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

ORDER MO-1889

Appeal MA-030205-1

City of Toronto

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BACKGROUND

The background to this appeal was described to me by the City of Toronto (the City) in its representations as follows:

> In June of 1999, the City issued a Request for Proposal [RFP] for Part I of a Plant-Wide Heating System at the Main Treatment Plant for Toronto Works and Emergency Services [Ashbridge's Bay Treatment Plant].
>
> The RFP was for the City of Toronto to select a contractor for the design, construction, start-up and acceptance testing of a plant-wide heating system at the Main Treatment Plant. The issuance of the RFP by the City was an invitation to short-listed firms or joint ventures to submit proposals. The City had earlier that year made a Request for Qualifications [RFQ] and four firms or joint ventures had been short-listed and invited to submit a proposal in response to the RFP.
>
> The RFP is a detailed document which outlines RFP and proposal information preparation and submission; technical proposal requirements; price proposal requirements; financial information requirements; proposal screening and evaluation; project requirements; and a number of appendices relating to declarations, bonds, letters of credit and agreements to bond, forms of contract, general conditions, specifications, drawings and reference information.
>
> When the bids were received, they exceeded the budget for the project. As a result, one facet of the project was removed and the bidders were asked to resubmit their bids based on the reconfigured project. This second set of bids is contained on the records entitled Revised Price Proposal Forms, (Form P-1 (Revised)).
>
> The aspect of the project that was removed from the first RFP was added onto Phase II of the project which was tendered in the summer of 2003 under RFP No: 915509307268. The Contract for Phase II of the project has not yet been awarded.

Since the submission of their representations, the City has not only confirmed that the contract for Phase II of the Ashbridge's Bay plant-wide heating system project has been awarded, but that construction on that phase began in September of 2004.

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 the "details of each of the tenders, including price", submitted by three named pre-qualified bidders in response to a Request for Proposal (RFP) put forward by the City for a plant-wide heating system at the Ashbridge's Bay Treatment Plant.

The City issued a decision letter to the requester, denying access to the responsive records in their entirety on the basis that they are exempt under section 11 (economic and other interests) of the *Act*.

The requester (now the appellant) appealed the City's decision to deny access.

During mediation, the City clarified that it was specifically relying on sections 11(c) and (d). In addition, the appellant narrowed the scope of the request to the Price Proposal Forms (Form P-1) and Revised Price Proposal Forms (Form P-1 (Revised)) submitted by the three bidders (the affected parties).

After contacting the affected parties, the City issued a new decision letter to the appellant, denying access to the records on the basis that they are exempt under section 10 (third party information) as well as sections 11(c) and (d).

Mediation did not resolve this appeal, and the file was transferred to adjudication.

This office began the adjudicative inquiry by sending a Notice of Inquiry to the City and the three affected parties, setting out the facts and issues on appeal and requesting representations. The City and one affected party submitted representations. A second affected party responded by stating that it did not wish to take a position in the appeal.

The Notice of Inquiry was then provided to the appellant, together with a copy of the City's representations. The Notice reproduced the representations of the affected party that made submissions. The appellant provided representations in response.

After reviewing the file documentation, I discovered that the records did not include a Revised Price Proposal Form for the affected party that submitted representations. The City has since confirmed that this affected party submitted a Price Proposal Form in response to the original RFP but did not re-submit a bid in response to the revised RFP. Accordingly, a Revised Price Proposal Form for this affected party does not exist.

RECORDS:

The records at issue consist of three Price Proposal Forms (Form P-1) submitted by the three affected parties in response to the RFP for plant-wide heating at Ashbridge's Bay Treatment Plant, as well as two Revised Price Proposal Forms (Form P-1 (Revised)) submitted by two of the three original bidders in response to the revised RFP.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a), (b) and (c) 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.

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 10(1) is designed to protect the "informational assets" of businesses or other organizations that provide information to the government [Order PO-1805].

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of information, which, while held by government, constitutes confidential information of third parties that could be exploited in the marketplace.

For a record to qualify for exemption under sections 10(1) (a), (b) or (c) of the *Act*, the parties resisting disclosure (in this case, the City and one third party) must satisfy each part of the following three-part test:

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

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

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

Part One: type of information

The City submits that the records contain commercial, technical and/or financial information:

> Commercial information is information that 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. (Order PO-493)
>
> Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practice, profit and loss data, overhead and operating costs. (Orders P-47, P-87, P-113, P-228, P-295 and P-394)
>
> Technical information is information belonging to an organized field of knowledge that would fall under the generalized categories of applied sciences or mechanical arts. It is difficult to define technical information in a precise fashion; however, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. (Order PO-2010)
>
> The forms set out various stages in Part 1 and the revised Part 1 of the project and the cost of material, equipment, and installation as well as a total for each stage and the total base bid price. The City submits that the information is commercial, financial and technical.

The affected party that provided representations submits:

> [S]ince the Records are a portion of a tender, they contain commercial and/or financial information about [the affected party]. A tender can be characterized as commercial information since it relates solely to the selling or exchange of merchandise or services. It is an offer to supply labour and material for a price. A tender can also be characterized as financial information since it refers to specific data relating to money, being pricing practices of [the affected party].

The appellant submits:

> [T]he information in the Records does not contain commercial information of the nature contemplated in definition of the term set out above. The responsive portions of the Records detail only the global prices that each of the Third Parties proposed for the supply of its labour and materials to the City on the Project. The Third parties were required only to break down their pricing into the categories of Equipment and Materials and Installation Costs as those categories related to each of the line items on the City's pre-printed form. There is no information in the Records, beyond a global price, that provides information to any other party regarding the discrete practices of the organizations so as to disclose proprietary

> commercial information. The Records relate only peripherally to the Third Parties' proposed commercial activity in that the Records detail global prices. Where the Records relate only peripherally to an affected party's proposed commercial activity, the Record cannot be considered to be sufficiently related to "the buying and selling or exchange of merchandise or services" to qualify as commercial information. [Order PO-2010]
>
> …
>
> [The appellant] submits that beyond the detailing of the proposed prices, the Records contain no specific data from which another party could infer, explicitly or implicitly, the pricing practices of the Third Parties. The Records do not include any profit or loss data, or indeed in any way provide information regarding the Third Parties' overhead or operating costs. Again, while proposed prices are in and of themselves financial information, the prices are peripheral in nature. [The appellant] submits that the only way that the Records could ever constitute "financial information" would be if the Records contained in the Third Parties' job estimate sheets, or specific details as to how these global prices for the project were determined. These Records being requested do not contain such information.
>
> …
>
> [The appellant] submits that "technical information" as defined above is contained in the respective proposals of each of the Third Parties. However, [the appellant] is only requesting the production of the Price Proposal Forms, which are a very discrete portion of the overall Proposal packages submitted to the City. As indicated before, the Records being requested do not contain anything more than proposed pricing in response to the items set out on the pre-printed forms. The technical approach or methodology that would be employed to deliver each of the items is not detailed in the Records; nor, could that information be reasonably inferred from the prices set out in the Records sought to be disclosed.

The information contained in the records at issue in this appeal is a breakdown of bid price information tendered by the different affected parties for the provision of plant wide heating at the Ashbridge's Bay Treatment Plant. The information appears on standard forms prepared by the City entitled either "Price Proposal Form – Plant Wide Heating" or "Revised Base Bid Price Proposal Form" and, as pointed out by the appellant, details the total cost for each specific task to be completed and divides that total cost into the cost of the equipment and material, and the cost for installation of that equipment. The City submits that this constitutes commercial, financial and technical information. In my view, the bids, which were submitted in response to a tender call, contain information that is most accurately characterized as "commercial" information in that it relates "solely to the buying, selling, or exchange of merchandise or services" and that it relates directly to the commercial operations of the affected parties [Order P-493]. I also find that the information consists of financial information as this office has defined it. It is information relating to money and its use or distribution and refers to pricing information

and specific costs for equipment, materials and installation. [Orders P-47, P-87, P-113, P-228, P-295] Therefore, it is not necessary for me to determine whether the records contain technical information.

I find that the first part of the section 10(1) exemption test has been established.

Part Two: supplied in confidence

In order to satisfy Part two of the test, the information must have been **supplied** to the City **in confidence** either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was supplied to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties. The following passage, from *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), addresses this purpose:

> …[T]he [proposed] exemption is restricted to information "obtained from a person" in accordance with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signalling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp.312-315). [emphasis added]

To meet the "supplied" aspect of part two of the test, it must first be established that the information in the record was actually supplied to the City, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the City. [Orders P-203, P-388 and P-393]

The City submits:

> All of the financial/commercial information contained on the forms is information that was supplied to the City in response to a [RFP]. If the information is not directly supplied in response to the RFP, the City submits that disclosure would permit accurate inferences to be drawn about information actually supplied, thereby revealing it.

> Some portions of the forms contain standard technical information that appeared on the blank form created by the City…The City is not claiming section 10 for this information, as it was not supplied to the City.
>
> The remainder of the form contains financial/commercial information, the bidders cost for each phase of the construction. The City submits that all of this information was supplied to the City.
>
> In addition, the City submits that on some forms, the bidders have included additional categories of information. For one example, see page 1 of the record, under the heading Other Costs. The bidder had included additional items, which correlate to a monetary value in another column. There are other examples on the other pages of the record. The City submits that these additional cost categories were supplied by the bidders to the City.

The affected party also submits that it supplied the information to the City.

The appellant concedes that the responsive information contained in the Records was supplied to the City in response to the City's RFP.

I accept that the information at issue was supplied to the City by the affected parties as part of a tendered bid. As highlighted by the City, the bid submissions are provided on a standard form authored by the City, with blanks filled in by the affected parties. In accordance with the City's submissions, only the information filled in by the affected parties can be said to have been supplied by those affected parties. I am satisfied that this information was supplied to the City by the affected parties and, therefore, the "supplied" aspect of part two of the test has been satisfied.

In confidence

In order to satisfy the "in confidence" component of the three-part test, the parties resisting disclosure must establish that there was a reasonable implicit or explicit expectation of confidentiality on the part of the supplier at the time the information was supplied. This expectation must have an objective basis. [Orders M-169, PO-2195].

Section 3 of the proposal headed "RFP and Proposal Information, Preparation and Submission" states in part, at clause 3.1.12 – Treatment of Information:

> All information contained in a Proposal will generally be available to the public in accordance with the Municipal Freedom of Information and Protection of Privacy Act (the "Information Act"). The proposal will become the property of the City and will not be returned to the Respondent(s), other than the return of the unopened Price Proposals.

> If Respondents believe that any of the information provided by them is confidential or proprietary, then they should identify it as such and provide a rationale as to why it should not be released under [the *Act*].

The City also points to section 3.2.6 of the RFP which states that the proposal is to be submitted in a sealed envelope marked "confidential".

The City submits that the information was provided with a reasonably held expectation that it would be treated confidentially.

> The City has described the notice that was given to the bidders with respect to the treatment of the information they provided.
>
> The City submits that confidentiality was an implicit and explicit part of the process for both the City and those companies submitting quotations. As described above, the RFP document states that bidders may claim confidentiality for information supplied and sets out that there may be restrictions on the confidentiality, such as disclosure of the total bid.
>
> The affected third parties' expectation of confidentiality is supported by their refusal to consent to the disclosure of the information, based on providing it in confidence, when given notice by the City. The City notified all three of the named bidders. Two responded objecting to the disclosure, stating that the information had been supplied in confidence. The third notice was returned as undeliverable as the third party had moved.
>
> The City submits that the information, other than the total price bid, set out under the columns entitled, Equipment and Material Cost, Installation Cost and Total Cost for each stage of the project; represent unit pricing for each aspect of the project, original and revised, from each of the bidders. As such, the City submits that all this information (the dollar values) was supplied to the City in confidence by the bidders.
>
> In ordinary circumstances, the City would be prepared to disclose the total bid price, as is the usual practice in these situations. However, because of the special circumstances that exist in this case, the City submits that the total price bid should remain confidential.
>
> The City submits that the total price bid should remain confidential because of the revising of the project in order to bring Part I within the City's budget for the project.
>
> If disclosure is made of the original total price bids and the revised total price bids, the appellant need only subtract the revised bid from the original in order to determine each bidder's unit cost for the part of the project that was removed from Part I and transferred to Phase II of the project. As stated above, there was a

> separate tendering process for Phase II of the project and no award has been made as yet. Therefore, disclosing this information would put any potential bidder on Phase II at an advantage as the bidder would now be able to calculate the amount that had been bid for the delayed aspect of the project under the original RFP.
>
> In this somewhat unusual case, disclosing the total bid price, which is customarily done, will permit the requester to draw accurate inference with respect to the unit price for one aspect of the project for which the tendering process is not completed.

The affected party also submits that it supplied the record to the City with an implicit expectation of confidence. It submits:

> While the "Base Bid Price Total" on page 1 of the Records would likely become public knowledge, there was an expectation that the rest of the information in the Records was confidential in nature. The Records were treated confidentially by [the affected party], they were not available from sources to which the public has access and they were not prepared for any purpose that would entail disclosure.

The appellant responds:

> [The appellant] submits that neither the City, nor the Third Parties have established that they had a reasonable expectation of confidentiality, implicit or explicit, at the time when the Records were provided.
>
> [The appellant] submits that nowhere in the [RFP] information does the City indicate expressly that the responses to the proposal call will be kept in confidence. The City in its submissions references Section 3, clause 3.1.12 of the RFP as evidence of the expectation of confidentiality. It is [the appellant's] submission that, from an objective reading of that section, quite the opposite conclusion should be drawn. That section speaks specifically to the fact that "all information" contained in a proposal will generally be available to the public in accordance with the *Municipal Freedom of Information and Protection of Privacy Act*. Furthermore, as set out in the RFP information, the City becomes the owner of the property. One of the express purposes of the Act is to provide a right of access to information controlled by the institutions in accordance with the principles that information should be available to the public; and necessary exemptions from the right of access should be limited and specific [MO-1706].
>
> [The appellant] submits that its request is limited to the Records as defined herein, which contain nothing more than the Third Parties' proposed global prices of materials and labour. When looking at the expectation of confidentiality, the Adjudicator is directed to consider whether information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential. Indeed, if any of the Third Parties' believed, at the time it submitted its proposal, that the proposal in part or in whole, was to be kept confidential then

> they were invited to disclose their reasons for the requirement of confidentiality at the time of submissions. [The appellant] assumes that none of them took that step at the time as that information has not been provided in any of the other parties' submissions. [The appellant] can only assume that the issue is being raised at this time, given the current request for the Records.
>
> The Adjudicator is also directed to consider whether the information in the Record was prepared for a purpose that would not entail disclosure. The very nature of the tendering process, particularly in tendering by a public agency requires an open and fair competition between bidders. [The appellant] submits that public tender prices are frequently disclosed. Accordingly, to assume that the information contained in the Records being requested, would be explicitly or implicitly kept in confidence is not a reasonable expectation. The Third Party in their submissions indicates that the based bid price total on page 1 of the price proposal form would likely become public knowledge. The Appellant agrees with that submission and indeed the base bid price total is simply a total of the global component prices set out on the Record. To submit that there is no confidentiality in the total base bid price, and yet asset confidentiality in the numbers that make up the total is illogical and not reasonable.

As stated by Adjudicator Anita Fineburg in Order P-520 where the provincial equivalent of section 10(1) was at issue:

> A determination of whether information was supplied to an institution in confidence for the purpose of section 17 of the *Act* requires an examination of the facts and circumstances surrounding each particular case. In a situation involving tenders, any written documentation such as policies or procedures governing bid process will provide some evidence as to whether there is a reasonable expectation of confidentiality on the part of the supplier at the time the information was supplied.

Taking Adjudicator Fineburg's reasoning into account, I find that the information at issue in the current appeal was not supplied by the third parties to the City with a reasonable expectation of confidentiality. It is important to note that the provision which requests that bids be placed in an enveloped marked "confidential" is under the heading "Proposal Packaging", whereas the provisions that alert bidders to the potential disclosure of the information contained in their bid submissions is under the heading "Treatment of Information." In my view, this indicates that despite the fact that bids were to be submitted in an envelope marked "confidential" section 3.1.12 of the RFP clearly alerts potential bidders that information provided to the City becomes the property of City and might be subject to disclosure under the *Act*. Under that provision, bidders are advised that if they feel that any of the information is confidential or proprietary they should identify it and provide a rationale as to why it should be withheld in accordance with the *Act*.

Despite this provision, there is no evidence that any of the affected parties identified information that they wished to have withheld at the outset, and raised this issue for the first time only once

the appellant submitted his request under the *Act*. In light of this provision, I do not accept that the affected parties provided this information to the City on the basis that it was confidential and that it was to be kept confidential within the meaning of this part of the *Act*. Moreover, the affected party has provided me with no evidence to support the conclusion that the information was supplied implicitly in confidence.

Accordingly, based on the material before me and the particular circumstances of this appeal, I am not satisfied that the information at issue was supplied by the third parties with a reasonable expectation of confidentiality. Although I have found part two of the section 10(1) exemption test has not been met and all parts of the three-part test must be met for the exemption to apply, I will proceed with an analysis of part three of the three-part test.

Part Three: harms

To discharge the burden of proof under part three of the test, the parties opposing disclosure must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient. [*Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 (C.A.).]

The City submits that disclosing the information contained in the records could reasonably be expected to lead to one or more of the harms set out in section 10(1)(a), (b) and/or (c) of the *Act* as disclosure could reasonably be expected to harm the interest of the bidders.

Section 10(1)(a)

The City submits that disclosure of the severed information would prejudice significantly the competitive position and/or negotiations of the bidders as contemplated by section 10(1)(a):

> Disclosure of the bidders unit price information could reasonably be expected to prejudice the successful bidders competitive position. Once a competitor knows the cost that has been proposed by the bidders for each aspect of the work to be done, particularly the successful bidder, he/she has the ability to submit a bid that could undercut the current successful bidder in future RFP's relating to the same project. In addition, the requester/appellant would gain an unfair advantage by virtue of knowing the financial details of each bid for each aspect of the project. The appellant would also learn the additional items listed under the item line, Other Costs, that may have had an impact on the decision to award the contract to the successful bidder.
>
> As stated above, if disclosure is made of the original total price bids and the revised total price bids, the appellant need only subtract the revised bid from the original in order to determine each bidder's unit cost for the part of the project that was removed from Part I and transferred to Phase II of the project. There was a separate tendering process for Phase II and no award has been made as yet.

> Therefore, disclosing this information would put any potential bidder on Phase II at an advantage as the bidder, in his bid or any negotiations with the City, would now be able to calculate the amount that had been bid for the delayed aspect of the project under the original tender.
>
> Because of the course this project has taken, the total price bid has been converted to information that would permit accurate inferences to be drawn about the cost of a unit or aspect of the project, information that is customarily protected under this section if found to be supplied in confidence.
>
> In addition, if the cost details of individual aspects of the project are disclosed, the successful bidder may feel pressure from other purchasing organizations or other current customers to supply similar work at similar price.

The affected party submits:

> [T]here is a reasonable expectation that the disclosure of the Record could significantly prejudice [the affected party's] competitive position, particularly if the Records are disclosed directly or indirectly to any of [the affected party's] competitors, since they would then have some knowledge of [the affected party's] costs, pricing, and estimating and tendering practices. [The affected party] would not have similar information about its competitors. This advantage could also result in an undue gain to [the affected party's] competitors, who would be in a better position to bid against [the affected party], particularly on projects with the City of Toronto. This would lead to more projects being awarded to [the affected party's] competitors, at [the affected party's] expense.

The other two affected parties did not provide representations on the harms component of section 10(1).

The appellant submits that the disclosure of the records would not prejudice the competitive position of any of the affected parties:

> [T]he information contained on the Records does not disclose any proprietary information which would otherwise provide [the appellant] with any competitive advantage over any of the Third Parties. The information sought is now five years old, arising from pricing assembled in 1999, in a marketplace where prices change quickly.
>
> [The appellant] submits that the Records do not provide information to [the appellant] or any other persons who may review this information as to the estimating and tendering practices of the third party. It is current, detailed, underlying information regarding estimating and tendering practices which would be the type of information that could be prejudicial if disclosed. [The appellant] cannot infer from price alone, the particular estimating, tendering or technical practices of the Third Parties, some five years ago. In addition, information

> regarding price alone does not disclose any particular financial or discrete information about the Third Parties' business practices.
>
> The Third Party has suggested that in disclosing the Records, other parties would be in a better position to bid against the Third Party, particularly on projects with the City of Toronto. It is trite to say that the disclosure of these Records, containing only prices, would lead to more projects being awarded to the Third party's competitors at the Third Party's expense.
>
> The competitive advantage for each tendering is gained not in the tendering and estimating practice itself, but rather in how the tendering and estimating practice is applied in each of their respective submissions. As indicated earlier in these Submissions, the documents which would disclose the discrete practices of the Third Parties, are documents which are not being requested here and are documents which are commonly referred to as the estimating or take-off sheets of the tender.

In Order MO-1811, I rejected the section 10(1)(a) harm arguments as they related to pre-qualification statements submitted by affected parties for a particular tender process. I stated:

> … As the appellant points out, this information is historic, and I am not persuaded that there is any reasonable possibility that a competitor could use the bottom-line total value of these past projects in a way that could prejudice the competitive position of the affected parties in a future selection, as required in order to fall within the scope of the section 10(1)(a) harm. While I can accept the City's and the affected parties' position that construction projects of this nature are highly competitive, it simply does not follow that disclosing the particular information at issue in this appeal, which, as the appellant points out, is frequently made public by either the public institution or the contractor, would compromise the interests of either affected party in bidding on future contracts of this nature.

In my view, similar reasoning applies to the records at issue in this appeal. While I accept the City's and the affected party's position that disclosure of the information would permit the drawing of accurate inferences about the cost of the aspect of the project that was deferred to Phase II, I agree with the appellant that such prejudice is unlikely to occur given the information at issue is now five years old in what I accept to be "a market place where prices change quickly". My finding here is reinforced by the fact that the contract for Phase II has now been awarded. I am not persuaded that there is any reasonable possibility that disclosing this information from a past project could be expected to prejudice the competitive position of the affected parties in future selection processes.

Accordingly, the parties resisting disclosure of the records have failed to provide the detailed and convincing evidence necessary to establish the harms identified in section 10(1)(a).

Section 10(1)(b)

The City submits that disclosure of the information would result in the harm set out in section 10(1)(b) because bidders may no longer supply similar information to the City when it is in the public interest to do so:

> The information in the quotation is supplied to the City on the understanding that it will be kept confidential. Failure to maintain this expectation of confidentiality may have a negative impact on the willingness of future suppliers to submit quotations in response to the City's RFP's. As stated under section 10(1)(a), the supplier may fear that disclosure of the detailed information will reveal the elements of a successful bid.
>
> The bidders understand the special circumstances that exist in this case and would expect the City to continue to respect their confidentiality with respect to the total price bid.

The affected party makes no submissions on the application of section 10(1)(b).

The appellant submits:

> The City has submitted that in disclosing these records there may be a "chilling effect" in the construction industry for bidding on future City projects. They submit that other parties may be reluctant to bid on other City projects if they know that the information they submit to the City, such as their proposed prices, may be publicly disclosed. Firstly, in this project and in other City projects, there is no express guarantee that the information will not be disclosed. It is also in the public interest that this information be disclosed in an open and fair public tendering process.
>
> Secondly, [the appellant] submits that where the request for disclosure is coming after the City has awarded the contract, the disclosure of such information can have no effect on the competitive process. What a party bid on this phase of the project will have no bearing on the future phases of this project or any other projects.
>
> Finally, if [the appellant] were asking for the proposals in their entirety to be produced then the City's argument might have merit. However, the disclosure of these Records following the award of the contract will not stop other parties from continuing to bid on projects. Because other parties may gain knowledge of the actual prices for the work that the City called for does not provide those parties with knowledge of how the other parties arrived at the price for the proposal.

I am not persuaded that disclosing the specific information that is at issue in this appeal could reasonably be expected to result in similar information no longer being supplied to the City in the context of future construction projects as contemplated by section 10(1)(b). Construction

companies doing business with public institutions such as the City understand that past work experience on similar scale projects is often an important part of a competitive selection process, and it is simply not credible to argue that the City would be provided with less information of this nature in future. The Price Proposal Forms and Revised Price Proposal Forms are required as part of the City's tender process for contracts of this nature, and I do not accept that the prospect of their release under the *Act* could reasonably be expected to result in a reluctance on the part of construction companies to participate in future projects.

The City's position seems to be that because disclosure of the information could reasonably be expected to cause competitive harm or undue loss under section 10(1)(a), it stands to reason that affected parties would be reluctant to disclose information to the City in the course of future negotiations. However, as I explained above, the evidence under section 10(1)(a) is not persuasive. Given that finding, I am not satisfied that it is reasonable to expect that companies will no longer supply similar information to the City during contract negotiations, and I find that the threshold for section 10(1)(b) has not been met.

Section 10(1)(c)

With respect to the application of section 10(1)(c) to the records, the City submits:

> [D]isclosure of the record could result in undue loss to the applicant and undue gain to other groups or agencies. Disclosure of the requested information could result in loss of future contracts for the successful bidders and undue gain to the requester to the reasons outlined under (a) and (b) above.

The affected party makes no specific submissions on the application of section 10(1)(c).

The appellant submits:

> [D]isclosure of the Records will have no effect on any of the complaining parties. It will not result in an undue loss or gain to the Third Parties or the City.

The representations provided by the parties on the section 10(1)(c) harms are general in nature and some of the information is integrated with their submissions on sections 10(1)(a) and (b). Although I have reviewed all of the representations in the context of section 10(1)(c), for the reasons that I have outlined above under sections 10(1)(a) and (b), I find that none of the parties resisting disclosure has provided the level of detailed and convincing evidence necessary to establish any of the section 10(1)(c) harms as they relate to the information at issue.

Accordingly, I find the evidence of harm provided by the parties resisting disclosure of the information at issue does not meet the "detailed and convincing" evidentiary standard established by the Court of Appeal in *Ontario (Workers' Compensation Board)* (cited above). Therefore, part three of the 3-part test for exemption under section 10(1)(a), (b) and/or (c) has not been established for these records.

I have also found, above, that part two of the test is not satisfied.

Because all three parts of the test must be established I find that the Price Proposal Forms and the Revised Price Proposal Forms submitted by the affected parties as part of the tender bid for the provision of plant-wide heating for Ashbridge's Bay Treatment Plant do not qualify for exemption under section 10(1) of the *Act*.

ECONOMIC AND OTHER INTERESTS

In the alternative to section 10(1), the City relies on the discretionary exemption in sections 11(c) and (d) for the records.

Sections 11 (c) and (d) read:

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

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non- governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Sections 11(c) and (d) take into consideration the **consequences** that would result to an institution if a record were released. [Order MO-1199-F]

In Order P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), I stated in reference to the provincial counterpart of section 11(1)(c):

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests.

For sections 11 (c) or (d) to apply, the City must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board)* (cited above)].

In support of its contention that certain information contained in the lease agreements is exempt under sections 11(c) and (d), the City submits:

> It is in the City's financial interest to protect the specific details of the bids for a number of reasons. First, disclosure would telegraph what the City is looking for in a successful bid. It is in the best interest of the City to have the information provided by the bidders themselves as a true reflection of their estimated costs for each aspect of the project. Secondly, it is in the City's financial interest to have the costs for the transferred aspect of the project kept confidential because of the special circumstances of this project. As stated above, Phase II has been tendered but no decision has been made. Knowing the unit cost that has already been bid for one important aspect of Phase II of the project is a real advantage not only in bidding on Phase II but in any negotiations that may result from the Phrase II tendering process. The City would be at a distinct disadvantage in negotiations if a bidder knew the costs that had been submitted by other bidders by virtue of doing the calculations with the total price bid and the revised total price bid.
>
> It is also to the City's advantage to keep the details of any added costs included by some bidders as they may indicate the thoroughness with which the bidder approached the project.

The appellant argues that the City and the affected party have failed to provide the "detailed and convincing" evidence that would establish a "reasonable expectation of harm" as required by *Ontario (Workers' Compensation Board)*. The appellant submits:

> It is in the economic interest of the City to purchase services from the market place through an open and fair competitive process. The City is obliged to get the best value at the best price because it has an obligation to spend the taxpayers' money prudently and thoughtfully. Obviously, disclosure of information regarding the specific details of the proposals submitted by the Third Parties, either during or following the award of the tender, could telegraph what the City is looking for in successful bids, which could affect future phases of this project.

Based on the representations of the parties and my review of the records, I am not satisfied that the City has presented the detailed or convincing evidence that is required to establish that the harms envisioned by section 11 (c) or (d) are present or reasonably foreseeable.

Firstly, the evidence submitted by the City in support of its claim that disclosure would telegraph what the City is looking for in a successful bid rather than placing the bidders in a position to provide a true reflection of their estimated costs for the project would prejudice its economic and financial interests, fails to demonstrate the necessary connection between the disclosure of the information contained in the records and any specific harm that could reasonably be expected to result.

Secondly, since the submission of its representations, the City has confirmed that the contract for Phase II of the provision of plant-wide heating at Ashbridge's Bay Treatment Plant has been awarded. Accordingly, the City's submission that because Phase II had been tendered but not yet awarded, disclosure of the information would prejudice the City's financial interest, is no longer applicable. Given that the contract has already been awarded, the City would no longer be at a disadvantage in negotiations with respect to the awarding of this contract were the information to be disclosed. Additionally, as discussed in the harms section of section 10(1), given the fact that the bid submissions were made five years ago in a market place where prices change quickly, even if the Phase II contract was not yet awarded, I would not find that disclosure of the information would prejudice the City's financial interests.

In my view, without more cogent evidence of prejudice to the City's economic interests or injury to its financial interests, I cannot find that the records qualify for exemption under section 11(1) (c) or (d) of the *Act* and they should be disclosed to the appellant.

ORDER:

1. I order the City to disclose the records at issue in their entirety to the appellant not later than **January 28, 2005** and not earlier that **January 24, 2005**

2. In order to verify compliance with this order, I order the City to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by: December 22, 2004
Tom Mitchinson
Assistant Commissioner