail the nature of the information contained in its submissions to the Transition Board and the basis for its belief that the information qualifies as commercial information under section 10(1). It argues that:

> The information, in its totality, represents a detailed description of the business of our two organizations. It is proprietary commercial information we supplied to the Transition Board for the City of Greater Sudbury in response to their Request for Proposals, and it contains information pertaining to the buying, selling or exchange of services, and it relates directly to our commercial operations. This information discloses the approach we take to compete for our core business including specialized marketing and techniques we utilize in order to compete in this very competitive niche market. Disclosure of this information would provide the Requestor with direct insight into our business operations and detrimentally affect our competitive position in the marketplace.

With respect to Record 8, which contains information similar to that found in Record 9, this affected party submits that:

> Document 8, our bid forms, contains detailed commercial and financial information. These forms requested all proponents to submit unit prices per line of coverage, rather than an overall bottom line premium. Release of these bid forms or the information they contain would provide our detailed Underwriting rating structure that we have been able to develop because of our specialization and longevity in this industry. It would provide the Requestor, a new competitor who is in direct competition for the same business, to unduly gain from the use of this information without the associated development costs.

The City has also made submissions on whether the information contained in these records qualifies as "commercial information" for the purposes of section 10(1). It states that:

> Records 8 and 9 are the bid forms completed and submitted by two of the short-listed bidders. These are standard forms included in the RFP package which are completed by the bidders and on which they provide the prices being quoted for

> the proposal. They are the "unit prices" offered by the bidders. Records 8 and 9 also include correspondence supplied by the bidders and received by the Transition Board in response to requests by the Transition Board for further information and clarification regarding their proposals. The contents of Records 8 and 9 were treated as part of each bidders proposal.
>
> Records 14, 15, 16 and 17 are the proposal binders received from all of the bidders (third parties). The proposal binders are the detailed descriptions and wordings which describe the types of coverages offered, the specific details of the coverages, including any limitations, the level of deductibles and any optional deductibles presented for consideration. The proposal binders were developed by each bidder based on the specifications set out in the RFP and the bidders' analysis of the risk/underwriting information and claims experience supplied to them.

Based on my review of the records and the submissions of the City and affected parties, I find that Records 5, 8, 9, 10, 14, 15, 16 and 17 contain information which qualifies as "commercial information" within the meaning of section 10(1). As a result, I find that the first part of the section 10(1) test has been satisfied with respect to this information.

Part 2 – Supplied in Confidence

There appears to be no dispute that the information contained in Records 5, 8, 9, 10, 14, 15, 16 and 17 was supplied to the Transition Board by the proponents in response to the RFP. This information was not the product of any negotiation and remains in the form originally provided to the City by the affected parties.

In support of its contention that the information was supplied with an expectation that it would be treated confidentially, the City submits:

> Records 8, 9, 14, 15, 16 and 17 were all supplied to the Transition Board in confidence. This confidentiality is expressly acknowledged in the RFP and implicit in the process.

The City and the affected parties also refer to Article 17.04 from the RFP which states that:

> Bidders should identify any information in their bids for which confidentiality is to be maintained. The confidentiality of such information will be maintained by the Transition Board for the City of Greater Sudbury except if an Order by the Information and Privacy Commissioner of the Province of Ontario or a direction by the Solicitor of the City of Greater Sudbury requires otherwise.

It goes on to add that:

> Because proposals (of all kinds) frequently contain sensitive commercial or financial information of the third parties, the policy of the municipality is always to treat the content of proposals as confidential, in accordance with normal

> business practice. Access to proposals from prospective bidders would normally be available only to the municipal employee in charge of letting the contract, the members of any group established for the purposes of evaluating proposals, the Manager of Supply and Services and any of their authorized delegates. After the contract is awarded, the municipality's Solicitor may receive the successful bidder's proposal for the purpose of preparing the final contract.
>
> It is the submission of the City of Greater Sudbury that disclosure of bidders proposals or the information contained therein through the disclosure of other documents, would be contrary to the high expectations of confidentiality which is the norm in procurement matters.

The City then concludes this portion of its submissions by arguing that Records 5 and 10, while not prepared by any of the bidders, contain information which was provided directly by them to the Transition Board.

The affected parties submissions on this issue are similar in nature. Each refers to the confidentiality language contained in their proposals and to the provision in Article 17.04 of the RFP to support their contention that the information containing their proposals was submitted with an expectation, both explicit and implicit, that it would be treated confidentially.

The appellant apparently recognizes the importance of maintaining confidentiality in the bidding process when she acknowledges that, "During the tender process, the information gathered throughout the process by the working group must be held in the strictest confidence. The outcomes are not; they are public documents." Her submissions do not, however, directly address whether the information was supplied to the City with an expectation that it would be treated in a confidential fashion.

I have reviewed each of the proposals and bid documents referred to as Records 8, 9, 14, 15, 16 and 17 and find that the affected parties supplied this information to the City with an explicit expectation that it would be treated confidentially. Further, I find that it is implicit in an RFP process such as that responded to by the affected parties that the responses made would be handled in a confidential manner by the City. I further find that the information contained in Records 5 and 10, which describes the contents of the proposals received, is identical to that contained in the proposals themselves and ought to be treated in the same fashion. As a result, I find that all of the information in Records 5, 8, 9, 10, 14, 15, 16 and 17 was supplied in confidence to the City by the affected parties and that the second part of the section 10(1) test has been met.

Part 3 – Harms

In support of its' contention that the disclosure of the records could reasonably be likely to result in harm to their competitive position or cause undue loss or gain to them, the affected parties have made similar submissions. Essentially, they argue that the appellant is one of their competitors and that disclosure of the contents of the proposals, or any other records which refer to them or contain extracts from them, will result in an unfair advantage being given to her.

They suggest that harm to their competitive position could reasonably be expected to flow from the disclosure of the contents of their proposals and the information referred to therein.

The position was succinctly put by one of the affected parties as follows:

> There is no doubt that should this record [the proposal] be disclosed, the Requestor will use this information to undercut our prices in any future procurement situations. They will use our in-depth knowledge of cost against us to gain a competitive advantage over us thereby destroying any competitive spirit and jeopardizing our competitive position. It also will significantly undermine the whole purpose of confidentiality in a Request for Proposal process whereby industry competitors are asked to compete on a confidential basis with the expectation that the information they provide will not later be exposed to competitors and used against them to their detriment in other business competitions.

The same affected party also reasons that:

> The quoting of the cost of insurance or the manner in which a risk is assessed by underwriters is based on the past history of the account and industry trends over many years. [The affected party] has developed detailed statistical information and a database to be able to assess the risks on which we choose to quote. This information and database is important proprietary information which is central to any analysis we take in responding to any public entity Request for Proposal. Disclosure to the Requestor will allow it to obtain access to information at no expense without having undertaken any development costs and would directly affect any competitive advantage we have developed. As well, insurance claims have a long monitoring period, so the true cost of insuring a municipality is not known for five (5) to seven (7) years. Our premiums are based on an extensive actuarial study of our claims database. The Requestor, our competitor, is new to this business and does not have this important five (5) to seven (7) years' experience or information.

I am of the view that the concerns expressed by the affected parties are well-founded. In my view, the disclosure of the information contained in Records 5, 8, 9, 10, 14, 15, 16 and 17 could reasonably be expected to significantly interfere with the competitive position of the affected parties. I find that the disclosure of the information contained in these records to the appellant would reveal the methodology employed by the affected parties in responding to Requests for Proposals which could then be used to the advantage of the appellant in undermining the competitive position of the affected parties. Essentially, the appellant could use the information to gain an unfair advantage over its competitors in future proposals.

In addition, I am of the view that the disclosure of the information contained in Records 5, 8, 9, 10, 14, 15,16 and 17 could reasonably be expected to result in an undue gain for the appellant with a concomitant undue loss for the affected parties. The underwriting of policies of insurance for the municipal sector is a highly competitive industry. I find that the disclosure of this

information would enable the appellant to gain an advantage at the expense of its competitors in the field.

I am satisfied, accordingly, that the third part of the section 10(1) test has been made out. As all three parts of the test have been met with regards to Records 5, 8, 9, 10, 14, 15, 16 and 17, I find that these records are properly exempt under this section.

Because of the manner in which I have addressed the application of section 10(1) to Records 5, 8, 9, 10, 14, 15, 16 and 17, it is not necessary for me to consider whether they are also exempt under sections 11(c) or (d).

PUBLIC INTEREST IN DISCLOSURE

The majority of the appellant's submissions focus on whether the "public interest override" referred to in section 16 of the *Act* operates to require the disclosure of the records at issue in this appeal. Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Purpose of the exemption

Section 10(1)

The purposes of section 10(1) of the *Act* were articulated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> . . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

Clearly, the purposes of the section 10(1) exemption are serious, and are intended to protect the public interest in the manner expressed by the Williams Commission. [Order PO-1688]

Submissions of the City and the Affected Parties

Addressing the possible application of the provision in section 16 to the records at issue, one of the affected parties states:

> . . . there is no compelling public interest to the release of this information. The Requestor is a corporation in direct competition with the entities from which it wishes to obtain information. The sole purpose in obtaining this information is to further its own interests in a very competitive niche marketplace at the expense of its direct competitors. Disclosure of this information does not in any way benefit the citizens of this municipality or otherwise address an issue which requires public disclosure or examination.

The City also addressed the possible application of the "public interest override" to the information contained in the records. It submits that:

> In this appeal, there is only one interest served by the disclosure of the records in dispute, that is the interest of the Appellant. As an unsuccessful bidder in the process, the Appellant believes that the disclosure of the other bidders proposals will enable it to "prove" that the Transition Board made the wrong choice in its selection of the provider of insurance services.
>
> . . .
>
> Even if the records are disclosed to the Appellant, the public will be no better informed.

. . .

> If the Appellant has a dispute with the fairness of the process followed by the Transition Board in the selection of the insurance for the new City, the disclosure of these records is unnecessary to its pursuit of that issue. The disclosure of the third party information will provide no information relevant to procedural issues.
>
> During the latter part of December 2000 and early January 2001 the Appellant used its best efforts to engage the media in this matter. However, it is the City's representation that they have not succeeded in "rousing strong interest or attention" to this matter. Throughout the above-mentioned period, the allegations of the Appellant and the response of the Transition Board were reported in the media. Notwithstanding this coverage, no one other than the Appellant has expressed any interest in the records sought by the Appellant or indicated any interest in pursuing the issues advanced by the Appellant. This includes the other unsuccessful bidders, the local news media, the Sudbury Chamber of Commerce and other representatives of the insurance industry, all of whom are well aware of the Appellant's dispute with the Transition Board.

Another affected party refers to the decisions in Orders M-892 and MO-1471 in support of its contention that the public interest override provision is not applicable in the present situation. It argues that, as was the case in these earlier decisions, the public interest in the disclosure of information submitted by bidders in response to a tender call by a municipality does not outweigh the purpose of the third party information exemption which was found to apply to the bids themselves.

Submissions of the Appellant

As noted above, the appellant was an unsuccessful bidder in the RFP process which lead to the award of the City's insurance business to one of its competitors by the Transition Board. The appellant takes issue with the manner in which the RFP process was conducted and argues that a public interest in the disclosure of the records exists in order to expose what it describes as a "flawed and biased" process. It suggests that the disclosure of the information contained in the records will "clearly show the bidding process, from the onset, suffered from a lack of confidentiality, personal bias and disregard for a fair and non-partisan process."

The appellant argues that she is not seeking any competitive advantage or personal gain but rather, seeks to "hold the institution accountable, re-instilling and building confidence in the public domain and correcting the inefficiencies that currently exist." The appellant is of the view that there exists a public interest in ensuring that the decision made by the Transition Board regarding the provision of insurance coverage for the new City was made transparently and in good faith.

Findings

In my view, I have not been provided with sufficient evidence to indicate that the interest which has been expressed in the RFP process which gave rise to the creation of the records is either "compelling" or "public". The appellant attached a letter which she has received from the local Chamber of Commerce to her submissions which she believes expresses some degree of support for her position. With all respect, I cannot agree. The letter simply expresses the Chamber's general position with respect to the City's tendering and RFP procedures and does not refer to the RFP which is the subject of this appeal. On this basis, I cannot conclude that a compelling public interest in the disclosure of the records exists.

In addition, I find that the interest which exists in the disclosure of the records is personal to the appellant and the firm which employs her. The request arose as a result of an unsuccessful bid by the appellant's firm in response to the RFP. I cannot agree that the interest which exists in the disclosure of the information of its competitors is sufficient to outweigh the purpose of the section 10(1) exemption, set out above.

For these reasons, I find that section 16 of the *Act* does not apply to the records which I have found to be exempt under section 10(1).

ORDER:

1. I uphold the City's decision to deny access to Records 5, 8, 9, 10, 14, 15, 16 and 17.

2. I order the City to disclose Record 2 to the appellant by providing her with a copy by **March 6, 2002 but not before March 1, 2002.**

3. I order the City to reimburse the appellant the sum of $600 within the time frame set out in Provision 2 for the disclosure of Record 2, in accordance with my findings with respect to the appropriateness of the fee estimate provided by the City to the appellant.

4. In order to verify compliance with the terms of Provision 2, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant.

Original signed by: January 30, 2002
Donald Hale
Adjudicator