



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2164

Appeal MA-060082-1

City of Kingston



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NATURE OF THE APPEAL:

The City of Kingston (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all copies of the submissions received by the City from proponents interested in providing project management services for a named project.

The City responded to the request by notifying three companies whose interests may be affected by the disclosure of the responsive records, pursuant to section 21 of the *Act*. After hearing from the three companies, the City decided to grant access to portions of two identified proposals. Access to the withheld portions of the two proposals, and the third proposal in full, was denied on the basis of the exemptions in sections 10(1)(a), (b) and (c) (third party information), and sections 11(c) and (d) (economic and other interests).

The requester, now the appellant, appealed the City's decision.

During mediation, the appellant confirmed that the sole record remaining at issue in this appeal is the winning proposal, which was withheld in its entirety. Also during mediation, the third party whose information is contained in the winning proposal (the affected party) consented to the release of three pages of the proposal (pages 56, 57 and 58), except for the project costs listed on pages 57 and 58. In addition, the appellant confirmed that he was not pursuing access to any personal information which may be contained in the record.

Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the appeal process. I sent a Notice of Inquiry to the City and the affected party, initially. Both the City and the affected party provided representations in response to the Notice. I then sent the Notice of Inquiry to the appellant, along with the representations of the City, and the non-confidential representations of the affected party. The appellant provided brief submissions in response.

RECORDS:

The record remaining at issue is the successful proposal submitted in response to a Request for Proposal (RFP) for an identified project (excluding any personal information). The pages remaining at issue are pages 1-55, the project costs on pages 57 and 58, and pages 59-63.

DISCUSSION:

PERSONAL INFORMATION

As identified above, the appellant has indicated that he is not pursuing access to any personal information which may be contained in the record. The term "personal information" is defined in section 2(1) as follows:

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

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

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

The affected party has identified the portions of the record which it considers to be the personal information of identified individuals, including their educational history and their employment history. The affected party has identified that, in its view, this personal information is contained

on portions of pages 5, 13, 20, 21, 22, 24, 25, 26 and 34.

On my review of these pages, I am satisfied that the information contained on pages 20 through 26 of the record, which includes information about the education and employment history of the affected party's project team, constitutes the personal information of these identified individuals. This information is, therefore, not at issue in this appeal. I am also satisfied that a small portion of page 34 contains the personal information of an identifiable individual, and it is also not at issue in this appeal.

However, with respect to the information pertaining to individuals contained on pages 5 and 13, in my view the names, job titles and contact information of these individuals do not qualify as their "personal information". Rather, I find that this information simply identifies these individuals in their professional or business capacity. Accordingly, I find that the names, job titles, and contact information of these individuals do not constitute their personal information as defined in section 2(1) of the *Act*. Accordingly, this information remains at issue in this appeal.

THIRD PARTY INFORMATION

As identified above, the City denied access to the responsive record on the basis of section 10(1) of the *Act*. Both the City and the affected party provided representations in support of the position that the record is exempt under sections 10(1)(a), (b) and (c) of the *Act*. Those sections 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) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184 and MO-1706].

For section 10(1) to apply, the City and/or the affected 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

I will now review the record at issue and the representations of the parties to determine if the three-part test under section 10(1) has been established.

Part one: type of information

The affected party takes the position that the record contains “commercial” and “labour relations” information for the purpose of the first part of the three-part test. The City takes the position that the record contains “trade secret” and “financial” information. These terms have been discussed in prior orders as follows:

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

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have

monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

I adopt the definitions of these terms as set out in the prior orders.

The affected party states that the record contains commercial information, and submits:

The Record was prepared by professionals, who are experts in structuring proposals, and it contains our ideas, processes and procedures for performing the services required pursuant to the ... project. In essence, the Record represents a detailed description of our business. The Record discloses the approach we take to compete in the very competitive construction and project management market, including the specialized proposal drafting techniques we utilize in order to prepare professional proposals and processes and procedures used in the actual construction of the project. The ideas, processes and procedures found in the Record and the structure of the Record itself are the result of our experience, expertise and investment of a significant amount of time, money and effort ...

The Record contains sensitive information concerning the price quoted for the services provided to the City....

In support of its view that the record contains labour relations information, the affected party states:

The Record contains confidential information about the names, duties and qualifications of our employees.

The City refers to the definitions of "trade secret" and "financial" information set out above, and states as follows in support of its position that the record contains this type of information:

The Request for Proposal (“RFP”) document was submitted as part of a process to solicit proposals to provide ... services for the planning and construction of [the named project]. The RFP asks proponents to demonstrate a track record and expertise in coordinating the planning, financial considerations, engineering, environmental considerations, reporting, contract preparation, design, architecture, and other related disciplines.

As such, the proposal contains ideas, processes, procedures, plans and reveals information of a trade secret and financial nature, including the proposed price proposal, and the rationale for arriving at the costs.

[The affected party’s] proposal included:

- detailed cost estimates for all phases for the project;
- detailed estimated costs for all contractors and suppliers;
- detailed draft project schedule; and
- their profile, work program, information about the project team, and their quality control and safety plan.

On my review of the record, I am satisfied that much of the information contained in it constitutes commercial information within the meaning of that term in section 10(1) of the *Act*. Some of the information also constitutes financial information for the purposes of that section.

However, based on the definition of trade secret and labour relations information set out above, I am not satisfied that the record contains such information for the purpose of section 10(1). I find that the names, duties and qualifications of individual employees is not “labour relations information” under section 10(1) because it does not relate to labour disputes, labour negotiations or other similar information as found above. In addition, I am not satisfied that the information in the record is the type of information set out in the definition of “trade secret” set out above, nor that it is not generally known in that trade or business. Based on my review of the record, I conclude that it does not contain trade secret information, nor information relating to labour disputes, labour negotiations, or any other labour relations related information.

Part 2: supplied in confidence

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 [Order MO-1706]. Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the “in confidence” component of part two, the party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at

the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The affected party states that the record was supplied to the City in response to the RFP concerning the identified project. With respect to whether the information was supplied in confidence, the affected party states:

We have treated the Record consistently as confidential and have not revealed it to anyone outside of the City or our organization. The Record is not available to the public. Furthermore, in the normal course, we would not expect the Record to be made public. We have been led to believe the Record would not be public because the very nature of the RFP process is that the proposals received are confidential

The City states that the record was supplied to it with an implicit expectation of confidentiality. In support of its position, the City refers to the purchasing by-law which set out the procurement process, and to the expectation of proponents that the information was supplied to the City in confidence.

Based on the representations of the parties, I accept the position of the City and the affected party that the record was supplied to the City by the affected party, and that it was supplied with a reasonably-held expectation of confidentiality.

Part 3: harms

General principles

To meet this part of the test, the party resisting disclosure 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a)

The affected party claims that the record is exempt under section 10(1)(a), as its disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

With respect to the information in the proposal, it states:

If disclosed to a third party, the ideas, processes and procedures outlined in the Record could be copied by our competitors in future RFP processes which will significantly prejudice our competitive position by eliminating the competitive advantage that our proposal structures, and our processes and procedures for completing construction projects, have given us. As mentioned above, the construction and project management industries are extremely competitive. It is more than merely price that distinguishes us from our competitors, but also our proposal format and other information related to providing the services that is revealed in those proposals. It is inevitable that the Record will be used as a template by others because it was the winning proposal.

Concerning the price quoted for the services provided to the City, the affected party states that the disclosure of this information will result in the following harm:

Disclosure of the price prejudices our competitive position by allowing our competitors to simply offer the services at a lower price. The disclosure of the price also interferes with our ability to negotiate the cost of services with other customers. Prices quoted depend on a number of factors and knowledge of the price quoted to the City may cause confusion or discontent with our current or future customers, despite the fact that services provided to them may be very different.

With respect to the names, duties and qualifications of the affected party's employees, the affected party states:

Our employees are our most valuable asset. If the Record is disclosed, it would give our competitors a shopping list of our employees. While the movement of employees amongst firms is a reality of business, the way in which our employees are listed and presented, along with their qualifications, resumes, and duties

makes it extremely easy for our competitors to target our employees for hiring. The loss of employees to competitors would not only prejudice our competitive position because of our loss, but doubly prejudice it because of our competitors' gain. Even if our employees are not hired by our competitors, our competitive position is prejudiced because the Record reveals to our competitors, our formula for the type of employees and the skill sets necessary to produce and execute winning proposals and build successful construction projects.

The City supports the affected party's position that disclosure of the record would result in the harms identified in section 10(1)(a). The City references the affected party's position in its representations, and also states:

By knowing the financial and business details of a proposal, for each aspect of a project, the requester would gain an unfair advantage because they would be able to see the factors that may have had an impact on the decision to award the contract to the successful proponent. This would greatly impact their position when competing for contracts regarding future business.

In addition, the City refers in some detail to the different categories of information contained in the proposal.

The City states that the proponents submitted proposals which were evaluated based on specific criteria, and that the winning proposal was ranked higher than the other proposals. The City then identifies some of the specifically weighted criteria that proponents were asked to provide, including the overview, company profile, workplan, the identity of the project team, quality control, safety plan, and price. The City identifies the various weights assigned to these categories, and then states:

... when the above criteria are examined together, it is easy to see that sections 10(1)(a), (b), and (c) preclude the City from disclosing the proposal because it reveals (among other things) trade secrets and financial information supplied to the City in confidence. ... If disclosed, other companies may have an unfair advantage over the winning proponent in future related contracts with the City and/or other organizations.

The City also provides representations on the application of section 10(1) to the specific criteria listed above. The City acknowledges that the affected party objects to the disclosure of any part of the proposal. The City, however, identifies the specific parts of the record which it believes will result in the harms identified in section 10(1)(a), if they are disclosed. The City's representations on each of the specifically weighted criteria are summarized as follows:

Overview: the City takes no position with respect to the specifics of this section.

Profile: the City argues that the financial information and references qualify for exemption.

Work Program: The City states that the Work Program describes how the affected party would approach and manage the project, and what steps would be needed to ensure a project of this scale is successfully completed. The City states that it contains trade secret information because it contains the affected party's ideas, processes and procedures for performing the services required pursuant to the RFP, and that the affected party would use the same methodology when submitting proposals for future projects of the same magnitude. The City identifies its view that this information qualifies for exemption under sections 10(1)(a), (b) and/or (c).

Project Team: The City identifies its concerns regarding the personal information contained in this portion of the proposal.

Quality Control: The City takes the position that this section contains trade secret information because it describes the techniques by which the affected party would ensure the quality of the project remains in their control. It identifies that this section specifically outlines exactly what the affected party would do to ensure a seamless project. The City then states that, if this information is in the hands of another proponent, then the other proponent could use this information to enhance their proposal - resulting in undue loss to the affected party and undue gain to the affected party's competitors.

Safety Plan: The City takes no position with respect to the specifics of this section.

Price Proposal: The City states that this section contains confidential financial information regarding the costs for the services provided by the affected party. The City also states that, if disclosed, this information could significantly harm the affected party in their future submissions for contracts, and that this information in the hands of the affected party's competitors would allow the competitors to use the information to their advantage in future projects (specifically, to undercut the affected party's bid).

The City also provides information regarding the specifications for the project. It identifies that, although the project is ongoing, the involvement of the affected party is now over. Accordingly, the City identifies that the potential harms resulting from the disclosure of the record relate to harms to future bids on projects with the City or any other organization.

Finally, in response to my invitation to the parties to identify whether there is anything unique about the specific business to which the proposal relates that gives rise to the possible harms under section 10(1), the City simply identifies that the affected party is engaged in a very competitive industry, and that each proponent has their own methods for ensuring a project remains on time and on budget. The City states that there is no set procedure to follow when managing a project of this size, but that each company which provides these services uses different resources in a variety of ways, making each company's submission unique from its competitors. The City again states that, if another company was able to see the affected party's

proposal, they would be able to modify their own proposals for future project, effectively “pilfering” the affected party’s confidential information.

Findings

As a preliminary point, it should be noted that the personal information contained in the record is no longer at issue in this appeal. In addition, as identified above, I have found that the information contained in the record is not “trade secret” information for the purpose of section 10(1).

After reviewing the record, as well as the representations of the City and the affected party, I am satisfied that the disclosure of some portions of the record, as well as some of the appendices attached to it, could reasonably be expected to result in the harms identified in section 10(1)(a). I find that the City and the affected party have provided me with sufficient evidence to demonstrate that disclosure of certain discrete portions of the record could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party.

Specifically, I find that certain banking information on page 5, some of the detailed reference information on page 9, small portions of the part of the proposal entitled *Work Program* (portions of pages 13, 14, 15, 18 and 19), portions of the part of the proposal entitled *Quality Control* (portions of pages 28, 29 and 30), the pricing information on page 34, the information contained in Appendix A (sample project schedule), Appendix B (sample cost logs) and the information on page 55 (insurance information) and pages 59 through 63 (reference information) qualify for exemption under section 10(1)(a). They qualify for exemption based on my view that the disclosure of these portions of the record would result in the harms set out in section 10(1)(a), and accordingly satisfy the third part of the three-part test set out above.

I make this finding on the basis of the level of detail contained in those portions of the proposal that identify specific information relating to the affected party’s proposed work program, quality control and pricing information. In my view, the unique information contained in those portions of the proposal discloses a particular approach to the project taken by the affected party. In addition, I find that the disclosure of the specific information contained in Appendices A and B could reasonably be expected to prejudice significantly the competitive position of the affected party, as it provides specific templates of those types of documents. This information includes specific samples of the types of reporting records used by the affected party in carrying out projects, and the specific manner in which this information is recorded. Accordingly, I am satisfied that these portions of the record qualify for exemption under section 10(1)(a). Finally, I am satisfied that the disclosure of the banking, insurance and reference information on pages 5, 9, 55 and 59 through 63 could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. Accordingly, this information is also exempt under section 10(1)(a).

However, I am not satisfied that the other portions of the record qualify for exemption under section 10(1)(a).

In my view, the remaining portions of the record do not contain information which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I find that I have not been provided with sufficiently persuasive representations to satisfy me that the information contained in these portions of the record qualify for exemption under section 10(1)(a). Some of the information is about the affected party and its history, experience and qualifications. This information appears to be general, public information about the work done by the affected party, and I have not been provided with sufficiently detailed and convincing evidence to support the affected party's position that the disclosure of this information could reasonably be expected to result in the harms set out in section 10(1)(a).

The other information contained in the proposal consists of information about the manner in which the affected party proposes to meet the requirements of the proposed project. The affected party has made general representations with respect to its concern that disclosure of the proposal would result in the identified harms, and that the disclosure of the form and structure of the proposal will allow others to use their successful proposal as a "template". The City also makes similar arguments in its representations. In two recent order (PO-2478 and MO-2151), I reviewed similar arguments. In PO-2478 the arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry. In that case, the exemptions in sections 17(1)(a) and (c) of the *Freedom of Information and Protection of Privacy Act*, (which is similar to section 10(1)(a) and (c) of the *Act*) were raised. After reviewing the argument, I stated:

In general, I do not accept the position of the Ministry and affected party concerning the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the disclosure of the "form and structure" of bid would result in the identified harms under sections 17(1) (a) and (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent Order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms. In Order PO-2435, Assistant Commissioner Beamish made the following statement:

The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

I accept the position taken by the Assistant Commissioner. In my view the arguments put forward by the Ministry and affected party regarding their concerns that disclosure of the "form and structure" of the bid, or its general format or

layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in either section 17(1)(a) or (c).

I adopted this same approach in Order MO-2151, and I will also apply it to the circumstances of this appeal. On that basis, I am not satisfied that the disclosure of general information contained in the proposal which discloses the “form and structure” of the proposal could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. Furthermore, on my review of the particular information contained in the proposal, I find that much of it is of a general nature, while the more specific information is contained in the appendices (two of which I have found qualify for exemption under section 10(1)(a)). I have not been provided with sufficiently detailed and convincing evidence to demonstrate that the disclosure of this general information could reasonably be expected to result in the harms set out in section 10(1)(a). Therefore, I conclude that these portions of the record are not exempt under that section.

Section 10(1)(b)

The affected party takes the position that the record is also exempt under section 10(1)(b), as its disclosure could reasonably be expected to result in similar information no longer being supplied to the City, where it is in the public interest that similar information continue to be so supplied. The affected party states:

If the Record is made public, it will result in fewer responses to the City's requests for proposals being made by quality firms. Firms like us will be reluctant to respond to the City's future requests for proposals and to do business with the government because the disadvantages of disclosure (ie. prejudice to competitive position and undue gain) will far outweigh the benefits. It is in the public interest that as many firms as possible respond to every City or other government RFP, so that the firm that offers the best combination of price and quality may be selected for the project.

... if we, or other companies like us, must risk the prejudice to our competitive position and the undue loss to us and gain to our competitors that will occur if proposals like the Record are made public, then we (and other companies like us) will stop responding to the City's requests for proposal. As mentioned above, this is not in the public interest because the pool of cost effective, quality service providers willing to respond to the City's contracts will shrink, resulting in an increased likelihood of such contracts being performed by more expensive, less qualified firms.

The City also argues that the information qualifies under section 10(1)(b). It states:

The disclosure of companies' proposals may have a cooling effect on the ability of the City to attract suitable proposals in the future. The release of the RFP information could very realistically result in companies not submitting proposals for future contracts because of the potential negative impact it could have on their company. The information ... 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 proposals in response to the City's RFP's. Commercial parties have specifically warned us of their fear in relation to this type of disclosure. It is important to ensure that the City is able to attract the best proponents possible and potential release of information could result in appropriate companies no longer submitting proposals ... due to the potential lack of ability to maintain confidence. ...

It is in the public interest that similar information continues to be supplied to the City in order to ensure that the City receives the best possible proposals from the most qualified professionals. As per Order MO-1239, it is not in the public's interest to compromise the integrity of the RFP process by disclosing the details of the proposals. This disclosure would be harmful to companies competing for business in the marketplace; especially given the large part that the City proponents play in the local economy. Anticipation of this harm may cause many companies to submit proposals ... elsewhere, leaving the City without the best possible companies to supply specific services. It is in the taxpayers best interest to continue to receive competitive proposals, which ensure the most effective and economical use of public funds.

I am not persuaded that disclosing the information which I have found does not qualify for exemption under section 10(1)(a) could reasonably be expected to result in similar information no longer being supplied to the City in the future, as contemplated by section 10(1)(b). I have found that certain specific information in the record, which could prejudice the competitive position of the affected party, is exempt under section 10(1)(a). With respect to the remaining information at issue, in my view companies doing business with public institutions such as the City understand that certain information regarding how it plans to carry out its obligations will be made public. I find a number of the arguments put forward by the City speculative, and not sufficiently "detailed and convincing". Furthermore, I do not accept that the prospect of the release of the type of information contained in the portions of the records which I have found do not qualify under section 10(1)(a) could reasonably be expected to result in a reluctance on the part of companies to participate in future projects.

Accordingly, I am not satisfied that it is reasonable to expect that the disclosure of this information will have the effect that companies will no longer supply similar information to the City. As a result, I find that the requirements for section 10(1)(b) have not been met.

Section 10(1)(c)

The City and the affected party claim that the record is exempt under section 10(1)(c), as its disclosure could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. The affected party states:

We are not in the business of training other companies to prepare proposals or training other companies on how to efficiently build large construction projects. We have incurred the expense and invested the enormous amount of time required to plan and prepare winning proposals and develop the project management and construction procedures contained in the Record. If the Record is disclosed, then our competitors would have a gain to which they are not entitled because they could simply copy the format of the proposal and the procedures contained in the Record.

...

The ability of our competitors to offer the services at a lower price will be assisted by the fact that they will not have had to put the same time, effort or resources into preparing a proposal or planning how to best provide the services that we have had to, because of the fact that they were able to obtain, at no cost to themselves, a template for winning proposals and the plans for how to provide the construction services.

The City states:

Disclosure of the ... information could result in undue financial loss to the successful proponent. By disclosing the financial and business details provided by this company, it may be placed at a disadvantage in subsequent proposals for similar projects as its competitors would have information as to how the proponent assembles a team, prepares a proposal and what specific elements it includes in its proposal that distinguishes it from others. In particular, the financial proposals as well as the specifics of planning and designing such a project are unique to the proposal developed and the challenges it overcomes. These solutions can be used in other projects and should be protected as proprietary processes.

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. The affected party's competitors would be in a better position to submit proposals against the affected party. The ideas contained in the proposal may continue to give the successful proponent a competitive advantage in the future and their competitors have no right to these ideas.

In the circumstances of this appeal, I am not satisfied that the information which I have found does not qualify for exemption under section 10(1)(a) satisfies the requirements of section 10(1)(c). I have found that certain specific information concerning the proposal is exempt under

section 10(1)(a). This included information about the specifics of certain aspects of the proposal, and specific samples of documents. As identified above, the information remaining at issue includes other information about the affected party and its history, experience and qualifications, as well as information which I consider to be fairly general about the manner in which the affected party proposes to meet the requirements of the project. In my view, the disclosure of information of this nature could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency, as contemplated by section 10(1)(c).

With respect to the City's and the affected party's concerns that competitors will use the proposal as a template for future proposals, as identified in the discussion under section 10(1)(a), I adopt the approach I took in Orders PO-2478 and MO-2151, and apply it to section 10(1)(c) in the circumstances of this appeal. I am not satisfied that the disclosure of general information contained in the proposal which discloses the "form and structure" of the proposal could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

In summary, I have found that some portions of the proposal and two appendices qualify for exemption under section 10(1)(a). I find that the disclosure of the remaining portions of the record will not result in the harms identified in sections 10(1)(a), (b) or (c). As all three parts of the test under section 10(1) must be met, the remaining information contained in the record does not qualify for exemption under section 10(1).

ECONOMIC AND OTHER INTERESTS

The City has also claimed the application of sections 11(c) and (d) to the records remaining at issue. These sections read:

A head may refuse to disclose a record that contains,

- (c) information whose 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.

For sections 11(c) or (d) to apply, the institution 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) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

Section 11(c): prejudice to economic interests

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

With respect to the application of section 11(c), the City states:

It is in the City's best economic interests to protect the details of a company's proposal ... because disclosure would telegraph precisely what the City is looking for in a successful proposal. Disclosing the proposal would disclose the resources that could give a future proponent an unfair advantage. Proponents could tailor their proposal to reflect what the City has looked for in the past and therefore prejudice the City's economic and financial interests. This prejudice could create a benchmark for other companies, which would stifle innovation. The proponents would then no longer supply the City with original proposals and innovative solutions to [identified] issues. It is in the best interest of the City to have the information provided by the proponents themselves as a true reflection of their company, for each aspect of the project.

Section 11(d): injury to financial interests

Concerning section 11(d), the City states that disclosing the information in the records could reasonably be expected to be injurious to the financial interest of the City because:

Disclosing proposal information from the successful proponent may cause qualified companies not to submit proposals for future contracts with the City. To prepare a ... proposal for [the project] requires expertise in a variety of specialized fields and considerable time and expense. Unless the proponents are

assured that the time and money expended on the proposal will be confidential, no credible firm will expend the resources necessary to prepare a quality proposal. This could result in the awarding of contracts to less qualified companies. This could reasonably be expected to be injurious to the financial interests of the City.

Also, if companies have prior knowledge about the proposal details of a successful proponent, then these companies will be able to tailor their proposal for future contracts so it reflects what they feel the City is looking for. This could be injurious to the financial interests of the City because then the proponents are not providing a true reflection of their estimated costs for specific services.

Findings

As identified above, I have found that portions of the record and two appendices contain information about the affected party's proposed work plan, quality control and pricing information and is exempt under section 10(1)(a). The portions remaining at issue include information about the background and experience of the affected party, the proposal generally (including its structure and format), and other information as identified more specifically in the discussion under section 10(1)(a) set out above.

In the circumstances, I am not satisfied that the portions of the record remaining at issue qualify for exemption under sections 11(c) and/or (d). I have not been provided with sufficiently detailed and convincing evidence to satisfy me that the disclosure of these particular portions of the record could reasonably be expected to lead to the harms set out in sections 11(c) or (d) of the *Act*.

The City's representations focus on possible harms resulting from the disclosure of the specifics of the affected party's proposal. In this case, I have found that some of the specific information contained in the proposal which is of concern to the City is exempt under section 10(1)(a). What remains at issue is the more general information referred to above, including information about the background and experience of the affected party which is specific to it and, by its nature, cannot be "copied" by competitors. With regard to the other information in the record, I have not been provided with sufficient evidence to support a finding that disclosure of this information would result in the identified harms.

In addition, with respect to the City's position that disclosure would signal to parties bidding on future contracts what the City is looking for, I addressed this same argument in Order MO-2088, and stated:

... it seems to me that not disclosing information could equally result in similar harm to the City. If the successful proponent was the sole party aware of what information was required in order to submit a successful bid, based on the City's representations, it would have an unfair advantage in future proposals, because it would be aware of "exactly what the City was looking for". I reject the City's

argument that disclosure of the records remaining at issue would result in harm on that basis.

I adopt the same approach in the present appeal, and reject the City's position that disclosure of the portions of the record remaining at issue would result in the identified harm.

In summary, I find that the disclosure of the information remaining at issue could not reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution, nor could its disclosure reasonably be expected to be injurious to the financial interests of an institution. Accordingly, I find that the remaining portions of the records do not qualify for exemption under sections 11(c) and/or (d) of the *Act*.

ORDER:

1. I have found that all of pages 20 through 26, and a small portion of page 34, constitute the personal information of identifiable individuals, and are not at issue in this appeal. For greater certainty, I have highlighted the portion of page 34 which is not to be disclosed on the copy of that page sent to the City along with this order.
2. I uphold the application of the exemption in section 10(1)(a) to portions of the part of the proposal entitled *Work Program* (portions of pages 13, 14, 15, 18 and 19), portions of the part of the proposal entitled *Quality Control* (portions of pages 28, 29 and 30), the pricing information on page 34, the information contained in Appendices A and B, and the banking, insurance and reference information on portions of pages 5 and 9, and all of pages 55 and 59 through 63. For greater certainty, I have highlighted the portions of pages 5, 9, 13, 14, 15, 18, 19, 28, 29 and 34 which are not to be disclosed on the copies of those pages sent to the City along with this order.
3. I order the City to provide the appellant with the remaining portions of the record by sending him a copy by **March 30, 2007** but not before **March 26, 2007**.
4. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the portions of the record which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____
Frank DeVries
Adjudicator

February 22, 2007
