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

Reconsideration Order PO-2879-R

Appeals PA08-12 and PA08-13

Order PO-2772

Ministry of Transportation

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BACKGROUND:

This order sets out my reconsideration decision in relation to Order PO-2772, which dealt with three access requests made by the appellant to the Ministry of Transportation (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requests were for procurement-related information about Ontario's new driver's licences and health cards. Four companies submitted bids as part of the procurement process.

The bidders also submitted prototype cards. The Ministry engaged two different consultants to test the security features of the cards. The records at issue relate to the testing conducted on the cards of one bidder (referred to in this order as Vendor C).

One of the consultants is a private sector entity (the "testing consultant'). The test results it prepared for the Ministry were at issue in Appeal PA08-12. Before responding to the initial request, the Ministry notified the testing consultant and subsequently denied access to the records in their entirety under sections 14(1)(c),(i),(l) (law enforcement/security), 15(a) (relations with other governments), section 17(1)(a),(b),(c) (third party information) and 18(1)(d) (economic and other interests). The Ministry subsequently withdrew its reliance on sections 14(1)(c) and 15(a) in Appeal PA08-12.

The other consultant is the Canadian Document Integrity Technical Working Group (the "Working Group"), whose members are employed by Passport Canada, the Canada Border Services Agency and the RCMP Forensic Laboratory Services. In essence, therefore, this consultant is a public sector entity. The reports it prepared for the Ministry were at issue in Appeal PA08-13. At the request stage, the Ministry notified the Working Group and subsequently denied access to the reports under sections 14(1)(c),(i) and (l), 15(a) and (b) and 18(1)(d) of the *Act*. In Appeal PA08-13, the Ministry did not claim the third party information exemption found at section 17(1) of the *Act*, which is intended to protect private business interests.

Although the requests were broadly worded when they were originally submitted to the Ministry, the appellant significantly narrowed them in the representations it provided during the inquiry into the appeals, prior to the issuance of Order PO-2772.

The narrowed requests focus on whether Vendor C's bid complied with a specific requirement of the Ministry's RFP process, which the appellant called the "mandatory substrate requirement" or "MSR." The MSR dictated that each bidder's proposed driver's licence and health card must be composed of the same substrate. According to the RFP issued by the Ministry, this requirement is self-evaluated; in other words, the Ministry would measure compliance based solely on the bidder's assurance that its proposed cards complied. Bidders indicated compliance by ticking a box on the proposal form.

As part of the exchange of representations process in the inquiry, I provided the appellant's representations to the Ministry, which responded to the narrowed requests by disclosing information that had been at issue in Appeals PA08-12 and PA08-13. This disclosure was made by the Ministry without prior notice to this office. At an earlier point in the inquiry, the Ministry had also disclosed information that was responsive to the original request in Appeal PA08-12, again without prior notice to this office.

In Order PO-2772, taking these disclosures into account, I found that the Ministry had already disclosed all of the information in Appeal PA08-12 that was responsive to the narrowed request in that case. In Appeal PA08-13, I identified one undisclosed record that appeared to contain additional responsive information. I also found that the exemptions claimed by the Ministry in Appeal PA08-13 (which, as noted, did not include the third party information exemption in section 17(1) of the *Act*) did not apply, and I ordered the additional responsive information disclosed. Because the Ministry had not claimed the section 17(1) exemption in that appeal, and had not notified Vendor C, I did not invite submissions from Vendor C prior to issuing Order PO-2772. I stayed Order PO-2772 pending the outcome of this reconsideration, and the responsive information I identified in Appeal PA08-13 has therefore not been disclosed.

Other than the question of whether Order PO-2772 should be reconsidered, based on the criteria found in section 18.01 of this office's *Code of Procedure*, the main issue in this reconsideration is what information in the records would be responsive to the narrowed request in Appeals PA08-12 and 13. This includes the question of whether the information I originally ordered disclosed is actually responsive, and as well, whether any additional information in the records is responsive. If additional responsive information is found to exist, I must consider the further issue of whether it is exempt from disclosure.

I explained the issue of responsiveness in my initial letter inviting representations in this reconsideration, as follows:

> … I have determined that Order PO-2772 may contain an error that would fall within the grounds for reconsideration set out in section 18.01 of the *Code*.…
>
> …
>
> The possible error in the order appears on page 8, in the section setting out the finding that one page of one of the records is responsive to the appellant's amended request. This portion of the order reads as follows:
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> …
>
> > [A]s part of my detailed review of the records, I looked for any information referring to whether Vendor C complied with the MSR, requiring that both the Driver's Licence and the Health Card consist of the same substrate, as mentioned in the narrowed request. With one exception, I find that there is no information of this nature in the records.
> >
> > The exception appears on the final page of one of the reports identified by the Ministry. The report is entitled, "Ontario Drivers' Licence/Health Card 2007 Bidder "A" and "C" Comments and Suggestions from [the Working Group]." *The information appears*

> *in a table, under the heading "Backing," and it is clear that it identifies the substrate material used in the Driver's Licenses and Heath Cards whose images appear on that page.* The Working Group has confirmed that lines 6 and 8 of the table relate to the prototype Driver's Licence and Health Card submitted by Bidder "C." *As the information about "backing" in lines 6 and 8 of the table addresses the question of whether the same substrate is used by Bidder "C" in its prototype Driver's Licence and Health Card*, I find that it is responsive to the appellant's amended request. [Emphasis added.]

As noted, this record was at issue in Appeal PA08-13, and at the beginning of the reconsideration process, the reconsideration therefore only related to that appeal. However, the Working Group made the following statement in its representations on the reconsideration:

> … the term "Backing" referred to on the page in question only in part refers to the "substrate" of the cards which are in question. The substrate is actually the "Face" and the "Backing" of the cards.

For its part, the appellant's initial representations on the reconsideration stated that "any information about the substrate – *e.g.* the base material, card construction, backing material or layers – of either or both of vendor C's cards" is responsive.

In addition to information about "backing," the same page that I ordered partially disclosed in Order PO-2772 (which forms part of a report at issue in Appeal PA08-13) also contains information about the "face" of the cards. In addition, the records in Appeal PA08-12 contain undisclosed information about the "magnetic stripe." The submissions provided in the reconsideration by the appellant, and in particular, the Working Group, therefore raise the question of whether I interpreted the appellant's amended request too narrowly in Order PO-2772, and whether there might in fact be additional responsive information, and I invited representations on that subject.

During the reconsideration, I invited representations from the testing consultant, the Working Group, the Ministry, the appellant and Vendor C. All parties responded with representations, which were exchanged to permit parties to provide representations in response to other parties' submissions on subjects in which they had an interest. Some portions of the representations were not shared for reasons of confidentiality.

Since Vendor C had not participated in the previous inquiry, I also sent it a copy of Order PO-2772, and as with the other parties, I invited it to provide representations on the issue of responsiveness. In addition, I invited Vendor C to provide "any additional information pertinent to the issues raised." Vendor C provided detailed representations on responsiveness, and on the potential application of the section 14 and 17 exemptions to the requested records.

Vendor C also raised several additional issues, which I will now address.

ADDITIONAL ISSUES RAISED BY VENDOR C:

Notice to Vendor C under section 28 of the *Act*

In its representations on the reconsideration, Vendor C argued that it should have been notified by the Ministry under section 28 of the *Act* before any records were disclosed. I invited, and received, representations on this issue from the Ministry in response to Vendor C's representations. I then invited and received reply representations on this issue from Vendor C.

Section 28 of the *Act* states, in part:

> (1) Before a head grants a request for access to a record,
>
> > (a) that the head has reason to believe might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; …
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.
>
> (2) The notice shall contain,
>
> > (a) a statement that the head intends to release a record or part thereof that may affect the interests of the person;
> >
> > (b) a description of the contents of the record or part thereof that relate to the person; and
> >
> > (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part thereof should not be disclosed.

Section 17(1) 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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

In Order PO-1694-I, former Assistant Commissioner Tom Mitchinson commented on the application of section 28. He stated:

> In my view, use of the word might in section 28(1)(a) creates a low threshold in determining whether notification is required.
>
> In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record **might** contain one of the types of information listed in section 17(1) (ie. a trade secret or scientific, technical, commercial, financial or labour relations information). If it does, the head must then consider whether disclosure of this information **might** affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1). For example, if the head has reason to believe that the information **might** have been supplied implicitly or explicitly in confidence, then notification is required. Similarly, if the head has reason to believe that disclosure of the record **might** result in one or more of the harms identified in section 17(1), then notification must also be given.
>
> If a head concludes that a record **might** contain section 17(1)-type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a). The potential for harm is a determination that must be made in the individual circumstances of a particular request and, in my view, the notification requirements of section 28 were designed to allow affected persons an opportunity to provide input on this issue before a decision is made regarding disclosure.

In Appeal PA08-12, the information relating to Vendor C that was disclosed by the Ministry consists of the scores awarded by the testing consultant for Vendor C's driver's licence and health card prototypes for each of fifteen "basic security elements." In addition, once it received the appellant's representations, in which the appellant narrowed the request to information about the substrate, as already discussed, the Ministry disclosed information identifying the substance of which the two cards are constructed, and a sentence comparing the security effectiveness of Vendor C's two prototype cards.

In Appeal PA08-13, the only information that the Ministry disclosed concerning Vendor C consists of references to "Bidder 'C'" on the cover page of the Working Group's Document Assessment, and in two headings within the assessment, one for Vendor C's driver's licence and one for Vendor C's health card. The information disclosed reveals only that these cards were examined by the Working Group, and nothing more. This does not meet any of the three requirements for exemption under section 17(1), outlined above, and for that reason, it is clear that notice under section 28 was not required in relation to this information, and I will therefore not consider this issue further for the information disclosed by the Ministry in Appeal PA08-13. The issue of whether any *undisclosed* responsive information in Appeal PA08-13 is exempt under section 17(1) is a separate matter, addressed in my discussion of whether that exemption applies, below.

Vendor C's representations also refer to Appeal PA08-21, in which parts of an e-mail chain were disclosed by the Ministry. The e-mails concerned the contents of the Ministry's proposed RFP and proposed testing process. These records predate the closing date for submissions named in the RFP, and the portions disclosed do not refer to the submission of any bidder. Vendor C is not mentioned in any information disclosed by the Ministry in this appeal, even inferentially. In my view, Vendor C's interests were not engaged by this disclosure and I will not refer to Appeal PA08-21 again.

Mootness

In my view, it is highly significant that the records for which Vendor C claims it should have had notice under section 28 have already been disclosed to the appellant. This invites consideration of whether the issue of notice under section 28 is moot.

The leading case on the issue of mootness is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. The Supreme Court of Canada described the test for mootness as follows (at para. 15):

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient

> must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

Given that the information for which Vendor C claims it should have had notice under section 28 has already been disclosed by the Ministry, it is not clear what effective remedy could be granted. In that regard, it is telling that Vendor C does not expressly ask for or specify a remedy for not having received notice under section 28. In my view, no such remedy exists. I therefore conclude that there is no live issue between the parties concerning this issue, and I find it to be moot.

Even if an issue is moot, an adjudicative body may still exercise its discretion to consider it. The criteria to be applied in this exercise of discretion are set out in *Borowski*. In its introduction to the criteria to be applied in exercising this discretion, the Court observes (at para. 29) that "… it is not surprising that a neat set of criteria does not emerge from an examination of the cases." The Court goes on to state (at para. 30):

> In formulating guidelines for the exercise of discretion in departing from a usual practice, it is instructive to examine its underlying rationalia. To the extent that a particular foundation for the practice is either absent or its presence tenuous, the reason for its enforcement disappears or diminishes.

Where, as in this case, the issue is found to be moot, the "usual practice" referred to by the Court would be a decision not to proceed.

The Court identifies three essential grounds for the mootness doctrine that should be considered in deciding whether to follow the "usual practice" of not proceeding with a moot case, and further explains the impact of these three grounds on the exercise of that discretion (at para. 42):

> "[i]n exercising its discretion in which an appeal is moot, the Court should consider the extent to which each of the three basic rationalia for enforcing the mootness doctrine [of not proceeding with moot cases] is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

The first underlying rationale for not hearing cases that are moot relates to the adversary system of justice, and the question is whether there is a subsisting adversarial relationship. Given that this reconsideration order addresses conflicting submissions on responsiveness, and whether responsive information that remains undisclosed by the Ministry ought to be disclosed, it is clear that some adversarial context continues to exist.

In my view, however, in the context of Vendor C's section 28 argument, and in the circumstances of this case, the determination that can still provide assistance to the parties is not whether notice was required, but whether the records disclosed by the Ministry in Appeal PA08-12 were in fact exempt under section 17(1), whose purpose is to protect "informational assets" supplied in confidence to an institution by private businesses and other organizations (see *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.)).

I must, in any event, address the issue of whether section 17(1) applies to undisclosed responsive information in Appeal PA08-13, below. As part of that discussion, therefore, I will also consider whether section 17(1) would apply to the information that the Ministry has disclosed in Appeal PA08-12. Moreover, as already noted, there is no effective remedy that can be granted in relation to section 28. In my view, therefore, this criterion provides little support for exercising my discretion to consider the issue of notice under section 28, despite the fact that this issue is moot, in the circumstances of this case.

As the Court states at paragraph 43 of *Borowski*, the second factor underlying the mootness doctrine is the need to promote judicial economy. In assessing this factor, the Court assesses whether the decision "… will have practical side effects on the rights of the parties" or may affect future cases in circumstances that will be "evasive of review," which raises the question of whether adjudicating the issue would provide useful guidance for future relations between the parties, and what the likelihood might be of the issue being addressed in a future case.

In my view, this is the most significant factor here, and one which weighs against adjudicating the section 28 notice issue in the circumstances of this case. This conclusion arises from the fact that, in Order PO-1694-I, the criteria for section 28 notice have been extensively canvassed by former Assistant Commissioner Mitchinson. I see no reason to repeat that exercise here. The issue is not of a recurring nature between Vendor C and the Ministry. In addition, in terms of judicial economy, the analysis I will conduct under section 17(1), as discussed above, will closely parallel the analysis I must do under this exemption in Appeal PA08-13, and will therefore not consume significant adjudicative resources.

The third underlying rationale for the mootness doctrine, identified in *Borowski* as relevant in deciding whether an adjudicator should exercise discretion to adjudicate an issue that has been found to be moot, relates to the "efficacy or effectiveness of judicial intervention." In that case, the Court found that adjudicating the issue before it would depart from the traditional role of the Court because it would "… intrude on the right of the executive to order a reference and pre-empt a possible decision of Parliament by dictating the form of legislation it should enact."

No such considerations arise in this case. As regards the efficacy of intervention in the circumstances of this reconsideration, the fact is that the criteria relating to section 28 notice are enunciated in the statute itself, and have been previously interpreted and explained by this office in Order PO-1694-I, as already discussed.

Accordingly, weighing the factors identified in *Borwoski*, I conclude that it would not be appropriate to exercise my discretion and adjudicate the issue of section 28 notice in this case, because no effective remedy could be granted and the issue has already been addressed in previous jurisprudence of this office. As noted, however, I will consider whether section 17(1) would apply to the information disclosed by the Ministry in Appeal PA08-12 in the discussion of that exemption later in this order.

Notice by this office under section 50(3)

Vendor C also argued that it should have had notice of the appeal prior to the issuance of Order PO-2772. This type of notification is dealt with in section 50(3) of the *Act*. If a party should have had notice of an appeal, this could be a defect in the adjudication process, which is one of the grounds for reconsidering an order. For this reason, I will address Vendor C's argument that it should have had notice under section 50(3) of the *Act* in the discussion of "Grounds for Reconsideration," below.

Sharing of Representations

In its correspondence on this reconsideration, Vendor C alleged that the sharing of representations during the inquiry process "might have resulted in the disclosure of confidential information about Vendor C's cards." Vendor C went on to state that "sharing" has effectively disclosed the subject matter of the record, and that further sharing would disclose content.

After receiving this correspondence, I reviewed the representations that had been shared during the inquiry I conducted prior to issuing Order PO-2772, as well as representations shared during this reconsideration process, and determined that Practice Direction 7, issued by this office, was carefully followed throughout. The practice direction indicates that portions of representations revealing the substance of a record at issue, as well as information that would be exempt from disclosure if contained in a record subject to the *Act*, will not be shared. I am satisfied that no such information was disclosed during the inquiry or reconsideration process, and I will not refer to this issue again.

GROUNDS FOR RECONSIDERATION

As set out in section 18.03 of the *Code of Procedure*, the IPC may reconsider a decision on its own initiative. The grounds for reconsideration are set out in section 18.01 of the *Code*, which states:

> The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or

> (c) a clerical error, accidental error or omission or other similar error in the decision.

I did not receive submissions specifically linking the circumstances of this case to the grounds for reconsideration enunciated in the *Code*.

As I have already noted, my invitation to the parties to provide representations on whether the order should be reconsidered arose from what I described as a "possible error" concerning the responsiveness of part of a record in Appeal PA08-13. This error could lead to grounds for reconsideration under section 18.01(b) or (c) of the *Code*.

In addition, as discussed above, Vendor C objected to the fact that it did not receive notice of the appeals until after Order PO-2772 was issued. This could be a fundamental defect in the adjudication process as mentioned in section 18.01(a).

As noted in previous orders, the *Code* provisions pertaining to reconsiderations are a summary of the position at common law, which continues to apply to reconsiderations undertaken by this office. The leading case on the ability of a tribunal to reconsider a decision is the Supreme Court of Canada's decision in *Chandler v. Alberta Assn. Of Architects* (1989), 62 D.L.R. (4th) 577 (S.C.C.). The issue in that case was the application of the common law principle of *functus officio* to tribunals. This principle holds that once a matter has been determined by a decision-maker, generally speaking he or she has no jurisdiction to further consider the issue.

In *Chandler*, Sopinka J., writing for the majority, stated:

> ... As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changes its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd. v. Ross Engineering Corp., supra [[1934] S.C.R. 186].
>
> To this extent, the principle of functus officio applies. It is based however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgements of a Court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

The question of whether a record or portions of a record are responsive to a request is one that affects the limits of an appeal, as non-responsive parts are excluded from consideration. In that

sense, it could be said that an error regarding responsiveness is a "jurisdictional defect" under section 18.01(b) of the *Code*. However, this may be distinguished from the question of whether a record is excluded from the scope of the *Act*, either because it is not in an institution's custody or under its control (see section 10(2)), or because it falls within an excluded category under section 65. Clearly, the latter questions are "jurisdictional" because they circumscribe the authority of this office to order records disclosed. The question of responsiveness of records that are clearly subject to the *Act*, such as the ones at issue here, is a different matter. In my view, an error of that kind is made "within jurisdiction" and does not fit within section 18.01(b).

Turning to section 18.01(c), I note that Ontario's Divisional Court considered the ground of reconsideration known as "accidental error" in the case of *Grier v. Metro International Trucks Ltd.* (1996), 28 O.R. (3d) 67. The issue in *Grier* was how much vacation pay an employee was entitled to, and the referee adjudicating the case under the Employment Standards Act made her decision on the basis of an incorrect date provided during the course of her deliberations. The Court found that because the decision was arrived at based on what was subsequently discovered to be incorrect information, the decision was a nullity and the decision maker could reopen the matter to correct the decision.

In reaching this decision, the Court referred to Sopinka J.'s comments in *Chandler* and stated:

> I believe that the flexibility of which Sopinka J. speaks in this passage is appropriate on the present application. Under the ESA [the Employment Standards Act] the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties accidentally placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision. Moreover, if there were any doubt about this, Referee Novick expressly confirmed her reliance in her subsequent decision dealing with the request for a rehearing. In these circumstances, I think that a fair conclusion is that her first decision, like the tribunal's decision in *Chandler*, was a nullity. She intended to make a final disposition; however, that disposition was fatally tainted by her reliance on a crucial fact which both parties agree is incorrect. She should be permitted, as was the tribunal in *Chandler*, "to reconsider the matter afresh and render a valid decision". ...
>
> In the present case, the parties made a mistake. The mistake influenced the decision of the referee. I can see no compelling reason for concluding that the mistake should not be corrected and the matter placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact.
>
> In conclusion, the flexibility in the application of the principle of functus officio articulated by Sopinka J. in Chandler permits a just resolution of the issues raised on this application. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts.

As noted in Order MO-1200-R, the decision in *Grier* would appear to allow an adjudicator to reopen a case in order to correct a factual error of a fundamental nature going to the actual issue to be determined.

In the present case, the potential error in Order PO-2772 that I identified when I first invited representations on whether the order should be reconsidered was whether information about "backing" is in fact information that is reasonably related to "substrate." My conclusion on that point in Order PO-2772 was not based on statements or arguments to that effect by the parties. Rather, it was a finding I made after reviewing the records. Nevertheless, if this fundamental conclusion was in error, I conclude that it would provide a ground for reconsideration as an "accidental error" under section 18.01(c) of the *Code*, bearing in mind the comments about flexibility made by Sopinka J. in *Chandler*, because the finding in question goes to the actual issue that was being determined in the order.

In addition, as identified above, the representations I have received from the Working Group and the appellant raise the possibility that not only is information about "backing" responsive, as I found in Order PO-2772, but in addition, further information about "face" or "magnetic stripe" may be responsive. If such additional information is responsive, this would also be a fundamental error, made without specific submissions by the parties, in the nature of under-identification of responsive information, and would similarly constitute an "accidental error" in the particular circumstances of this case.

Under section 18.01(a), I have already noted Vendor C's objection to not being notified of the appeals or invited to provide representations prior to the issuance of Order PO-2772. If Vendor C was entitled to notice, this would constitute a fundamental defect in the adjudication process within the meaning of section 18.01(a).

Notice to affected parties by the Commissioner is dealt with in section 50(3) of the *Act*, which states:

> Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an interest in the appeal, including an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*, of the notice of appeal.

This section conveys the discretion on the Commissioner to notify, or not notify, a party with "an interest" in an appeal. This discretion must be properly exercised, bearing in mind relevant factors and not taking irrelevant ones into account.

In my view, the change in the appellant's request was significant in this regard. In its representations provided during the inquiry, the appellant revised and narrowed its request from a general focus about card testing to a request for parts of the records that "… address the important issue of whether Vendor C complied with the mandatory requirement that the

[driver's] license card … and health card … consist of the same substrate." In my view, this reformulation gave rise to an "interest" by Vendor C because the revised request referred to compliance with a term of the RFP.

In that circumstance, I conclude that an order to disclose information about Vendor C without inviting its representations did not accord procedural fairness to Vendor C. This was therefore a fundamental defect in the adjudication process within the meaning of section 18.01(a). This defect has, however, been corrected through this reconsideration process, because Vendor C has been invited to provide representations on responsiveness and to provide any additional information pertinent to the issues raised. Vendor C has provided substantial representations on a number of issues, including the application of sections 14 and 17 of the *Act*. I have taken the latter submissions into account in my analysis of these exemptions, below.

In the immediately following analysis of "Responsiveness of Information," I conclude that the information I ordered disclosed in Order PO-2772 was, in fact, responsive. Significantly for the purposes of this reconsideration, I also find that one additional column of information about Vendor C's cards, under the heading of "Face," is also responsive, and on the basis of the analysis above, I find that this was an "accidental error" within the meaning of section 18.01(c), providing a basis for me to reconsider and add to my findings in Order PO-2772.

RESPONSIVENESS OF INFORMATION

The Ministry's initial representations in this reconsideration state that it was not providing representations on the issue of responsiveness.

The Working Group's initial representations stated that:

> … the term "Backing" referred to on the page in question only in part refers to the "substrate" of the cards which are in question. The substrate is actually the "Face" and the "Backing" of the cards.

The appellant's initial representations state that "any information about the substrate – *e.g.* the base material, card construction, backing material or layers – of either or both of vendor C's cards" is responsive.

After receiving these representations from the Ministry, the Working Group and the appellant, I invited the Ministry to respond to the appellant's and Working Group's representations, and I also invited the appellant to respond to the Working Group's representations.

The appellant responded by stating that:

> "Any information about all or part of the substrate – *e.g.* base material, card construction, backing material or layers – of the cards is responsive. If the "Face"

> section contains such information, then, either alone or in conjunction with the "Backing" information, the "Face" information is responsive.

The Ministry responded by starting that it had reviewed the records it had received from the Working Group and found "no further responsive information."

As I have already noted, the scope of this reconsideration initially involved only Appeal PA08-13. Because the submissions of the appellant and the Working Group appeared to take a broader approach to defining information responsive to the appellant's revised request, I conducted a further review of the records in Appeal PA08-13 to see if there might be additional responsive information. In that regard, I noted that the table referred to on page 8 of the order (as quoted above) which contained information under the heading of "Backing," also contained a column under the heading, "Face."

Since the appellant had similarly amended its request in Appeal PA08-12, I also reviewed the responsive record in that case to see whether a broader interpretation of the amended request might include any further information in that record. I found a reference to the magnetic stripe used in the cards at page 82 of the record in Appeal PA08-12. At this point, therefore, the scope of the reconsideration expanded to potentially include Appeal PA08-12.

I then invited the appellant, the Ministry and the testing consultant (who, as noted above, prepared the record at issue in Appeal PA08-12) to provide representations on whether information about the magnetic stripe is responsive. At the same time, I also invited Vendor C to provide representations in relation to responsiveness and to provide "any additional information pertinent to the issues raised."

The appellant responded with submissions to the effect that the magnetic stripe is "applied to the cards as a layer" and therefore also responsive. The Ministry pointed out that information about the magnetic stripe could not be responsive because the RFP actually requires the magnetic stripes to be different, and therefore, the magnetic stripe would have nothing to do with the MSR referenced by the appellant in its amended request.

Vendor C replied by submitting that "substrate" does not include materials, such as the magnetic stripe, that are added to the basic underlying structure. The testing consultant also submitted that the magnetic stripe had "little to do" with card substrates.

I then provided Vendor C with a further opportunity to provide more general submissions on responsiveness and once again invited it to provide any information pertinent to the issues raised in this matter.

Vendor C then provided further, detailed representations on the issue of responsiveness. These representations state, in part:

> … Order PO-2772 describes a table with a heading, "Backing", that the Order erroneously equates with "*[identifying] the substrate material*" used in both card types submitted by [Vendor C]. It is important to note, however, that the "backing" of the card is merely the thin over-laminate film applied to a side of the card substrate, and the information in the table under the heading "Backing" should not therefore be thought to "identify the substrate material". "Backing" information is not "substrate" information. …
>
> By equating "backing" material with "substrate" material, the Order makes certain assumptions as to the meaning of these terms that are incorrect. There are large quantities of literature, and many patented processes, that deal with the components and processes for manufacturing these types of cards. What appears to the naked eye to be a card made up of a single piece of plastic is, in fact, a laminated product that contains a number of layers of durable material bonded, front and back, to other adjacent layers, some of which may comprise or include the substrate. Because it deals with "backing" and not "substrate", [Vendor C] submits that the record at issue is not responsive to the issue on appeal….

Later in its representations, Vendor C states:

> The manufacture of identity cards, or cards of that type, involves a number of steps. The substrate, which is contained within the core of the card, is covered with laminated material which is bonded to the card front and back. The technique for laminating these layers, and rendering them stable, makes them basically indistinguishable as individual layers to the naked eye when the card is looked at. However, the card is manufactured through a process that involves a number of steps including design, lamination, cutting, printing and personalization. The laminate layer that forms the surface of the reverse of the card may be referred to as the "backing".
>
> …
>
> As stated above, there are many patented processes for manufacturing laminated identity cards and cards of like nature. Attached for illustrative purposes is an example of one such patent that describes a process for applying a liquid coating material to a sheet substrate, and subjecting it to heat and pressure to obtain a smooth outer surface that is durable and abrasion resistant.
>
> Order PO-2772 therefore errs when it equates the term "Backing" to "substrate". [Vendor C] submits that the term "Backing" refers to the outer layer that is laminated onto other layers, including the substrate, and is not the substrate material itself. As such, the document is not responsive to the request and should not be produced.

The U.S. Patent provided by Vendor C with its initial representations states:

> … High quality transaction cards, such as those used for credit cards, are typically made by printing or otherwise forming image information on a plastic sheet substrate…. After image formation, a thin over-laminate film is applied to both sides of the sheet substrate.

Vendor C subsequently affirmed that its representations relating to "backing" would also apply to information about the "face" of the cards. At that time, Vendor C provided a further U.S. Patent, which states:

> It is an object of this invention to provide a composite ID card stock and process of using same which has an effective antistatic backing layer which will adhere to a polymeric core substrate.

The non-confidential portions of Vendor C's representations on responsiveness, including the passages I have just quoted, were shared with the appellant along with an invitation to provide representations in response. The appellant then submitted that information that would "directly or indirectly identify all or part of the substrate materials of either or both of Vendor C's cards" is responsive, as is any "comment, suggestion, question, recommendation or conclusion" about the substrate materials in Vendor C's cards.

The appellant further submits that:

> … it is not the case that the only information that should be considered as potentially responsive to the Appellant's revised request is information contained in the sections of the [Working Group] Reports of the Card Security and Integrity Report that precisely map to a discussion of the MSR set out in the RFP. Information relating to substrate may be contained in other sections of the [Working Group] reports or the Card Security and Integrity Report, including parts that address "face", "backing" or magnetic stripe.
>
> It is notable that the Appellant's submission that information in the sections dealing with "face" and "backing" is responsive is consistent with the position taken by the Working Group and that the Ministry has not opposed the Appellant's representations regarding the responsiveness of information in the "backing" section.

Analysis

The responsiveness of the parts of the record in Appeal PA08-13 that I ordered disclosed, and the possible responsiveness of other information in the records in Appeals PA08-12 and PA08-13, is one of the substantive issues to be determined on this reconsideration. As outlined in the "Nature of the Reconsideration" section, above, the specific issues to be determined in this

regard are whether information about "backing," "face," and magnetic stripes in the cards is responsive to the appellant's reformulated and narrowed request.

To reiterate, during the inquiry that led to the issuance of Order PO-2772, the appellant revised and narrowed its request, continuing to seek access to parts of the records that "… address the important issue of whether Vendor C complied with the mandatory requirement that the drivers' license card … and health card … consist of the same substrate."

In Order P-880, Adjudicator Anita Fineberg commented on the meaning of "responsiveness." She stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. *While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request*. [Emphasis added.]

Previous orders of this office indicate that institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134 and P-880].

In addressing this issue, it is important to note that it is not my task to assess compliance with the MSR, and that such a task is completely outside the expertise or authority of this office. Rather, I must determine what information is "reasonably related" to the amended, narrowed request. In my view, this includes anything that compares any components of Vendor C's driver's licence and health card that could reasonably be related to "substrate." Again, this does not require that I determine the precise meaning of this term, nor that I opine on whether information that is "reasonably related" to the request is, in fact, information about the parts of the card that actually comprise the "substrate." In other words, the fact that I find information to be responsive does not mean that it identifies the actual substrate of the card. It only means the information is "reasonably related" to that subject based on the evidence provided to me.

Also, as stated above, the RFP indicates that the MSR was a self-evaluated component of the bid process. Section 2.1 of the RFP, entitled, "Card Stock," includes a requirement called "Base Card," which sets out the MSR. The RFP only identifies one evaluation criterion for this portion of the RFP, namely "Proponent's stated compliance to this requirement." In other words, as I have already noted, this requirement was to be self-evaluated by bidders. This statement in the RFP supports the view that the Ministry would not have tested the prototype cards for compliance with this requirement. The records are consistent with that position, given that they

do not specifically address compliance with the MSR. Nevertheless, they will be found to contain responsive information if any of it is "reasonably related" to the composition of the substrate of the prototype cards provided by Vendor C.

The undisclosed information about "backing," "face" and "magnetic stripe" in the records that were at issue in Order PO-2772 is found in the table referred to under Appeal PA08-13, which pertains to "backing" and "face," and in the reference to the magnetic stripe at page 82 of the record in Appeal PA08-12.

As already noted, the Ministry states that the MSR does not relate to the magnetic stripe, since the RFP required different magnetic stripes to be used in the two cards, and the testing consultant who produced the record in Appeal PA08-12 also states that the magnetic stripe has "little to do" with card substrates. It is clear that, since the RFP required the two cards proposed by a bidder to have different magnetic stripes, the MSR does not apply to this component. Accordingly, given the wording of the amended request and its reference to the MSR, I find that information about magnetic stripes is not responsive. As this was the only undisclosed and potentially responsive information in the records at issue in Appeal PA08-12, that appeal need not be discussed further in assessing the issue of responsiveness.

The remaining analysis of this issue will therefore focus on whether the information identified as responsive and ordered disclosed in Order PO-2772, namely the column entitled, "Backing," from the table that formed part of the record in Appeal PA08-13, as well as the additional column in that table under the heading, "face," constitute information that is responsive to the revised request.

The evidence and argument I have received on the meaning of "substrate," and whether it includes backing and face information, is somewhat contradictory. While Vendor C provides detailed representations accompanied by documentary evidence suggesting that it does not, the Working Group submits that "backing" only in part refers to the "substrate" of the cards, and argues that the substrate is actually the "face" and the "backing" of the cards. The appellant echoes these submissions from the Working Group and notes that the Ministry did not dispute them.

It is clear that both Vendor C and the Working Group possess expertise in the area of secure cards and on the meaning of the term, "substrate." As I have already noted, however, my task does not entail determining which portions of the record actually refer to or compare the substrates of the prototype drivers' licence or health cards submitted by Vendor C, but rather to determine what information in the records is "reasonably related" to the appellant's amended request.

Given the position taken by the Working Group, and its expertise in the area, the evidence before me supports a finding that information about "backing" and "face" is "reasonably related" to the request, especially given that ambiguity is to be resolved in the requester's favour. Accordingly, I find that both of these categories of information, found in the table that is at issue in Appeal

PA08-13, are responsive to the amended request. As already noted, the determination that these components are "reasonably related" to the request does not equate to a conclusion that they actually form the substrate, or part of it. The latter determination is not for me to make. In my view, it is clear from the evidence of the Working Group that this information is "reasonably related" to the amended request.

IS THE RESPONSIVE INFORMATION EXEMPT FROM DISCLOSURE?

I must now determine whether the responsive information should be disclosed. In Order PO-2772, I have already ruled on all exemptions claimed by the Ministry in Appeal PA08-13, which did not include the third party information exemption found at section 17(1) of the *Act*, as previously stated.

The Ministry did claim the law enforcement exemptions in sections 14(1)(c), (i) and (l), and the exemptions concerning relations with other governments in sections 15(a) and (b). The Ministry provided representations to support the application of these exemptions to all of the records it had originally identified as responsive in Appeal PA08-13, which included the table whose columns under the heading of "Backing" and "Face" I have now found to be responsive. In Order PO-2772 I found that these exemptions did not apply to the information I found responsive at that time, namely the table column under the heading of "Backing."

In response to my invitation to Vendor C to provide representations in the reconsideration on any issues it considers pertinent, Vendor C argues that section 17(1) applies to information about its cards in both Appeals PA08-12 and PA08-13, and makes additional argument relating to section 14, with reference to subjects that are addressed in sections 14(1)(c), (i) and (l).

Third Party Information

This exemption is set out in section 17(1) of the *Act*, whose text is reproduced earlier in this order. For ease of reference, I am including this provision again. It states:

Section 17(1) 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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

The analysis of section 17(1) in this case has two different aspects. The first of these is the question of whether the undisclosed information in Appeal PA08-13 that I have found to be responsive is exempt under this provision. The second, as outlined in the discussion of notice to Vendor C under section 28, above, is whether the information disclosed by the Ministry in Appeal PA08-12 relating to Vendor C would have been exempt under this provision.

In this regard, it is important to bear in mind that the Ministry did not claim that the records in appeal PA08-13 were exempt under section 17(1). The Ministry did make this claim in Appeal PA08-12, but in view of the fact that it subsequently decided to disclose a limited amount of information, it is evident that it ultimately decided that this exemption, which is mandatory, could not apply to the information it released pertaining to Vendor C. The Ministry subsequently confirmed this in its representations in the reconsideration.

The amount of information at stake in this analysis is quite limited. To reiterate, the undisclosed responsive information in Appeal PA08-13 all appears on one page of the records originally identified as responsive in that appeal. It consists of part of the test results prepared by the Working Group on behalf of the Ministry, and shows the composition of two components of Vendor C's prototype driver's licence and health cards, namely the "face" and "backing" used in the cards.

The information relating to Vendor C that the Ministry disclosed in Appeal PA08-12 is, similarly, very limited. It consists of a table showing the scores awarded by the testing consultant, as the result of the testing of Vendor C's prototype cards that the testing consultant conducted on the Ministry's behalf, in fifteen identified categories. This information appears on pages 61 and 103 of the testing consultant's report. In addition, the Ministry disclosed four lines of information on pages 68 and 78 of the report, showing the composition of Vendor C's prototype cards and comparing their security effectiveness.

In assessing whether the undisclosed responsive information in Appeal PA08-13 is exempt under section 17(1), and whether the information disclosed by the Ministry in Appeal PA08-12 would be exempt under this section, I have taken into account Vendor C's representations specifically directed to the application of this exemption, as well as its representations on the issue of notice under section 28, since those representations also include extensive reference to the potential application of the section 17(1) exemption to information about Vendor C's cards.

Vendor C submits that:

> … the records at issue in these appeals relate primarily to materials and sample cards supplied by [Vendor C] to the Ministry….
>
> In its bid submission to the Ministry, [Vendor C] *explicitly specified* that the information relating to its sample cards, including information relating to the physical card construction and background, was "confidential." This was done for security and commercial reasons that are important to [Vendor C] and [its] reputation in the marketplace.
>
> The reports discussed in Order PO-2772, which are the subject of appeals PA08-12 and 13, contain confidential technical information relating to and derived from [Vendor C]'s sample cards that were submitted … to the Ministry as part of [Vendor C]'s bid response. Any technical information derived from the testing of [its] sample card prototypes is indeed confidential and proprietary to [Vendor C] and should not be disclosed under any circumstances without [Vendor C]'s prior consent.

Vendor C also submits that the information at issue affects "… its important interests, including [Vendor C]'s interest in the security of its products, protecting [Vendor C]'s investment in know-how developed by [Vendor C], and protecting Vendor C's contractual relationship with the Ministry."

Vendor C also refers to section 2.4 of the Ministry's RFP, which states:

> The results of the Card Security, Integrity, Durability (Adversarial) and forensic testing WILL NOT BE SHARED. The sharing of the results of this testing

> component is detrimental to the security of the card. [Emphasis added by Vendor C.]

In addition, Vendor C submits that "the applicable test in relation to 17(1) of the Act is whether disclosure of the records would give rise to a reasonable expectation of harm." Vendor C then argues that its interests would be harmed by disclosure.

As regards Vendor C's reference to the wording of the RFP, it is important to note that the question before me in relation to section 17(1) is not whether disclosure of testing results concerning Vendor C's cards is contrary to the confidentiality statement referred to by Vendor C in section 2.4 of the RFP. Rather, the question is whether section 17(1) of the *Act* applies to exempt the information at issue.

Nevertheless, as regards the comments in the RFP about disclosure of test results, several important points must be made. To begin with, in addition to the comments in the RFP quoted by Vendor C, the RFP contains a number of references to possible disclosure under the *Act* in relation to information supplied by bidders to the Ministry. For example, section 4.5.5 on page 43 of the RFP states that:

> The Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.F.31, as amended, applies to information provided to the Ministry by a Proponent, including, without limit, any information provided in the course of Limited Negotiations. A Proponent should identify any information in its proposal or any accompanying documentation or in the course of Limited Negotiations supplied in confidence for which confidentiality is to be maintained by the Ministry. *The confidentiality of such information will be maintained by the Ministry, except as otherwise required by law or by order of a court or tribunal.* [Emphasis added.]

In this case, however, the information in question consists of test results on Vendor C's cards prepared either by the testing consultant (Appeal PA08-12) or the Working Group (Appeal PA08-13), both of whom were retained by the Ministry for that purpose. Vendor C did *not* provide this information to the Ministry.

A more general reference to disclosure under the *Act* appears in section 5.06 on page 19 of the RFP, under the heading, "FIPPA Records and Compliance." This section states, in part:

> The Supplier and the Ministry acknowledge and agree that [the *Act*] applies to and governs all Records … and *may require disclosure of such Records to third parties*. [Emphasis added.]

While I understand Vendor C's reliance on the statement in section 2.4 of the RFP that testing results would not be disclosed, I must nevertheless observe that if the Ministry was purporting to guarantee that testing information would never be disclosed under the *Act*, this was a guarantee that the Ministry was not in a position to give. Institutions are bound by the *Act*. As noted in

Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services), [2003] F.C.J. No. 348, dealing with the federal *Access to Information Act*, "the weight of judicial authority is to the effect that it is not possible to contract out of" that statute. The Court stated further that "…[W]hile confidentiality agreements may be taken into account, they cannot override or trump the express statutory requirements of the *Act*."

As I stated above, the issue before me is, in any event, whether the undisclosed responsive information in Appeal PA08-13, or the information about Vendor C's cards disclosed by the Ministry in Appeal PA08-12, is exempt under section 17(1) of the *Act*. I now turn specifically to the consideration of that question.

Part 2 of the section 17(1) test relates to whether the information was "supplied in confidence" to the Ministry. As stated above, all of the information under consideration here was produced for the Ministry by the testing consultant or the Working Group.

For the following reasons, I find that the undisclosed responsive information in Appeal PA08-13, and the information disclosed by the Ministry in Appeal PA08-12, does not meet the second requirement for exemption under section 17(1) because the information was not "supplied" to the Ministry as that term is used in the *Act*. In that regard, the Ministry's representations briefly set out its view that information it disclosed in Appeal PA08-12 was not "supplied" to the Ministry as that term has been interpreted under the *Act*.

Order MO-1237 provides an example of a relationship that is analogous to the one between the Ministry and the testing consultant, as well as the relationship between the Ministry and the Working Group. In that order, an architectural firm was found to have acted as agent for an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*) in assessing bidder pre-qualification on behalf of the institution. Scores awarded to bidders by the architect were found not to reveal information that was "supplied" to the architect, and hence, to the institution. The order treats the architectural firm and the institution as, essentially, one and the same entity in assessing whether the scoring information had been "supplied" to the school board. (See also Order MO-1690.)

Although the prototype cards were provided by Vendor C, the test results were provided to the Ministry by its consultants, and *not* by Vendor C. As both the testing consultant and the Working Group were retained by the Ministry for the very purpose of testing the cards, and acted on the Ministry's behalf, there is no principled basis for differentiating this information from similar information that could have been generated by the Ministry's own staff, if the Ministry had chosen to employ individuals with the necessary expertise. While testing methodology proprietary to an external consultant could meet the "supplied" requirement in some circumstances, no such information is at issue in this reconsideration. In my view, it cannot be said that the test results disclosed by the Ministry in Appeal PA08-12, or the undisclosed responsive information in Appeal PA08-13, were "supplied" to the Ministry by the testing consultant, or the Working Group, who prepared this information on the Ministry's behalf.

With respect to the "supplied" requirement, Vendor C states that the information at issue was obtained from test results relating to cards that it supplied to the Ministry. This argument could be interpreted as meaning that, in Vendor C's view, it had in some fashion "supplied" the test results to the Ministry. In my view, however, supplying an item for testing does not go so far as to encompass the results of independent testing of that item. On the contrary, the information under consideration in both Appeals PA08-12 and PA08-13 was generated on the Ministry's behalf by the testing consultant (Appeal PA08-12) and the Working Group (Appeal PA08-13).

This view finds support in Order F10-06, issued by the Information and Privacy Commissioner of British Columbia. In that case, the Commissioner found that fish carcasses turned over to the Ministry for testing by fish farms did not constitute the supply of information within the meaning of the equivalent of section 17(1) in British Columbia's *Freedom of Information and Protection of Privacy Act* (found at section 21(1) of that statute). The B.C. Commissioner's order states, in part (at paras. 59 and 60):

> In this case, Ministry veterinarians derived the knowledge, such as that concerning bacteriology, from the study of the dead fish. The veterinarians recorded that knowledge and it is contained in the records under heading 3. As the applicant points out, the fish carcasses are the things studied, but not the resulting knowledge.
>
> For this reason, it simply cannot be the case that the conveyance of deceased fish by fish farm operators to the Ministry constitutes or equates to a supply of "information" under the second branch of the test of s. 21(1)(b).

I agree with this reasoning, and in my view, it applies to the test results prepared on the Ministry's behalf in this case, which encompasses all of the information about Vendor C's cards that was disclosed by the Ministry in Appeal PA08-12, as well as the undisclosed responsive information in Appeal PA08-13.

Similarly, in *Ontario (Workers' Compensation Board v. Ontario Assistant Information and Privacy Commissioner) (1998), 3 O.R. (3d) 464*, the Ontario Court of Appeal upheld a decision of former Assistant Commissioner Tom Mitchinson in which he ordered disclosure of information about employers with high penalty rankings in five accident prevention programs operated by the Board. The records at issue were lists showing the names and addresses of the top 50 employers, in descending order, according to the amount of penalty surcharge. In reaching this conclusion, the Court commented on part 2 of the test. It stated:

> With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. *The records had been generated by the WCB based on data supplied by the employers*. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers.

Again, with respect to the test results, which encompass all of the information under consideration here, the Court's analysis in the WCB case is directly applicable. The information was not "supplied" by Vendor C.

Based on the foregoing analysis, it is clear that the test results were not "supplied" to the Ministry by the testing consultant, the Working Group or Vendor C, and accordingly, I find that the undisclosed responsive information in Appeal PA08-13 does not meet Part 2 of the test, nor does the information about Vendor C's cards that was disclosed by the Ministry in Appeal PA08-12. As all three parts of the test must be met, this information is not exempt under section 17(1).

The information in Appeal PA08-12 has already been disclosed, and I will therefore not make any further order in that regard. If the undisclosed responsive information in Appeal PA08-13 is not otherwise exempt, I must also order it to be disclosed. I now turn to consider that question.

Other Exemptions

In response to my invitation to provide representations on any pertinent issues in these appeals, Vendor C provided submissions to me in this reconsideration under the heading of "Investigative Techniques/Control of Crime," with reference to section 14 of the *Act*. Vendor C's submissions under this heading relate, in part, to its interest "in maintaining the highest standards of security over its own product," and its "ability to assure … existing and future customers that [its] products are subject to the highest standards of security." In that regard, it expresses concern about prejudice to its reputation in the marketplace. These submissions essentially relate to the issue of whether the records meet part 3 of the test for exemption under section 17(1). I have already found that section 17(1) does not apply on other grounds, namely the fact that the records do not meet part 2 of the test under that exemption.

However, Vendor C also submits, more generally, that disclosure entails a risk of forgery and could facilitate the commission of unlawful acts, or hamper the control of crime, all of which are issues addressed under sections 14(1)(c), (i) and (l). With respect to the information disclosed in Appeal PA08-12, I note that section 14 is a discretionary exemption, and the discretion to claim or waive it rests with the Ministry, not with Vendor C. With respect to the information disclosed by the Ministry in Appeal PA08-12, it is clear that the Ministry decided not to rely on section 14, and this was the Ministry's decision to make.

With respect to the undisclosed responsive information in Appeal PA08-13, I am not persuaded that the very limited information I have found to be responsive could reasonably be expected to lead to the harms identified by Vendor C, or to similar concerns expressed by the Working Group in its representations.

The responsive information simply identifies the substances used in the "face" and "backing" layers of Vendor C's prototype cards. In a brochure published by Vendor C, which was attached to the Ministry's representations in response to Vendor C's section 28 arguments (which I, in turn, provided to Vendor C for reply), Vendor C plainly identifies substances used in its secure

cards, including explicit identification of the jurisdictions that use these cards, and the type of cards that use these substances in each jurisdiction. This is the exact category of information at issue here. Information of this kind is also disclosed in the U.S. Patents provided to me by Vendor C as part of its representations, from which extracts are quoted above in the discussion of responsiveness. Vendor C consented to these patents being shared with the appellant as part of the exchange of representations in this reconsideration. It is clear from Vendor C's position in the reconsideration that it takes this issue very seriously, and if this type of information could reasonably be expected to produce the harms identified in sections 14(1)(c), (i) or (l), Vendor C would never have published this information in its brochure or consented to the disclosure of these patents.

As noted above, the Ministry claimed the law enforcement exemptions in sections 14(1)(c), (i) and (l), and the exemptions concerning relations with other governments in sections 15(a) and (b) in Appeal PA08-13. The Ministry provided representations to support the application of these exemptions to all of the records it had originally identified as responsive in that appeal, which included the table whose columns under the heading of "Backing" and "Face" I have now found to be responsive to the amended request.

In Order PO-2772, I conducted an extensive analysis of each of these exemptions and concluded that none of them applied to the column entitled "Backing," which I had found to be responsive in that order. There is nothing to distinguish the information about Vendor C's cards in the column entitled "Face," which I am now finding to be additional responsive information, from the column entitled "Backing," and therefore, there is no need to repeat or expand on the analysis of those exemptions that is already set out in Order PO-2772. I adopt and apply those conclusions, which appear at pages 9 though 14 of Order PO-2772, to the information about Vendor C's cards under the heading of "Face."

As the undisclosed responsive information in Appeal PA08-13 is not exempt from disclosure, I will order the Ministry to disclose it to the appellant.

ORDER:

1. I confirm Order Provision 2 of Order PO-2772, which required that the Ministry disclose portions of the information from one page of the record at issue in Appeal PA08-13, entitled, "Ontario Driver's Licence/Health Card 2007 Bidder "A" and "C" Comments and Suggestions from [the Working Group]." Those portions refer to the Driver's Licence and Health Card, and relate to the "Backing" of Vendor C's prototype cards.

2. In addition, I order the Ministry to disclose the information about Vendor C's cards in one additional column from the table referred to in order provision 1, namely the column entitled, "Face."

3. I order the Ministry to disclose the information identified in order provisions 1 and 2 to the appellant by sending this information to the appellant no later than **May 4, 2010** and

not earlier than **April 29, 2010**. For greater certainty, I am providing a copy of this page of the record, on which the information to be disclosed is highlighted, to the Ministry with this order.

4. If Vendor C requires further particulars about the information I have ordered disclosed, it must contact the Ministry in that regard. This office does not disclose records at issue to parties to an appeal.

5. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the record that has been disclosed to the appellant.

Original signed by: March 30, 2010
John Higgins
Senior Adjudicator