



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2755

Appeal PA08-129

Lakehead University



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

Lakehead University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain records relating to a Request for Proposals (RFP) for project management services (the Project) at one of the University's campuses. The requester later narrowed his request and submitted a second request for:

...copies of the "winning submission" and all records related to [the University's] evaluation of the winning submission and the decision to award the contract to the submitter.

The University located the responsive records, which comprised the winning proposal for project management services. Pursuant to section 28 of the *Act*, the University notified and obtained representations from the proponent of the winning proposal (the affected party) regarding the possible disclosure of the responsive records. The University then issued a decision to both the requester and the affected party advising that it was granting partial access to the responsive records. Access to the remainder of the information was denied pursuant to sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. The affected party agreed with the University's decision to disclose certain records and portions of records and did not appeal its decision. These records were subsequently disclosed to the requester.

The requester (now appellant) appealed the University's decision to deny access to the remaining portions of the responsive records.

During mediation, the appellant narrowed his appeal by reducing the number of records at issue. As no further mediation was possible, this file was transferred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the University and the affected party, initially. I received representations from the University only. I also received consent from the affected party to disclose the representations which it made to the University pursuant to the section 28 notification to the appellant. I sent a copy of the affected party's and the University's representations to the appellant, along with a Notice of Inquiry, and sought the appellant's representations. I received representations from the appellant. In his representations, the appellant indicated that he did not wish to receive personal information relating to individuals. Accordingly, I will not address the application of section 21(1) to those portions of the records which are comprised of personal information.

RECORDS:

The following records or portions of records were claimed to be exempt by reason of section 17(1):

RECORD #	DOCUMENT AND PAGE #	DESCRIPTION OF RECORD	RELEASED?
1	Doc. No. 3, Page i	Letter of Introduction	partial
2	Doc. No. 6, Page 1	1.0 Corporate Profile	partial
3	Doc. No. 7, Page 2	2.1 Qualifications and Experience of the Firm	partial
4	Doc. No. 11, Pages 6 to 8	3.0 Sub-Consultant Team Member Firms	no
5	Doc. No. 13, Page 11	5.0 Project Team	no
6	Doc. No. 15, Pages 13 to 17	5.2 Project Team Members	no
7	Doc. not numbered, one paragraph, Page 17	5.3 Project Team Availability	no
8	Doc. No. 17, Page 18	6.0 Schedule & Manpower Estimate	no
9	Doc. No. 18, Pages 19 to 32	7.0 Approach & Methodology	no
10	Doc. No. 22, Appendix C	Staff Assigned to this Project and Sub-Consultants to be Used for this Project	no - (the names of the staff are not at issue)
11	Doc. No. 26, Appendix G	Sample: Master Schedule	no
12	Doc. No. 27, Appendix H	Sample: Risk Register	no
13	Doc. No. 28, Appendix I	Sample: Cost Tracking Log	no - (none of the dollar values are at issue)

The following records were claimed to be exempt by reason of section 21(1):

RECORD #	DOCUMENT AND PAGE #	DESCRIPTION OF RECORD	RELEASED?
14	Doc. No. 16, Pages 13 to 15	5.2.1 PM Experience, Roles & Responsibilities	no
15	Doc. No. 16, Pages 16 to 17	5.2.2 Key Project Sub-Consultant Team Members	no

DISCUSSION:

PERSONAL INFORMATION

As the appellant has indicated that he does not wish to receive personal information of any identifiable individuals in the records, I will first determine if any of the records contain personal information as defined in section 2(1). The University claims that Records 14 and 15 contain

personal information and are exempt by reason of the personal privacy exemption in section 21(1) of the *Act*.

“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 if 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 where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”. Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The University submits that:

The information in these records certainly identifies the individuals involved and goes beyond mere "name, title, contact information or designation" of those individuals "in a business, professional or official capacity" ...by including academic credentials, skills, education, experience, and employment history. These records probably provide, in fact, sufficient information for an individual knowledgeable about the highly specialized, small field in which the identified persons work to identify them even without their names.

The affected party submits that:

The [proposal] contains the educational history (e.g. degree or diploma acronyms) and the employment history (e.g. other employers worked for, duties held on various projects, including the current one) of our employees at pages 13-17 [Records 14 and 15]...

It is not enough to simply redact the name of the individuals where connected to their educational and employment history. It is not difficult to take this personal information and without knowing the individual's name, discover whose personal information it is, when you know the individual is one of our key employees. We ask that none of this personal information be revealed, with or without the names redacted.

Analysis/Findings

Based on my review of the records, I find that certain portions, including portions of Records 14 and 15, contain the personal information of identifiable individuals other than the appellant. In Records 14 and 15, this type of information is part of the textual description of various individual's experience. This information reveals these individual's past work experience and is properly characterized as personal information as contemplated by paragraph (b) of the "personal information" definition of section 2(1).

However, I find that the names of the individuals who are designated by the affected party to work on the Project, their professional designations, their job titles, and any general descriptions of their assigned tasks or responsibilities for components of the Project, as well as where they fall in reporting structures, does not qualify as their personal information for the purposes of the definition of that term in section 2(1). Rather, I find that this information simply identifies and describes these individuals in their professional or business capacity and qualifies as business information under section 2(3) of the *Act* [Order PO-2637]. As the University claims that this type of information is exempt under section 17(1), I will include it in my analysis of that section, below.

In summary, I find that the employment history of identified individuals contained in the records qualify as their personal information for the purpose of the definition of that term in section 2(1) of the *Act*. As the appellant is not interested in receiving the personal information of identifiable individuals in the records, it is not necessary for me to determine whether disclosure of the personal information in the records is exempt by reason of section 21(1) of the *Act*. For ease of reference, I will highlight on a copy of the records sent to the University with this order those portions of the records that contain personal information and should not be disclosed to the appellant.

THIRD PARTY INFORMATION

I will now determine whether sections 17(1)(a) to (c) apply to the undisclosed information in Records 1 to 13, other than the information in these records that I have determined is comprised of personal information of identifiable individuals. Section 17(1) states in part that:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

Section 17(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 17(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, MO-1706].

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The types of information at issue in the records are listed in section 17(1) and have been discussed in prior orders:

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [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],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

The University submits that:

...the records which have been withheld under section 17(1) include commercial information as well as, in places, financial and, in a broader sense than PO-2010 and its antecedents interpret the term, "technical" information as well.

The affected party submits that the proposal it submitted contains commercial, technical, and labour relations information. It states that:

[The proposal contains commercial information as it] 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 management services at the [named] Campus. In essence, [it] represents a detailed description of our business. [It] discloses the approach we take to compete in the very competitive 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 [proposal] and the structure of the [proposal] itself are the result of our experience, expertise and the investment of a significant amount of our time, money and effort...

[The proposal] contains sensitive commercial information concerning the price quoted for the services provided to the University...

[The proposal] contains confidential [technical] information concerning our corporate structure (page 1), a list of our staff assigned to this project (Appendix C) ...our sample master schedule (Appendix G), our sample risk register (Appendix H), our sample cost tracking log (Appendix I)... All of these documents disclose the particular approach that we adopt in planning and managing projects, all in an extremely high level of detail...

[The proposal] contains confidential [labour relations] information about the names, duties and qualifications of our employees at Appendi[x] C ...

The appellant did not address this issue in his representations.

Analysis/Findings

Based on my review of the records at issue, I find that they contain commercial information within the meaning of section 17(1). This information related to the affected party's bid to provide project management services regarding the project [Order MO-2197]. I also agree with the University that the records contain financial information, namely, information concerning cost accounting and operating costs of the affected party [Order PO-2010]. Therefore, part 1 of the test has been met.

I disagree with the affected party that the names, duties, and qualifications of individual employees in Appendix C are "labour relations information" [Orders MO-2151 and MO-2164]. This information in Appendix C does not refer to information concerning the collective relationship between an employer and its employees.

I also disagree with the affected party that certain records contain technical information. This information at issue is not information prepared by a professional describing the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010]. However, as stated above, all of the information at issue in the records qualifies as either commercial or financial information.

Part 2: supplied in confidence

Supplied

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

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

The University submits that:

[it] had no prior knowledge that it would receive a bid from [the affected party] and had absolutely nothing to do with either the preparation or the drafting of the bid. When [the University] received the [proposal], it had not had, and did not have underway, any negotiations with [the affected party] in regard to the Project. The [proposal] is purely [the affected party’s] product.

The affected party submits that:

The [proposal] was supplied to the University in response to an RFP concerning the project management services required at the University’s [named] campus. Nothing in the [proposal] is a result of any negotiations between us and the University.

The appellant did not address this issue in his representations.

Analysis/Findings

The affected party’s proposal was successful and resulted in an agreement being entered into between the University and the affected party. Having closely reviewed the specific information that remains at issue, in my view, the information was not a result of negotiation and cannot be characterized as mutually generated. Rather, it represents the contractual terms proposed solely by the affected party.

Accordingly, in the circumstances, I am satisfied that all of the information at issue in this appeal was supplied to the University for the purpose of section 17(1) of the *Act*.

In confidence

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the 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 University submits that the affected party had a reasonable expectation of confidentiality in submitting its bid. It submits that:

In Appendix C of [the University's] "Request for Proposal, Submission Requirements And Format" stipulate that proposal copies are to be "sealed", which would be pointless if proposals were not to be treated confidentially. In addition section 8.4, "Submission General Terms & Conditions", on page 33 of [the affected party's] bid, contains the following declaration: "This proposal is submitted in confidence ... " .

The affected party submits that:

We have treated the [proposal] consistently as confidential and have not revealed it to anyone outside of the University and our organization. The [proposal] is not available to the public. Furthermore, in the normal course, we would not expect the [proposal] to be made public. We have been led to believe that the [proposal] would not be public because the very nature of the RFP process is that the proposals received are sealed and confidential, lest competitors steal ideas from each other for winning the right to tender the services. It will significantly undermine the whole purpose of confidentiality in the request for proposal process if industry competitors are asked to compete on a confidential basis and then the information they provide is later exposed to competitors and used against them to their detriment in other business competitions. Maintenance of confidentiality is particularly important in the construction industry, which is highly competitive and where proposals are kept secret because we compete against the same project management companies on many different projects in any given year.

The fact that the competition is now over in no way lessens the confidential nature of the [proposal] for all of the reasons discussed above...

The appellant does not address this issue in his representations.

Analysis/Findings

I accept that the affected party supplied the information contained in the records “in confidence”. In the circumstances of this appeal, I am satisfied that the information contained in the proposal, including the appendices, was supplied to the University with a reasonably-held expectation of confidentiality. In my view, the confidentiality statement in the RFP, along with the representations of both the affected party and the University evince a clear intention on the part of the parties that information contained in response to the RFP was being provided in confidence.

Accordingly, I find that all of the information at issue in this appeal was “supplied in confidence” in the context of the University’s tender process, thereby satisfying part 2 of the section 17(1) test.

Part 3: harms

To meet this part of the test, the institution and/or the third party 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].

The affected party describes the records as:

...a detailed description of our business. The [proposal] 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 [proposal] and the structure of the [proposal] itself are the result of our experience, expertise and the investment of a significant amount of our time, money and effort.

It submits that disclosure of the records would result in the following harm:

- (i) prejudice to the affected party’s competitive position;
- (ii) undue gain by the appellant; and,
- (iii) similar information no longer being supplied.

The University relied on the affected party's submissions. It only made one general submission with respect to section 17(1)(b), which I will refer to below.

The appellant does not address this issue in his representations.

I will now deal with each item of the test in part 3 separately.

(i) section 17(1)(a): prejudice to competitive position

The affected party states that:

If disclosed to a third party, the ideas, processes and procedures outlined in the [proposal] 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 [proposal] will be used as a template by others because it was the winning proposal....

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 University may cause confusion or discontent with our current or future customers, despite the fact that services provided to them may be very different...

[C]oncerning our corporate structure (page 1), a list of our staff assigned to this project (Appendix C)... our sample master schedule (Appendix G), our sample risk register (Appendix H), our sample cost tracking log (Appendix I)... [w]e have invested considerable time, money and resources into the development, cultivation and acquisition of the various methods, procedures, forms, corporate structures, employee mix, manpower estimates, risk registers, working relationships; support resources, service delivery methods, project plans, master schedules, and cost tracking logs that we use to provide project management services... Quite simply, we will not respond to RFPs from the University in the future if this information is disclosed as we simply cannot afford for this information to be made public...

[Records 5 and 6 and Appendix C] ... reveal 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.

Analysis/Findings

I find that the information in the records which remains at issue is substantially similar to that which was considered in Order MO-2151. I adopt the approach taken by Adjudicator Frank Devries in that case, where he found exempt from disclosure:

... the specific detail contained in those portions of the proposal that identify the specific information relating to the affected party's proposed approach to the project. In my view, the unique information contained in those small portions of the proposal discloses a particular approach to the project taken by the affected party. I also find that the disclosure of the specific information contained in the appendices..., which includes specific samples of the types of reporting records used by the affected party in carrying out the project, and the specific manner in which this information is recorded, could reasonably be expected to prejudice significantly the competitive position of the affected party, as it provides specific templates of those types of documents. Accordingly, I am satisfied that these portions of the record qualify for exemption under section 10(1)(a) [of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal Act), section 17(1)(a) of the *Act*].

After reviewing the records, as well as the representations of the University, the appellant and the affected party, I find that the following portions of the proposal qualify for exemption under section 17(1)(a):

- Parts of the project management work plan in Record 9
- The sample master schedule (Record 11)
- The sample risk register (Record 12)
- The sample cost tracking log (Record 13)

I do not find that the other portions of the records qualify for exemption under section 17(1)(a). I agree with the findings of Adjudicator DeVries in MO-2151, where he found that:

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 which satisfy me that the information contained in these portions of the record qualify for exemption under section 10(1)(a) [of the municipal *Act*]. Some of the information is information about the affected party and its history, experience and qualifications. This information appears to be of a public nature, and I have not been provided with sufficiently detailed and convincing evidence supporting the position that the

disclosure of this information could reasonably be expected to result in the harms set out in section 10(1)(a) [of the municipal Act].

The other information contained in the proposal ...contains information about the manner in which the affected party proposes to meet the requirements of the RFP. The affected party has made general representations with respect to the concern that disclosure of the proposal would result in the identified harms. The affected party also identifies its concern that the disclosure of the form and structure of the proposal will allow others to use their successful proposal as a "template". I recently reviewed a similar argument in Order PO-2478. In that case the arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry, and in which the exemption in section 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 [municipal] Act) was 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).

In this appeal, I find that the disclosure of merely general information contained in the proposal which discloses only the "form and structure" of the proposal would not 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 do not have sufficiently detailed and convincing evidence to demonstrate that disclosure of this general information could

reasonably be expected to result in the harms set out in section 17(1)(a). Therefore, I find that these portions of the records are not exempt under that section.

(ii) section 17(1)(b): similar information no longer supplied

The University submits that:

[I]t is certainly not in the interests of Lakehead University and the general public whom we serve that private firms bidding for our contracts should, in order to keep valuable information about their operations, skills, and procedures - information essential for the University to make sound assessments of bids and decisions on awarding contracts - out of the hands of their competitors, devote only minimal effort and information to the framing of their bids, leaving us with only, as it were, "lowest common denominator" bids to scrutinize and choose from!

The affected party takes the position that the records are also exempt under section 17(1)(b), as its disclosure could reasonably be expected to result in similar information no longer being supplied to the University, where it is in the public interest that similar information continue to be so supplied. The affected party states:

If the [proposal] is made public, it will result in fewer responses to the University's requests for proposals being made by quality firms. Firms like us will be reluctant to respond to the University's future requests for proposals and to do business with the government because the disadvantages of disclosure (i.e. 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 University RFP, so that the firm that offers the best combination of price and quality may be selected for the project...

As indicated above, 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[s] are made public, then we (and other companies like us) will stop responding to the University'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 University's contracts will shrink, resulting in an increased likelihood of such contracts being performed by more expensive, less qualified firms...

Analysis/Findings

I find that the portions of the records that I have found not to be exempt by reason of section 17(1)(a) also do not qualify for exemption under section 17(1)(b). I agree with the findings of Adjudicator DeVries in MO-2151, where he determined that:

I am not persuaded that disclosing the information which I have found does not qualify for exemption under section 10(1)(a) [of the municipal *Act*] could reasonably be expected to result in similar information no longer being supplied to the Town in the future, as contemplated by section 10(1)(b) [of the municipal *Act*]. I have found that certain specific information in the record, which could prejudice the competitive position of the affected party, qualifies for exemption under section 10(1)(a) [of the municipal *Act*]. With respect to the remaining information at issue, in my view companies doing business with public institutions, such as the Town, understand that certain information regarding how it plans to carry out its obligations will be public. 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) [of the municipal *Act*] 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 University. Accordingly, I find that the requirements for section 17(1)(b) have not been met.

(iii) section 17(1)(c): undue loss or gain

The affected party claims that the undisclosed information remaining at issue in the records are exempt under section 17(1)(c), as 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 manage 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 procedures contained in the [proposal]. If the [proposal] 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 [proposal]...

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. We would like to stress we are now and will in the future compete with many of the same companies over many projects. By discovering the pricing for the project to which the requested confidential information pertains, our competitors will be able to determine how we will price future projects. This information would be extremely valuable to our competitors for the reasons discussed above (as further evidence, we point to the very fact that the access to information request that has been made), and if disclosed to them would be an undue gain...

Finding, recruiting and retaining key employees of the calibre that we have and that are needed to produce winning proposals and manage successful projects is a time consuming and costly enterprise. If the [proposal] is disclosed, our competitors will not have any expenses related to the search for these types of employees, as they will be listed for them in the [proposal]. Consequently, our competitors will be able to use the money they saved in the search for these employees, on salaries for them.

Please note that recruitment costs are significant. In some cases, job recruitment firms charge fees of up to 30% of an employee's salary for the first year. Our competitor's ability to offer inflated salaries to our employees because of the money they save on job searching is an undue gain and we ask that it be prevented by not allowing the disclosure of the [proposal].

Analysis/Findings

Based upon my review of the undisclosed portions of the records and the parties' representations, I find that section 17(1)(c) does not apply. With respect to the records that include information about the affected party's employees, I have found above that the employment history of the employees is personal information and is not to be disclosed to the appellant, in accordance with his representations. However, I did find above that the names of the employees who are designated to work on the Project, their professional designations, their job titles, and any general descriptions of their assigned tasks or responsibilities for components of the Project, as well as where they fall in reporting structures, qualifies as their business, not their personal, information.

Concerning the claim by the affected party that its employees will be hired away from it, if this information is disclosed, these types of concerns have been addressed in prior orders by this office and have not been accepted [Order PO-1818, PO-1816 and PO-2637]. Similarly, in the specific circumstances of this appeal, in my view, I have not been provided with the requisite detailed and convincing evidence to support a finding that an undue loss or gain will result from the disclosure of this information. Rather, I find that this information is general information about the qualifications and expertise of employees that would be made available to anyone interested in hiring the affected party for a project. In my view, it is not reasonable to assume that the names and experience of key players and experts in the field are not known to others in the same industry and it is certainly not reasonable to assume that this type of information is only known to an employee's employer [Order PO-2637].

In fact, the affected party's own website and in the records already disclosed to the appellant, include the names of some of the affected party's employees, their professional designations, titles, a general descriptions of their assigned tasks or responsibilities for the affected party as well as where they fall in reporting structures.

As stated by Adjudicator Catherine Corban in Order PO-2637:

Clearly, while a recruitment firm or competitor may use a list of names and positions of specialists on an RFP to recruit candidates it is certainly not the only manner in which to gather contact and background information about the affected party's employees. In my view, contact information about key industry players can also be obtained by internet research, networking, advertising and other such methods...

Secondly, in my view the argument that disclosure of this type of information would result in the affected party losing staff to recruitment firms is speculative at best. The affected party has not provided any evidence to demonstrate that it is definitive that were any of these individuals contacted by a recruitment agency or competitor, as a result of the disclosure of the specific information at issue, they would choose to leave their current position. If the affected party is a competitive employer in the industry, an employee's decision to leave is more complicated than simply for the reason that he or she has been contacted by a recruitment agency or competitor. In my view, losing staff to competitors is a risk of doing business in a competitive industry.

Therefore, I am not satisfied that disclosure of this business information could reasonably be expected to result in an undue loss to the affected party by the luring away of its employees.

Concerning the remaining information at issue, I agree with the findings of Adjudicator DeVries in Order MO-2151, with respect to the applicability of section 17(1)(c), where he stated that:

In the circumstances of this appeal, I am not satisfied that the information which I have found does not qualify under section 10(1)(a) [of the municipal *Act*] qualifies under section 10(1)(c) [of the municipal *Act*]. As identified above, I have found that certain specific information concerning the proposal is exempt under section 10(1)(a) [of the municipal *Act*]. 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 RFP. In my view, the disclosure of information of this nature could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

With respect to the affected party's concerns that competitors will use the proposal as a template for future proposals, ...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.

Furthermore, concerning the pricing information, I note that much of the specific pricing information for the Project is contained in Record 13 (Appendix I to the proposal) and will not be disclosed. I have found this record to be exempt under section 17(1)(a). In any event, as per the appellant's narrowing of the scope of the appeal at mediation, the dollar values in this record are not at issue. I also have not been provided with the requisite detailed and convincing evidence that section 17(1)(c) applies to the remaining pricing information in the records. Disclosure of the records that I will order disclosed reveals only global pricing information for the entire project as opposed to the pricing information for the individual components of the Project. I am not satisfied that this general pricing information that will be disclosed as a result of this order will allow the affected party's competitors to determine how the affected party will price future projects.

In conclusion, with respect to section 17(1), I find that part 3 of the test, as outlined in paragraph (a), operates to exempt certain records or portions of records from disclosure. With respect to the remaining records or portions of records, I have not been provided with sufficiently "detailed and convincing" evidence to establish a "reasonable expectation of harm" as contemplated by paragraphs (a), (b) or (c) of section 17(1). As all three parts of the test under section 17(1) must be met, the remaining information contained in the records or portions of records do not qualify for exemption under section 17(1).

ORDER:

1. I uphold the University's decision not to disclose the following records or portions of records:
 - The personal information in the records (as highlighted in pink on the copy of the applicable pages of the records provided to the University with this order);
 - The names of staff in Appendix C (Record 10);
 - Parts of the project management work plan in Record 9 (as highlighted in green on the copy of Record 9 provided to the University with this order);
 - The sample master schedule (Record 11);
 - The sample risk register (Record 12); and,
 - The sample cost tracking log (Record 13).
2. I order the University to disclose the remaining records or parts of the records to the appellant by **February 27, 2009** but not before **February 20, 2009**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the University to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____

Diane Smith
Adjudicator

January 23, 2009 _____