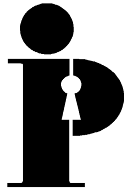

ORDER PO-2859

Appeals PA07-222, PA07-280 & PA07-281

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NATURE OF THE APPEAL:

This inquiry concerns three appeals involving two requests submitted by the same requester (the Requester) on the same date to the Ontario Realty Corporation (ORC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requests were for access to information relating to proposals submitted in response to two specific Requests for Proposals (RFP) regarding the procurement of lease space for the Ontario Provincial Police (OPP) in Prince Edward County (Request 1) and Kincardine (Request 2). In each case, the Requester sought access to the following documents:

- the ORC's scoring summary tables that it used to score and evaluate the proponents that responded to the RFPs

- copies of the successful submissions

The Requester was an unsuccessful proponent in each of the two RFP processes.

REQUEST 1

The ORC identified records responsive to Request 1 and issued an access decision in which it agreed to provide access to four records and deny access to other information pursuant to the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) and the discretionary exemption in section 18 (economic and other interests). However, before releasing records to the Requester the ORC notified four affected parties to obtain their views regarding disclosure.

Two of the parties did not respond. One affected party responded that it objected to any information related to its company being disclosed. However, as this affected party was not the successful bidder and did not score high enough to be considered in the scoring summary table, there were no responsive records relating to it. The successful bidder (Affected Party 1) responded that it had no objection to the ORC disclosing some records in their entirety, along with a portion of another record, described as Appendix I. With regard to Appendix I, Affected Party 1 agreed to disclose the total annual rent, but not a breakdown of the rent also contained in the document. Affected Party 1 also objected to the disclosure of any portion of its proposal submission.

After considering the third parties' representations, the ORC issued a final decision in which it granted partial disclosure to the Requester. Affected Party 1 did not appeal the ORC's access decision.

The Requester appealed the ORC's decision (the Prince Edward County appeal) on the basis that it should release additional information.

During the mediation stage of the appeal process, the ORC agreed to release further responsive information to the Requester. In addition, after further consultations within its office, the ORC revised its position and claimed the application of sections 14(1)(e) (law enforcement) and 20 (danger to safety and health of an individual) to various floor plans.

Ultimately, the ORC issued a supplementary decision letter and granted access to further additional records.

Also during the mediation stage, Affected Party 1 agreed to the disclosure of certain portions of its successful submission. In addition, the Requester narrowed the scope of his appeal to include only the information contained in Appendix I of Affected Party 1's proposal and the application of the mandatory exemption in section 17(1) to it. Accordingly, the undisclosed portions of Affected Party 1's successful submission and the application of all other claimed exemptions, namely sections 14(1)(e), 18, 20 and 21, are no longer at issue in the Prince Edward County appeal.

REQUEST 2

The ORC issued the Requester a decision letter, identifying records responsive to Request 2, and agreed to provide partial access to them. In denying access to portions of the records at issue, the ORC cited the application of the mandatory exemptions in section 17(1) and 21(1) and the discretionary exemption in section 18. Before releasing responsive information to the Requester, the ORC notified four affected parties to obtain their views regarding the disclosure of this information.

One of the affected parties, the successful bidder (Affected Party 2), objected to the release of any responsive records on the basis that they contain its proprietary information.

The ORC then issued a final access decision in which it agreed to provide partial access to the records at issue, maintaining its reliance on sections 17(1), 18 and 21(1) to the withheld portions. In response, Affected Party 2 appealed the ORC's decision to provide partial access and a third party appeal (the third party appeal) was opened by this office. In addition, the Requester appealed the ORC's final access decision (the Kincardine appeal).

During the mediation stage of the appeal process, the Requester agreed to remove the following information from the scope of the Kincardine appeal:

- Information withheld under section 21(1);

- Financial or banking information relating to Affected Party 2, withheld pursuant to section 17(1); and

- Signatures belonging to the principal of Affected Party 2 or any of its employees and the signatures of any sub-contractors who were consulted as part of the proposal process.

Accordingly, this information and the application of section 21(1) are no longer at issue.

Also during mediation, the ORC agreed to review its decision with a view to releasing additional portions of the scoring summary records relating to the evaluation of the RFP process in this case. Subsequently, the ORC agreed to release the scoring summary record in its entirety and issued a revised decision letter to the Requester. However, before doing so the ORC again notified all four affected parties regarding the disclosure of these records. Affected Party 2 appealed the ORC's decision to release the scoring information; however, no appeals were received from the other three affected parties.

In its revised decision, the ORC also advised that it was withholding additional records pursuant to sections 14(1)(e) and 20. In addition, the ORC confirmed that it was continuing to rely on section 17(1) to deny access to portions of the records at issue, but that it was no longer relying on section 18 to deny access to any of the records at issue. Accordingly, the application of the section 18 exemption is no longer at issue.

In response, the Requester advised that he is not seeking access to the information withheld under sections 14(1)(e) and 20. Accordingly, this information and the application of the section 14(1)(e) and 20 exemptions are no longer at issue.

The Requester confirmed that in addition to the information that the ORC had agreed to release to him, to which Affected Party 2 has objected, he is interested in gaining access to "Appendix G - Annual Rent Proposal Form" (Appendix G) pertaining to Affected Party 2's successful submission. Accordingly, the application of section 17(1) to the following records remains at issue in the Kincardine appeal:

- ORC's summary of total scores;
- Appendix G; and
- Successful submission (excluding those portions that have been removed from the scope of the appeal).

Since the two requests involve the same requester and institution, as well as similar information, I have decided to adjudicate the three appeals together in one order.

THE INQUIRY PROCESS

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the ORC on the application of the section 17(1) exemption to the information at issue in both the Prince Edward County and the Kincardine appeals. I also sought representations from Affected Party 1 on the application of section 17(1) to the withheld sections of its Appendix I, in regard to the Prince Edward County appeal, and from Affected Party 2 on the application of section 17(1) to the following records relating to its proposal in relation to the Kincardine appeal: ORC's summary of total scores, Appendix G and its successful submission.

Both the ORC and Affected Party 2 submitted representations. Affected Party 1 did not respond to my Notice of Inquiry.

I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the ORC's representations, along with a severed version of Affected Party 2's representations. Portions of Affected Party 2's representations were severed due to confidentiality concerns. The appellant chose to not submit representations.

RECORDS:

There are a total of four records at issue, described as follows:

Record #	Request #	Record Description	Exemption at Issue
1	1	Appendix I – Rent Proposal Form (appendix to Affected Party 1's proposal in response to the Prince Edward County RFP)	17(1)
2	2	ORC's summary of total scores for the Kincardine RFP	17(1)
3	2	Appendix G – Annual Rent Proposal Form (appendix to Affected Party 2's proposal in response to the Kincardine RFP)	17(1)
4	2	Affected Party 2's successful submission in response to the Kincardine RFP	17(1)

DISCUSSION:

As identified above, the ORC relies on section 17(1) to deny access to portions of the records at issue in each appeal and Affected Party 2 relies on section 17(1) to deny access to the records at issue in the Kincardine appeal.

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) states:

> 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.), leave to appeal dismissed, Doc. M32858 (C.A.)]. 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 affected 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 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 17(1) will occur.

I note that the ORC's representations deal with the application of section 17(1) to Records 1, 2, 3 and 4, while Affected Party 2's representations address only Records 2, 3 and 4. As noted above, I did not receive representations from Affected Party 1 or the appellant on the application of the section 17(1) exemption to the information at issue in the records.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders. Those that may be relevant to the current appeal have been defined in past orders as follows:

> *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].
>
> *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].

On my review of the records at issue, I am satisfied that they contain commercial and financial information.

Records 1 and 3 are annual rent proposal forms submitted by the successful proponents in response to the two RFP processes identified above. These forms contain the annual rent rate that each proponent proposed to pay, along with a breakdown of individual costs associated with the proposed rates, including net rent, realty taxes and operating costs. I find that the information at issue in these records is commercial in nature, as the records contain key proposed terms of commercial landlord and tenant relationships. I also find that this information is financial in nature in that it deals with the proposed payment of money in exchange for the lease of premises.

Record 2 is a scoring summary document created by the ORC to evaluate the performance on certain criteria of the proponents that responded to the Kincardine RFP. The record contains a chart with the names and addresses of the proponents that were being evaluated at stages III and IV of the review process, general evaluation criteria for stages I through IV, scores assigned by the ORC to each of the proponents for stages III and IV and the total score assigned to each proponent for stages III and IV. Below the chart the net present value (NPV) of each proponent's proposed gross rental rate is set out together with an assigned score. Although this is an internal ORC evaluation document, I find that it contains commercial information to the extent that some of the information at issue relates to the terms of a proposed commercial lease arrangement. I am also satisfied that this record contains financial information in that some of the information at issue provides insight into the pricing practices of the proponents to the RFP.

Record 4 comprises Affected Party 2's successful submission in response to the Kincardine RFP. It contains Affected Party 2's proposed vision for the building of an OPP detachment in Kincardine. In my view, it is clear that the contents of this record qualifies as commercial information as it contains the key elements of a proposed commercial development between the ORC and Affected Party 2 for the benefit of the Kincardine OPP.

I find that part 1 of the three-part test under section 17(1) has been satisfied for all of the records at issue.

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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is agreed upon with little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis and John Doe*, (cited above)].

Representations

The ORC submits that Records 1 and 3 are appendices to proposals submitted by Affected Party 1 and Affected Party 2 respectively in response to the Prince Edward County and Kincardine RFPs. The ORC states that these records contain the rent particulars developed and proposed by each affected party. The ORC's representations do not address the application of part 2 of the test under section 17(1) to Records 2 and 4.

Affected Party 2 echoes the submissions made by the ORC with regard to Record 3. It states that the contents of Record 3 were supplied to the ORC in a sealed envelope in support of its proposal in response to the Kincardine RFP. With regard to Record 2, Affected Party 2 submits that the information in Record 3 was used to determine the contents of Record 2 and, as a result, the information in Record 2 was supplied to the ORC. With respect to Record 4, Affected Party 2

states that the contents of this record comprises the terms of its proposal regarding the Kincardine RFP.

Analysis and findings

Based on my review of the records and the representations submitted by the ORC and Affected Party 2, I am satisfied that portions of the information at issue in Records 2 and 3 do not meet the "supplied" test under section 17(1). However, I also find that other portions of Records 2 and 3, as well as all of the information at issue in Records 1 and 4, meets the supplied test under section 17(1). I have reached these conclusions for the following reasons.

With regard to Record 2, in my view, with the exception of the names and address information of the competing proponents, the information contained in this record was not supplied within the meaning of section 17(1). Clearly, the name and address information was supplied to the ORC by the proponents. However, the remaining information in Record 2, including the ORC's evaluation criteria, along with its written assessment and scoring of each of the proponents at each stage of the evaluation process, does not qualify as information that was supplied by the proponents to the ORC. This information was created and used by the ORC to conduct its evaluation process. With regard to the information that appears below the chart, I am prepared to accept, on the evidence before me, that the NPV figures are connected to information that was supplied by each proponent in each of its proposals to the ORC. Accordingly, I find that this information was supplied by the proponents to the ORC within the meaning of section 17(1). However, I find that the point scores assigned to each NPV figure by the ORC is again information that was formulated by the ORC for the purposes of its evaluation process. Therefore, I conclude that these point scores on their own do not meet the supplied test under section 17(1).

Turning to Record 3, I find that the bottom line annual rent rate figure set out in this record also does not meet the "supplied" component of part 2 of the test under section 17(1). The disclosure of pricing information contained within a contract or proposal has been addressed in a number of previous orders of this office. However, I note that while Affected Party 2's attention was drawn to these orders, it did not provide submissions that address any of these orders or the fact the information at issue is contained in a bid proposal submitted to an institution that is subject to the *Act*. In the circumstances, and for the reasons that follow, I find that the information does not meet the supplied test under section 17(1).

In Order PO-2435, Assistant Commissioner Brian Beamish considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish rejected that position and observed that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management

> Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part 2 of the section 17(1) test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in Order PO-2453 contained the successful bidder's pricing for various components of the service to be delivered, as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under section 17(1), Adjudicator Corban stated (at page 7):

> [T]he information at issue in this appeal details the bid information prepared by the affected party in response to an RFQ issued by the Ministry and contains the successful bidder's pricing for various components of the service, the identification of a "back-up" aircraft, and the total price of the affected party's quotation bid. As the affected party was the successful bidder in the competitive selection process the terms outlined by the affected party presumably formed the basis of a contract for service between the affected party and the Ministry.
>
> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

In my view, this excerpt from Adjudicator Corban's reasons in Order PO-2453 emphasizes that the exemption in section 17(1) is intended to protect immutable information belonging to an affected party that *cannot* change through negotiation, not that which could, but was not, changed [see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); Orders PO-2371, PO-2433 and PO-2435].

I agree with the reasoning articulated in the orders excerpted and discussed above, and apply it in my analysis of Record 3.

Record 3 contains the bottom line annual rent rate that was proposed by Affected Party 2 in response to the Kincardine RFP and accepted by the ORC. As Affected Party 2 was the successful bidder in the competitive selection process, I am satisfied on the evidence presented that the annual rent rate specified by Affected Party 2 in Record 3 presumably formed the basis of a contract for service between Affected Party 2 and the ORC. My conclusion is buttressed by the fact that the equivalent information in Record 1 was disclosed to the Requester with the consent of Affected Party 1. Accordingly, I find that annual rent rate portion of Record 3 does not meet the supplied test under section 17(1).

However, with regard to the breakdown of the individual costs associated with the proposed annual rate in both Records 1 and 3, including net rent, realty taxes and operating costs, I find that the disclosure of this information would permit accurate inferences to be drawn with respect to underlying non-negotiated confidential information supplied to the ORC by the two affected parties in this case. I am satisfied that this information consists of the affected parties' underlying costs and I, therefore, find that it meets the supplied test under section 17(1).

Record 4 consists of Affected Party 2's proposal to the ORC in response to the Kincardine RFP. It contains, amongst other things, Affected Party 2's vision for the project in response to the ORC's assessment criteria. Although it is an established fact that Affected Party 2's proposal was accepted by the ORC, unlike the annual rent rate in Record 3, it is not clear what if any portions of this proposal document comprise terms of a contract between the ORC and Affected Party 2. Accordingly, on the basis of the evidence before me, I accept that Record 4 meets the supplied component of part 2 of the test under section 17(1).

In confidence

In order to satisfy the "in confidence" component of part 2, 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]

Representations

The ORC states that it understood that the information contained in Records 1 and 3 was submitted in confidence by the affected parties in support of their respective proposals.

Speaking broadly about the information contained in the proposal documents it received from the proponents, including all appendices, the ORC states that the affected parties had a reasonable expectation of confidentiality based on the treatment of the proposals themselves by the affected parties. The ORC states that at the time the proposals were submitted they were sealed in separate envelopes and delivered directly to a designated official at the ORC. The ORC submits that it has consistently treated this information as confidential. In support of its position, the ORC states:

> No part of the proposals, including the appendices, were released to the public and there was an implicit understanding on the part of the ORC and the proponents that the proposals and appendices would only be circulated to members of the ORC, its agents and representatives, and only for evaluation and/or payment purposes.

Affected Party 2 reiterates much of what the ORC has said regarding the confidentiality of the information contained in the records that affect its interests, namely Records 2, 3 and 4. Affected Party 2 states that Records 3 and 4 were provided to the ORC in sealed envelopes that were marked "confidential" and that by taking these steps, it intended that the information contained in these records would be held in confidence. Affected Party 2 also relies on a clause found in the Kincardine RFP, titled "Disclosure Information to Advisors", which states:

> I/We hereby consent, pursuant to subsection 17(3) of [the Act], to the disclosure, on a confidential basis, of this proposal by ORC to ORC's advisors including but not limited to the ORC Representative and occupant, retained for the purpose of evaluating or participating in the evaluation of this proposal.

In relying on this clause, the Affected Party 2 states that it "explicitly agreed to allow the release of [Record 4] for the purposes of evaluating the proposal only."

With regard to Record 2, Affected Party 2 suggests that because this record contains information that is connected to Record 3, the information contained within Record 2 must also be viewed as having been supplied in confidence.

Analysis and findings

Based on my review of the information in Records 1, 2, 3 and 4 that I have found meets the supplied test and the representations submitted by the ORC and Affected Party 2, I am satisfied that the information at issue in these records was supplied with a reasonably held expectation of confidentiality within the meaning of that aspect of part 2 of the test under section 17(1).

As stated above, the information at issue in Records 3 and 4 contains elements of Affected Party 2's proposal to the ORC in response to the Kincardine RFP. Both the manner in which Affected Party 2 submitted these documents to the ORC (in sealed envelopes marked "confidential") and the wording of the Kincardine RFP, which states that disclosure would be limited to ORC advisors for evaluation purposes, lead me to conclude that this information was supplied in confidence to the ORC.

With regard to Record 2, I am satisfied that it contains information derived from Record 3 that was supplied with a reasonably held expectation of confidentiality to the ORC. Accordingly, I find that it meets the "in confidence" component of part 2 of the test under section 17(1).

As stated above, Record 1 was submitted as an appendix to Affected Party 1's proposal in response to the Prince Edward County RFP and is similar in form and content to Record 3. Although I have not heard directly from Affected Party 1, I am satisfied that, like Affected Party 2 in relation to Record 3, Affected Party 1 supplied this record to the ORC with a reasonably held expectation of confidentiality as part of its proposal in response to the Prince Edward County RFP. I find that it too was supplied in confidence within the meaning of part 2 of the test under section 17(1).

Part 3: harms

Having found that portions of Records 2, 3 and 4 do not meet the supplied component of part 2 of the test under section 17(1), I am not required to consider the application of the part 3 "harms" test to that information since all three parts of the test under the section must be met for the exemption to apply. However, for the sake of completeness, I will consider the application of the part 3 harms test to all of the undisclosed information in Records 1, 2, 3 and 4, including those portions that I have found meet parts 1 and 2 of the test under section 17(1), as well as those portions that I have found do not meet the part 2 supplied test.

To meet the "harms" test under section 17(1), the institution and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The 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].

ORC's representations

The ORC states that in addressing the records at issue, it attempted to take a balanced approach, recognizing its "responsibility to operate in an open and transparent manner" and "be accountable to the taxpaying public for the use of public funds relating to the payment for certain services" it procures while also safeguarding the proprietary information of the affected parties in order to protect their competitive positions. In striving to meet this objective, the ORC submits that it decided to partially disclose information in the records and to withhold information that exposed the affected parties' unique pricing strategies and methodologies.

Records 1 and 3

With regard to Records 1 and 3, the ORC states that it did not view the annual rent rate figures contained in these records as sensitive proprietary information. However, the ORC submits that the rental rate breakdowns, including amounts for net rent, realty taxes and operating costs, are unique to the affected parties and that competitors could use this information as a guide to tailor their own rental rates to those of the affected parties, giving competitors a "significant competitive advantage" within the meaning of section 17(1)(a) in pursuing future work. The ORC submits that the release of the rental rate breakdowns would "significantly prejudice [Affected Party 2's] competitive position, negotiations and commercial interests, given the current competitive climate in the real estate industry, particularly with respect to leased lands." The ORC also submits that disclosing the rental rate breakdowns could reasonably result in the harms contemplated by section 17(1)(b), to the extent that leasing companies would become hesitant to bid on other ORC projects in the future, for fear that the proprietary information underlying their total rent rates would be publicly disclosed. The ORC also submits that disclosing the rental rate breakdowns would result in undue loss and gain within the meaning of section 17(1)(c). The ORC states that the affected parties would suffer undue loss since their competitors could use this information as a basis for fixing their own rental rates and the appellant and other competitors would experience undue gain by having the use of this information in future competitions.

Record 2

The ORC states that it had decided to disclose this record in its entirety to the Requester. The ORC justifies its decision on the basis that the record is an internal ORC evaluation scoring sheet, prepared and used solely by the ORC to reflect a proponent's scores and provide a comparison with competitors' scores. The ORC states that the information contained in this record shows the total number of points for each proponent as calculated and allocated by the ORC pursuant to its evaluation process. The ORC adds that the scores that are documented in the record do not reveal information that falls within the section 17(1) exemption.

Record 4

The ORC submits that section 17(1) does not apply to the information remaining at issue in Affected Party 2's successful submission. The ORC states that the remaining information consists of "general" information relating to Affected Party 2 including its "history and description, project experience and qualifications, information about past comparable projects as well as general introductory information including a cover letter and table of contents." The ORC views this information as general in nature that "does not appear to reveal information that is unique to [Affected Party 2].

Affected Party 2's representations

Affected Party 2 has provided representations on the harms component of the three-part test under section 17(1) with regard to Records 2, 3 and 4, which are the three records that involve its interests. It has provided similar representations for each of the three records.

Referring to the language in section 17(1)(a), Affected Party 2 submits that disclosure of these records will "significantly prejudice" its competitive position in "all future RFPs because [its] pricing practices will be known by the Requester, while the pricing practices of the Requester will not be known by [it]." With particular reference to Record 4, Affected Party 2 submits that disclosure would significantly prejudice its competitive position as the Requester would be able to "duplicate proprietary methods and techniques used by [it] to implement ecologically friendly and energy conservation methods in [its] buildings thereby [reducing its] competitive advantage." Affected Party 2 also asserts that disclosure will interfere with its contractual negotiations with other potential tenancy partners, who will have expectations for the same rental pricing and ecologically friendly and energy conservation measures that were offered and accepted by the OPP for the Kincardine RFP.

With regard to section 17(1)(b), Affected Party 2 submits that if the information at issue in these records is disclosed it will no longer participate in and respond to ORC RFPs and it will withdraw any proposals currently being considered by the ORC. Affected Party 2 submits that it is in the public interest that similar information continues to be supplied to the ORC since it has a proven track record and long standing relationship with the ORC as a landlord. Affected Party 2 suggests that if it no longer participates in the ORC's RFPs, future RFP processes will be less competitive and result in tenancy agreements that are less beneficial to the ORC.

Finally, Affected Party 2 submits that disclosure of the contents of these records would result in the transfer of greater than 50 years of professional knowledge and experience, resulting in undue loss to it and undue gain to the Requester, as contemplated by section 17(1)(c).

Analysis and findings

Having carefully reviewed the records and the representations received from the ORC and Affected Party 2, I find I am not persuaded that disclosing the information at issue in the records could reasonably be expected to result in any of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*, with two notable exceptions.

The exceptions are the rental rate breakdowns that appear in Records 1 and 3. I concur with the views expressed by the ORC that the rental rate breakdowns, including amounts for net rent, realty taxes and operating costs, are unique to the affected parties. I accept that competitors could utilize the breakdown figures and formulas as a template to tailor their own rental rates to meet or undercut those proposed by the affected parties. I find that this would provide these competitors with a significant competitive advantage within the meaning of section 17(1)(a) in bidding on future projects. Accordingly, I find that the rental rate breakdowns in Records 1 and 3 qualify for exemption under section 17(1)(a).

However, I am not satisfied that the other portions of the records remaining at issue qualify for exemption under sections 17(1)(a), (b) or (c).

I agree that disclosing information relating to an RFP process must be approached in a careful way, applying the tests as developed over time by this office while appreciating the commercial realties of the RFP process and the nature of the industry in which the RFP occurs [see Order MO-1888]. Each case must be considered independently, with a view to the quality of the evidence presented and the impact of other factors, such as the positions taken by all affected parties, the passage of time, and the nature of the records and all of the information at issue in them. As well, the strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability. The importance of transparency and government accountability is a key reason for requiring "detailed and convincing" evidence under section 17(1), as articulated by Assistant Commissioner Brian Beamish in Order PO-2453:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385). Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

> …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP, there would be no meaningful way to subject the operations of the project to effective

> public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

With regard to the annual rental rates in Records 1 and 3, which I have found do not meet the supplied test, I agree with the ORC that this is not sensitive proprietary information. The annual rental rates are contractual terms that, with the passage of time, are of limited historical value. Both the Prince Edward County and Kincardine RFP processes were concluded more than three years ago, with Affected Party 1 and Affected Party 2 the successful proponents respectively. The new OPP detachments that were the subject of these RFPs were completed in 2007. The representations provided by Affected Party 2 make vague reference to concerns that the disclosure of its "pricing practices" will result in the harms enumerated in sections 17(1)(a), (b) or (c). However, in my view, Affected Party 2 has not provided sufficiently detailed and convincing evidence as to how the disclosure of the actual annual rental rate set out in Record 3 would result in the harms contemplated by those sub-sections. I have no evidence to suggest that this information would be of any value to competitors today as the economic conditions, real estate market and needs of public institutions have likely changed through the passage of time. In addition, the fact that Affected Party 1 consented to the release of this information merely bolsters the view that this information is not sensitive proprietary information. Based on the evidence before, I find that the annual rental rates in Records 1 and 3 do not qualify for exemption under sections 17(1)(a), (b) or (c).

Similarly, I find that the scoring information in Record 2 does not qualify for exemption under sections 17(1)(a), (b) or (c). I accept that this is an internal evaluation document that was created by the ORC as an evaluation tool to assess the proponents that had made it as far as stages III and IV of the Kincardine RFP process. I acknowledge that the record contains the NPV amounts for each of the evaluated proponents and that this information can possibly be linked to their annual rental rates. However, having concluded that the annual rental rates do not qualify for exemption under section 17(1), I see no basis for concluding that the NPV amounts should otherwise qualify for exemption under sections 17(1)(a), (b) or (c). I find it noteworthy that while all of the proponents listed in this document were notified and invited to make submissions by the ORC on the disclosure of the contents of this record, only Affected Party 2 objected to disclosure. Furthermore, while Affected Party 2 has reiterated its objection to disclosure in its representations, it has failed to provide the type of detailed and convincing evidence that demonstrates how the disclosure of the information in this record would result in the harms set out in sections 17(1)(a), (b) or (c). I will order the disclosure of this record in its entirety, including the names and address information for the proponents identified in the record.

Finally, for many of the same reasons behind my finding that portions of Records 1 and 3 and all of Record 2 do not qualify for exemption under section 17(1), I am not persuaded that disclosure

of any of Record 4 would result in the harms contemplated by sections 17(1)(a), (b) or (c). I find portions of the information at issue in this record to be general in nature, describing the Affected Party 2's team, including its background and qualifications. And, while the majority of the document outlines the details of Affected Party 2's proposal in response to the specific requirements in the RFP, I note that much of this information is generic in nature, or of a public nature. For example, I find that those portions of the proposal that address the ecologically friendly and energy conservation measures proposed by Affected Party 2 are rather generic and well established within the public domain. This information does not, on its own, reveal proprietary methods and techniques and Affected Party 2 has failed to provide the requisite detailed and convincing evidence to support its contention that disclosure of this information would result in the harms contemplated by sections 17(1)(a), (b) or (c). In my view, the representations provided by Affected Party 2 are at best general in nature and speculative as to the likelihood of harms in the event of disclosure. Coupled with the age of the proposal and the fact that the project has long since been completed, I conclude that the interests of transparency and government accountability far outweigh any possible harms that might occur upon disclosure. Accordingly, with the exception of the information in Record 4 already identified above in the Background section of this order as having been removed from the scope of this inquiry, I will order the disclosure of Record 4 to the Requester.

ORDER:

1. I order the ORC to disclose Record 2 to the Requester in its entirety.

2. I order the ORC to disclose portions of Records 1, 3 and 4 to the Requester by **February 3, 2010** but not before **January 28, 2010**, in accordance with the highlighted version of these records included with the ORC's copy. To be clear, the ORC should not disclose the highlighted portions of this record.

3. In order to verify compliance with Provision 2, I order the ORC to provide me with severed copies of Records 1, 3 and 4.

4. I remain seized of this matter to address any compliance issues.

Original Signed By: December 24, 2009
Bernard Morrow
Adjudicator