Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

RECONSIDERATION ORDER PO-3062-R

Appeal PA09-413

ORDER PO-2987

Ontario Power Authority

March 16, 2012

Summary: The reconsideration of Order PO-2987 was requested by the successful proponent (affected party) and the institution in two separate requests. The affected party's reconsideration request was granted under section 18.01(a) of the *IPC Code of Procedure*, based on the failure to seek its representations with respect to one of the records. During the reconsideration, the appellant removed some financial information belonging to the affected party, as well as information related to the scoring of the bids, from the scope of the reconsideration. In this reconsideration order, the adjudicator upholds the disclosures ordered in Order PO-2987 with some modifications based on the removed information. The institution's reconsideration request is dismissed as it does not fit within section 18.01 of the *IPC Code of Procedure*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1), 18, 28(1)(a), and 50(3); *IPC Code of Procedure*, ss. 18.01(a) and 18.02.

Orders and Investigation Reports Considered: PO-2987, PO-2538-R.

OVERVIEW:

[1] This reconsideration order deals with two requests to reconsider Order PO-2987, which was issued on July 27, 2011. In that order, I determined the issues arising from an access decision by the Ontario Power Authority (OPA) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) regarding a community organization's request for records related to the procurement process for a gas-fired peaking generation facility in northern York Region.

[2] In the introduction section of Order PO-2987, I described the background of the appeal as follows:

> After identifying the responsive records, the OPA notified the companies named in the request pursuant to section 28(1)(a) of the *Act*, which provides parties whose interests may be affected by the disclosure of records relating to them with an opportunity to make submissions. Upon receiving the representations of the affected parties objecting to the disclosure of portions of their RFP submissions, the OPA issued a decision letter granting partial access to the responsive records. Records, or portions of records, were withheld pursuant to sections 17(1) (third party information) and 18(1)(c) and (d) (valuable government information) of the Act.

[3] Upon appeal of the OPA's access decision, and following efforts to resolve the appeal through mediation, the appeal was transferred to adjudication and assigned to me to conduct an inquiry. During the inquiry, I first sought representations from the OPA and the first affected party. In the OPA's initial representations, and in a concurrent, revised decision to the appellant, it claimed that additional parts of section 17(1) and 18 applied to the remaining records, and added a claim that the mandatory personal privacy exemption in section 21(1) applied to information contained in the first affected party's bid documents (record 3).

[4] Relevant to this reconsideration is the fact that the OPA claimed, for the first time in its representations, that section 17(1) also applied to a summary record relating to the RFP's evaluation and selection process (record 7). This record contained information relating to the two bids submitted by a second affected party, as well as the first affected party. I subsequently obtained reply representation from the OPA, followed by sur-reply representations from the appellant, with specific reference to the possible application of the public interest override in section 23 of the *Act.* I then contacted the second affected party to obtain its views on the disclosure of the information relating to it in record 7. Upon receiving the second affected party's consent to disclose the information in record 7 relating to it, under section 17(3) of the *Act*, I concluded my inquiry.

[5] In Order PO-2987, I upheld the OPA's section 17(1) claim, in part, in relation to the first affected party's bid documentation (record 3) but I did not uphold the application of section 17(1) with respect to record 7. I also did not uphold the claim for exemption under section 18 of the *Act* in relation to records 4 to 6, representing the OPA's scoring of the bids submitted. As the appellant did not seek access to "personal information", the information I found to fit within the definition of personal information in section 2(1) of the *Act* in record 3 was also removed from the scope of the appeal.[1]

[6] On August 8, 2011, I received a reconsideration request and initial submissions from the first affected party, alleging that there was a defect in the adjudication process respecting Order PO-2987. The first affected party maintained that I ought to have notified it and sought representations with respect to disclosure of *all* of the records for which section 17(1) was claimed, with particular reference to record 7. I issued a partial interim stay on August 9 with respect to the disclosure of records 6 and 7 (pertaining to the first affected party) ordered in Order PO-2987.

[7] On August 23, 2011, I received a separate reconsideration request from the OPA with respect to my findings on both sections 17(1) and 18 in relation to records 4 to 7. The OPA also submitted representations in response to the first affected party's reconsideration request. On September 1, I issued an additional interim stay respecting the disclosure of records 4 and 5, and the parts of record 7 not covered by the initial interim stay of August 9, pending the determination of the reconsideration requests.[2]

[8] Next, I sought and received the first affected party's reconsideration representations. As part of these submissions, the first affected party requested that I order the OPA to provide it with copies of records 6 and 7 for the purpose of preparing representations. The OPA maintained confidentiality over the two records, as these two records were the subject of the OPA's reconsideration request, which included challenging my finding on the application of the exemption in section 18 of the *Act* to those records.

[9] On October 14, 2011, I issued an interim reconsideration decision to the first affected party, granting its request that I reconsider Order PO-2987 pursuant to section 18.01(a) of the *IPC Code of Procedure*. All parties received a copy of this interim reconsideration decision. I advised the parties at that time that I had not reached any conclusions as to the merits of the reconsideration requests of either the first affected party or the OPA.

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[1] Any information that I found qualified as "personal information" based on my consideration of the issue in Order PO-2987 was severed from the records ordered disclosed because of its removal from the scope of the appeal.

[2] The portions of record 3 ordered disclosed were not subject to the interim stay imposed pending the conclusion of the reconsideration process, and these records were disclosed by the OPA in accordance with Order PO-2987.

[10] After receiving the first affected party's representations, it was necessary to address issues that arose respecting the sharing of them with the appellant. Once resolved, I sent the appellant a non-confidential copy of the first affected party's representations,[3] and I received submissions from the appellant in response. An aspect of the appellant's representations led to my review of the scope of the information at issue in this reconsideration order.

[11] In reaching my decision, I have reviewed the representations submitted by the parties, the additional documents provided with those representation, the complete appeal file for Appeal PA09-413, the relevant records, and the circumstances of the request for reconsideration. Although each of the parties who provided representations to this office during the reconsideration process indicated a desire to hold those representations confidential, either in whole or in part, it is necessary to set out certain portions of them for the purpose of explaining my decision. Further, where I have done so, I have been satisfied that the excerpts do not meet the confidentiality criteria in *IPC Practice Direction 7*.[4]

[12] In this order, I conclude that the OPA's submissions do not support a reconsideration of my decision under section 18.01 of the *IPC Code of Procedure* with respect to records 4 to 7. Furthermore, although the first affected party's reconsideration request was granted under section 18.01(a) of the *Code*, the representations received from the first affected party do not persuade me that section 17(1) applies to record 6 or 7. This finding is based, in part, on the appellant's removal of certain financial and scoring information related to the first affected party's proposal from the scope of the request, which has led to this reconsideration order.

RECORDS:

[13] The records, as described in Order PO-2987 consist of:

> Record 4 - RFP Evaluation of Rated Criteria - Second Affected Party's 1st Proposal (2 pages), *in part* – sections 18(1)(c)-(e)

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[3] I did not provide the OPA's August 2011 reconsideration representations to the first affected party or the appellant for the purpose of response, although the OPA's position was summarized in my December 22, 2011 letter to the appellant seeking representations.

[4] Section 5 of *IPC Practice Direction Number 7* states: The Adjudicator may withhold information contained in a party's representations where: (a) disclosure of the information would reveal the substance of the record claimed to be exempt; (b) the information would be exempt if contained in a record subject to the Act; or (c) the information should not be disclosed to the other party for another reason. Section 6 states: For the purpose of section 5(c), the Adjudicator will apply the following test: (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party; (ii) confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party; (iii) the relation is one which in the opinion of the community ought to be diligently fostered; and (iv) the injury to the relation that would result from the disclosure of the information is greater than the benefit gained for the correct disposal of the appeal.

Record 5 - RFP Evaluation of Rated Criteria - Second Affected Party's 2nd Proposal (2 pages), *in part* - sections 18(1)(c)-(e)

Record 6 - RFP Evaluation of Rated Criteria - First Affected Party's Proposal (2 pages), *in part* - sections 18(1)(c)-(e) and *section 17(1)(a)-(c)*

Record 7 - Stage 4 - Evaluation & Selection Process spreadsheet (2 pages, partial), *in part* - sections 17(1)(a)-(c) and section 18(c)&(d)

[14] The first affected party's reconsideration request relates to records 6 and 7, while the OPA's reconsideration request relates to records 4 to 7. The findings of Order PO-2987 respecting record 3 are not challenged by the parties.[5] Issue B, below, addresses other information that is no longer at issue for the purpose of this reconsideration order.

ISSUES:

A. Are there grounds under section 18.01 of the *IPC Code of Procedure* to reconsider Order PO-2987?

B. What impact does the removal of certain responsive information from the scope of the appeal have at the reconsideration stage?

C. Should the finding in Order PO-2987 regarding the application of section 17(1) be amended?

D. Should the finding in Order PO-2987 that section 18 does not apply be reconsidered?

DISCUSSION:

Are there grounds under section 18.01 of the *IPC Code of Procedure* to reconsider Order PO-2987?

[15] Under this heading, I will review the reconsideration process and findings to this point, including the interim reconsideration decision issued by me on October 14, 2011.

[5] In September 1, 2011 correspondence sent to the OPA, first affected party and the appellant, I confirmed that the additional interim stay did not apply to record 3 because the parties were not challenging my findings with respect to its disclosure. At page 3 of that correspondence, I stated: "The further interim stay granted … does not extend to the responsive non-exempt portions of record 3 and the OPA must disclose the severed version of record 3 to the appellant by September 2, 2011, pursuant to provision 2 of Order PO-2987."

[16] The first affected party seeks reconsideration of Order PO-2987 under section 18.01(a) of the *IPC Code of Procedure* (the *Code*) on the grounds that it ought to have received notice under sections 28(1) and 50(3), respectively, from the OPA and this office concerning the possible application of section 17(1) to records 6 and 7. The first affected party alleges that the failure to provide notice under section 28(1)(a) of the *Act*,[6] and an opportunity to submit representations, under sections 50(3) and 52(13), resulted in a "fundamental defect in the adjudication process."

[17] The OPA's request for reconsideration of Order PO-2987 relates to the ordered disclosure of records 4 to 7 consequent to my finding that sections 17(1) and 18 do not apply to them. The OPA alleges that my findings on the exemption claims reflect a "fettering of discretion" resulting from a rigid application of precedent from this office and a disregard for the "expert [and other] evidence" provided by the OPA. The OPA also submits that Order PO-2987 represents a "violation of the rules of natural justice," because I determined "fresh issues" that had not been raised and because the findings were based on factors that the OPA (and other parties) were not invited to comment upon.

[18] Section 18 of the *Code* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code* state as follows:

> 18.01 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.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

[19] As stated, this issue was initially addressed in an interim reconsideration decision sent to the parties on October 14, 2011, in which I framed the scope of the interim decision as follows:

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[6] Section 28(1) reads, in part: "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."

> At this time, I will not be addressing the merits of [the first affected party's] or the OPA's reconsideration requests respecting the application of the exemptions claimed. This letter is instead directed solely at addressing [the first affected party's] position regarding the obligation of this office to provide notice of the possible application of section 17(1) to records 7 (and 6) and the opportunity to provide submissions accordingly. As suggested, [the first affected party's] position is that section 17(1) applies to record 7, and that it may also apply to record 6. I note that the OPA disputes the assertion that [the first affected party's] interests – section 17(1) or otherwise – are engaged by record 6.

[20] Next, I described the events leading up to my decision to grant the first affected party's reconsideration request under section 18.01(a) of the *Code*:

> The OPA did not notify the first affected party – under section 28(1)(a) of the *Act* – of the possible application of section 17(1) to record 7 (or record 6) at the request stage, although notice was provided respecting the mandatory exemption's application to other records. After the OPA's access decision was appealed to this office, the possible application of section 17(1) was not raised during mediation or the initial part of adjudication. As I acknowledged in my letter to the parties dated August 9, 2011, the claim of section 17(1) to record 7 was first raised by the OPA in the submissions that were provided in response to the Notice of Inquiry sent to the OPA and to the first affected party simultaneously. Upon receipt of the OPA's representations, I accepted the claim of, and submissions respecting, the application of the mandatory exemption in section 17(1) to record 7. However, I did not advise the first affected party of the OPA's revised position on record 7, nor did I share the OPA's representations with the first affected party for the purpose of providing an opportunity [for it] to submit its own representations on the possible application of section 17(1).
>
> Having reviewed this matter, I have concluded that the first affected party was entitled to receive notice respecting record 7. Furthermore, while it is not clear to me that the first affected party was entitled to notice with respect to record 6, I will include record 6 in my finding on the issue of notice for the sake of completeness.
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> My failure to notify the first affected party respecting the possible application of section 17(1) of the *Act* to record 7 or to provide the first affected party with an opportunity for submissions on the issue constitutes a procedural defect. In the circumstances, I am satisfied that this omission on my part qualifies as a "fundamental defect in the adjudication process" for the purpose of section 18.01(a) of the *IPC Code of*

Procedure. Accordingly, I am granting the first affected party's reconsideration request.

[21] For the purpose of addressing the procedural defect established under section 18.01(a) of the *Code*, I provided the first affected party with the relevant non-confidential portions of the OPA's representations on records 6 and 7, as submitted during the inquiry, to seek representations on the possible application of section 17(1). Although the first affected party requested that I order the OPA to provide it with copies of records 6 and 7 to assist in the preparation of the additional representations, I declined.[7] Accordingly, the first affected party prepared its representations relying on the description of records 7 (and 6) contained in Order PO-2987, as well as the additional information provided about record 7 in my October 14, 2011 correspondence.[8]

[22] As already noted, in the October 14, 2011 correspondence, I advised that I had not reached any conclusions with respect to the merits of the reconsideration requests. In this reconsideration order, I confirm my interim finding that the basis for granting the first affected party's reconsideration request under section 18.01(a) has been established. Accordingly, I will consider the first affected party's submissions respecting the application of section 17(1) of the *Act* to records 6 and 7. For the sake of completeness, I will also review the OPA's reconsideration request in this order and in greater detail under Issue D, which addresses the application of section 18 of the *Act.*

[23] However, it is necessary to address certain submissions of the appellant first because they affect the scope of the information at issue in this reconsideration order.

B. What impact does the removal of certain responsive information from the scope of the appeal have at the reconsideration stage?

[24] In the introductory section of Order PO-2987, I noted that "the appellant was specifically interested in reviewing the methodology and basis upon which the OPA had scored and evaluated the following parts of the request for proposal (RFP) submissions: electrical connection point and islanding [3.3.1]; municipal and regional appeals [3.3.3]; and community outreach [3.3.4]."

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[7] Full reasons for my decision not to order the OPA to provide copies of records 7 and 6 or disclose these records to the first affected party myself were set out at page 4 of the October 14, 2011 interim decision, which was sent to all parties: the first affected party, the OPA, the appellant and the second affected party. One of the reasons given was that the first affected party's initial reconsideration representations conveyed "a reasonably complete knowledge of the content of record 7, even without access to a copy of that record." I also referred to section 55(1) of the *Act*, which relates to confidentiality and the prohibition of disclosure by this office.

[8] A description of record 7 is found at pages 10, 13 and 18 of Order PO-2987, and the description of record 6 is found at page 32.

[25] In the representations received from the appellant regarding the reconsideration of Order PO-2987, the appellant states:

> We wish to reiterate and clarify our request under [the *Act*]. … With respect to the proponent's RFP submission and more importantly, OPA's evaluation and scoring, we requested all records related to [the three areas mentioned above]. … We did not request the Economic Bid Statement contained in Record 7; however we did ask for the Total Score awarded by the OPA to each of the 3 bids. … We are willing to withdraw our request for the total scores of the RFP bids … [but] we still wish to receive all records related to the scoring methodology used by the OPA to evaluate proposals.

[26] Based on the appellant's reconsideration submissions, therefore, I find that the following information is removed from the scope of this reconsideration order: information drawn directly from the first affected party's economic bid statement in record 7 and the total score awarded to the first affected party's proposal, as well as that accorded to the second affected party's two bids The latter information appears in both records 6 and 7.

[27] Furthermore, given the appellant's reiterated areas of interest, I also find that only the columns and rows associated with the scoring criteria and rubric for electrical connection point and islanding [3.3.1]; municipal and regional appeals [3.3.3]; and community outreach [3.3.4] in records 4-6 remain at issue.

[28] I will now reconsider the possible application of section 17(1) to record 7, and also to record 6, subject to the removal of the information described above from the scope of this reconsideration order.

C. Should the finding in Order PO-2987 regarding the application of section 17(1) be amended?

[29] The OPA and the first affected party submit that I ought to reconsider and amend my decision respecting disclosure of the evaluative summary (record 7) under section 17(1). The first affected party also argues that I ought to reconsider my decision with respect to disclosure of the scoring record relating to its bid (record 6) on the basis that section 17(1) applies to it as well.

[30] 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 …

[31] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[9] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[10] For section 17(1) to apply, each part of the following three-part test must be met:

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

[32] Before setting out the parties' arguments on the reconsideration of my section 17(1) finding in Order PO-2987, I will reiterate what information remains at issue following the discussion in Issue B, above:

- the rows (and associated columns) for the appellant's three specific areas of interest 3.3.1(a) & (b), 3.3.3 and 3.3.4(a) & (b) of record 6; and
- the column[11] reflecting the summative calculations of the first affected party's proposal on record 7, with the exception of the total point score.[12]

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[9] *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.).

[10] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

[11] The associated headings or categories used to describe the input and calculated values do not appear to be at issue in the reconsideration requests.

[12] All of the information on the first page of the evaluative summary consists of information drawn directly from the economic bid statement supplied by the first affected party. Notably, certain information on page 1 of record 7 (name of proponent, name of facility, average annual contract capacity, nameplate

[33] The scope of the information under review is limited. Therefore, portions of the representations that I received during the reconsideration process are not reproduced because they are specifically tailored to opposing the disclosure of information that is no longer at issue as a result of the amendment to the scope of the request by the appellant.

[34] In addition to the representations set out below, the first affected party also provided affidavit and documentary evidence to elaborate on the harms it would allegedly incur should the information relating to it in records 6 or 7 be disclosed. As stated, portions of those representations and other evidence have been held confidential pursuant to the sharing criteria articulated in *IPC Practice Direction 7.*

[35] The first affected party's initial reconsideration representations refer to sections 17(1)(a), (b) and (c), but highlight paragraphs (a) and (c) and the harms that would allegedly result from disclosure of the records to third parties or competitors. The affected party's supplementary representations focus on section 17(1)(a) and alleged harms specifically associated with disclosure to the appellant and other individuals or organizations said to be opposed to the project.

[36] The first affected party submits that injury will result from the disclosure of record 7 because it contains financial and economic values from its economic bid statement. Although the figures from the economic bid statement are no longer at issue, the first affected party also submits that because the adjusted values in record 7 are derived from the economic bid statement, the financial information in the latter and associated efficiency factors could be reverse-engineered through reference to the RFP and the OPA's bid evaluation documentation, thereby leading to the same injuries as would occur if the economic bid statement itself were disclosed.

[37] The harms the first affected party argues would result from disclosure of its economic bid statement (directly or indirectly) relate to possible appropriation of the information by competitors leading to the first affected party having to "adjust its future bids to remain successful by sustaining lower revenues, margins and returns" and to avoid higher financial risk. The first affected party notes that its submissions on this point are based on specific projects and bids the company is involved in, or will be involved in. Additional information about such projects was provided to me on a confidential basis.

[38] The first affected party submits that:

> The apparent consent of the second affected party to disclosure of the information regarding its bid in record 7 should not be regarded as a

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capacity) are public on the OPA's website. For the purpose of this reconsideration order, however, these parts of record 7 are not reviewed under section 17(1).

> general lack of concern amongst power facility operators about the injury that would be likely to occur from disclosure of their bid information.
>
> … the position of [the first affected party] as the successful bidder for the … facility differentiates it from the second affected party in any event, because [its] bid information would represent more value to a competitor for similar projects given its success.

[39] These representations reflect the view of the first affected party (and that of the OPA) that I ought not to have considered the second affected party's consent to disclose information relating to its own bid information in record 7 as probative evidence of a lack of harm arising from disclosure of the successful proponent's information.

[40] Respecting the harm under section 17(1)(a) in disclosing records 6 and 7 specifically to the appellant and others publicly opposed to the project, including members of the King Township council, the first affected party argues that disclosure would negatively affect its position in ongoing discussions with King Township. The first affected party refers to the parts of record 3 that I found exempt under section 17(1)(a) due to the harm to its negotiating position I accepted could reasonably be expected to result from revealing confidential mitigation strategies for communicating with the community.[13] The first affected party contends that disclosure of record 7 would also prejudice it in negotiations with King Township, because the information would be used to the prejudice of the first affected party, and would disrupt efforts to build its relationship with the community. The first affected party submits that disclosure of records 6 and 7 would have a negative impact on its position in discussions with King Township and that, accordingly, the records qualify for exemption under section 17(1)(a) for the same reasons as did the pages from exhibit 9 of record 3. The confidential portions of the first affected party's November 2011 representations elaborate on this position.

[41] The first affected party also suggests that disclosing the scores awarded to its bid (as set out in record 6) would result in undue gain to the receiving parties for the purpose of section 17(1)(c) because the information could be used to their advantage in "community benefits" discussions and negotiations. The harms projected to result from disclosure of record 6 are linked to concurrent disclosure of the information in record 7 relating to its bid. The first affected party states:

> Although Record 6 was generated by the OPA, disclosure of the information in it, particularly should record 7 be disclosed, will reveal to competitors the relative merits of specific components of [our] bid, which in conjunction with the adjusted values in record 7, would allow quite

[13] See page 18 of Order PO-2987.

> accurate calculation of the Economic Bid Statement financial values. The level of detail about [our] bid that disclosure of record 6 would generate qualifies it as information "supplied" to the OPA because of the accurate inferences about [our] bid and, in conjunction with … record 7, [our] Economic Bid Statement…
>
> Disclosure of the points allocated to [our] NYR bid components would allow competitors to asses the relative strengths or weaknesses of [our] bid in great detail and identify specific ways to undercut or defeat future … bids [from us] for similar power plant facilities.

[42] Notably, in Order PO-2987, I found that record 7 contains information supplied in confidence, thereby meeting the first two parts of the test for exemption under section 17(1). In this context, the first affected party was not required to provide further argument on parts 1 and 2 of section 17(1) regarding record 7 during the reconsideration process. However, record 6 was not reviewed for its possible exemption under section 17(1) in Order PO-2987 and, consequently, no finding was made with respect to those first parts of the test. Accordingly, in its reconsideration submissions, the first affected party offered submissions in support of a similar finding with respect to record 6.

[43] The first affected party argues that given the intent of section 17(1) to protect the confidential information of third parties from disclosure where harm may be established, it is not appropriate to parse the information where, as here, the stream of information about the first affected party is generated by the OPA, based on confidential business information it supplied to the OPA. The first affected party submits that this approach is consistent with the "inferred disclosure" basis for finding that information has been "supplied" in that it contemplates information that "permits the drawing of accurate inferences" with respect to information supplied by a third party (Orders PO-2620 and PO-2043). The first affected party also submits that record 6 is distinguishable from a contractual document with negotiated terms because it is based solely on information supplied by third parties to which evaluative criteria are applied.

[44] According to the first affected party:

> This information should be regarded as having been "supplied" to the OPA in confidence because it relates directly to the content of the confidential bid information itself. If the information in record 6 is solely based on confidential information submitted with [our] bid, as it is here, and would significantly enhance the understanding of that information, as it would here, the information should also be regarded as part of the supply of information to the OPA.

[45] With respect to the confidentiality of the record 6, the first affected party argues that because the record is based on the bid, it is subject to the confidentiality undertakings of the OPA. In this context, the first affected party agues, it "reasonably expected that points assigned to its bid would not be made public, and would be held in confidence by the OPA."

[46] Respecting record 6, the OPA explains that it did not claim section 17(1) in relation to it because the information in the record (and records 4 & 5) represents the application of "internally generated criteria" to the proponents' bid information to create a record resulting in a score for each proponent. The OPA maintains that the information in record 6 was not "supplied" for the purpose of section 17(1); further, the OPA notes that the first affected party has no knowledge of the information in record 6. According to the OPA, records 4-6 do not contain information that was supplied in confidence by the proponents to the OPA, and section 17(1) cannot apply.

[47] Respecting record 7, the OPA submits that if it is disclosed: the OPA's competitive position in the marketplace will be prejudiced; proponents will attain competitive advantages over one another; proponents will be deterred from making proposals to the OPA; and the OPA will have its contractual negotiations interfered with. The OPA refers me to its full representations provided during the inquiry. The OPA argues that the fact that the first affected party filed a reconsideration request lends support to the OPA's assertion in its initial inquiry representations that proponents are concerned with the confidentiality and protection of bid information, notwithstanding the second affected party's consent to disclosure. The OPA alleges that "the practical realities and the factual matrix of procurement processes" were not given due accord in Order PO-2987, which placed undue evidentiary weight on the consent of the second affected party, without any opportunity for it and the first affected party to respond. According to the OPA:

> [T]here is absolutely no evidence available on the evidentiary record in this appeal that disclosure of record 6 or record 7 will not harm the OPA or proponents in ways which sections 17 and 18 of *FIPPA* are intended to prevent.

[48] The OPA points out that the numbers in record 7 directly populate the contract that results from the RFP process and those numbers are directly taken from the first affected party's economic bid statement. In this regard, the OPA (with the support of the first affected party) challenges the accuracy of the following statement in Order PO-2987 (at page 21):

> Specifically, the OPA contends that the same information in record 7 "directly populated the contract that resulted" from the RFP, and that the "RFP and final form of contract arising from the RFP are publicly available." In other words, at least some of the same information in

> record 7 that the OPA seeks to withhold is publicly available. I have not been provided with any evidence that harm has resulted from that availability.

[49] The appellant's representations begin with the statement:

> We begin by re-stating our position that in light of the fact that the [power-generating facility] has already been built, [we have] no intention of trying to prejudice [the first affected party] in their commercial endeavour. Rather, our objective remains that of attempting to understand how the …OPA – a public body – made its decision to grant the winning bid to [the first affected party].

[50] The appellant submits that "without the Economic Bid Statement [information] and the total point scores of the criteria, we cannot see how the selective information from Record 6 and Record 7 would substantively disadvantage [the first affected party] in bids for future power projects, as these three criteria are situation specific."

[51] In specific reference to the three criteria of interest in record 6,[14] the appellant notes that they are not seeking access to the scoring of the remaining criteria, or information about them. Further, the appellant disputes the characterization of that information as "informational assets" of the first affected party, particularly as that term is used in section 17(1) of the *Act.* The appellant also questions how disclosure of the scoring related only to those three criteria (leaving seven criteria undisclosed) could permit competitors to meaningfully assess the relative strengths and weaknesses of the bid.

[52] The appellant takes issue with the first affected party's comparison of disclosure of certain portions of record 3 with disclosure of record 7, specifically in relation to the alleged harm to community benefits negotiations with the township.[15] The appellant claims that it is unaware of any specific community benefits accruing as a result of the facility and questions the "intent to negotiate in any meaningful way."

[53] Although contacted about this reconsideration process, I received no further submissions from the second affected party whose proposals led to the creation of records 4 and 5, as well as populating two columns of information in record 7. Therefore, the consent obtained from the second affected party under section 17(3) to disclose the information relating to it in record 7 remains in effect.

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[14] The appellant's submissions indicate that the three (of 10) criteria that are of interest account for 55% of the points total for each bid.

[15] As noted, the portions of record 3 identified by the appellant have already been disclosed pursuant to the provisions of Order PO-2987; my findings respecting the record and its exhibits were not the subject of a reconsideration request.

Findings

[54] In Order PO-2987, I concluded that record 7 was not exempt under section 17(1) because I was not satisfied that its disclosure could reasonably be expected to result in the harms contemplated by paragraphs (a), (b) or (c) of the exemption. I did not consider the possible application of section 17(1) to record 6.

[55] In this reconsideration order, I have reconsidered the application of section 17(1) to record 7 based on the first affected party's representations and with reference to the OPA's submissions. I have also considered the exemption's application to record 6 because the first affected party has raised it.

[56] Under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. Similarly, where it is a third party opposing disclosure, the burden of proof is effectively shared with the institution. I mention section 53 of the *Act* to address the OPA's submission respecting the alleged absence of "evidence available on the evidentiary record in this appeal that disclosure of record 6 or record 7 will not harm the OPA or proponents in ways which sections 17 and 18 of *FIPPA* are intended to prevent." To be clear, the burden of proof does not rest with this office to identify evidence on the record of an *exculpatory* nature with respect to the harms alleged in not upholding an exemption claim. Under section 17(1), the burden of proof rests squarely on the parties opposing disclosure under the *Act* to establish a reasonable expectation of harm resulting from disclosure of information supplied in confidence by a third party.

[57] Moving to the conclusions I have reached with respect to the records, I begin with the portions at issue from record 6, the scoring record related to the first affected party's bid proposal. In the October 14, 2011 interim decision granting the first affected party's reconsideration request under section 18.01(a) of the *IPC Code of Procedure*, I indicated that while it was not clear to me that the first affected party was entitled to notice (under section 28(1)(a) of the *Act*) respecting the application of section 17(1) to record 6, I would nonetheless invite representations addressing the possibility.

[58] Having reviewed those representations, I am not persuaded that section 17(1) applies to record 6. To begin, I reject the first affected party's submission that the information at issue in record 6 represents its "confidential informational assets," flowing from the stream of information supplied by it to the OPA for the purposes of this RFP process. In Order PO-2853, Adjudicator Donald Hale received the following submissions from an affected party with respect to evaluated criteria and scoring records prepared by the OLGC:

> … [the affected party's] individual OLGC evaluation scoring clearly constitutes [its] Information Assets since such evaluation scoring contains

> confidential information about [the affected party], including [its] "trade secrets," "commercial information" and "financial information" supplied to the OLGC in the course of the OLGC RFP process, and which identifies [the affected party's] strengths and weaknesses in the OLGC RFP process, in particular, and in the marketplace, in general.

[59] Adjudicator Hale rejected that argument, noting that the scoring records before him did not contain the actual commercial or financial information that was submitted by the affected party in its proposal, but rather described the scoring process and the proposals in general. In the circumstances of this appeal, and based on my review of the records themselves, I note that record 6 contains information which is more in the nature of the scoring records described in Order PO-2853. It does not contain the first affected party's, or any proponents', bid information. Indeed, I agree with the OPA that record 6 represents the application of "internally generated criteria" to the proponents' bid information to create a record resulting in a score for each proponent.

[60] Further, in my view, disclosure of the limited information remaining at issue in record 6 would not permit accurate inferences to be made with respect to any underlying non-negotiated confidential information supplied by the first affected party to the OPA. In this way, I find that the "inferred disclosure" exception discussed in past orders of this office is not engaged.[16]

[61] The first affected party argues that the linkage of the scoring values and information in record 6 to the information in record 7 heightens the reasonable expectation of harm. However, I find that disclosure of the more limited information in record 6, relating only to the appellant's three specific areas of interest, could not reasonably be expected to result in the harms asserted by the first affected party, including revelation of the bid strategy or relative merits of the first affected party's bid. This is particularly the case given that information from the first affected party's economic bid statement in record 7 no longer remains at issue. Accordingly, I find that section 17(1) does not apply to record 6.

[62] With regard to record 7, and as already noted, the second affected party whose proposals are the subject of records 4 and 5, as well as two columns in record 7, did not provide representations in this reconsideration. Therefore, the consent obtained from the second affected party under section 17(3) to disclose the information relating to it in record 7 remains valid.

[63] On a related note, during the reconsideration process, both the OPA and the first affected party suggested that my reliance on the second affected party's consent to disclose information relating to its own bid information (in record 7) improperly coloured my conclusions on the harms that were argued would result from disclosure of the first

[16] See especially pages 6 to 9 of Order PO-2371. See also Orders MO-1706, PO-2384, PO-2435, and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* ([2008] O.J. No. 3475 (Div. Ct.).

affected party's information, as the successful bidder. In the circumstances of this reconsideration, I accept that this is a valid criticism However, as a result of this reconsideration, I now have the benefit of full representations from the first affected party respecting section 17(1) and record 7. In Order PO-2987, I described record 7 as "a two-page document titled Stage 4 - Evaluation and Selection Process, prepared by the OPA to evaluate the bids on a comparative and adjusted basis." I previously found in Order PO-2987 that record 7 met the first two parts of the test for exemption under section 17(1). I do not propose to revisit my analysis of those parts, notwithstanding that the information in that record has been considerably lessened by removal of the first affected party's economic bid statement information from the scope of the reconsideration by the appellant. What appears in the column containing the evaluation of the first affected party's bid on page 2 of record 7 does not appear in the form it was provided by that proponent.[17] However, there is at least an arguable basis for concluding that disclosure of the remaining information could permit accurate inferences to be made about the confidential information on which it is based. In this respect, I note the first affected party's position that I ought not "to parse the information where, as here, the stream of information about the first affected party is generated by the OPA, based on confidential business information it supplied to the OPA."

[64] Regardless, the remaining information in record 7 must be reviewed under the third part of the test for exemption in section 17(1) to determine if its disclosure could reasonably be expected to result in harm. Given the narrowing of the scope by the appellant, only the information on the second page of record 7 relating to OPA calculations of project costs (and their headings) remain at issue. These costs are based on the scoring and economic bid statement information and certain other factors set by the OPA for the purpose of this RFP's bid evaluation process.

[65] Notably, the total point score accorded to the first affected party's bid is removed from that one column of information remaining at issue. It may be argued that the total point score awarded to the first affected party's bid could be reverse-engineered/calculated from the other information in the column, based on the calculation provided in the associated category description, the (public) RFP documents and as was contained in the appellant's representations. However, I am not persuaded that a reasonable expectation of harm under section 17(1)(a), (b) or (c) with disclosure of the figures in this column has been established, whether or not the total point scores are included.

[66] To meet this part of the test, the OPA and the first affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" with the release of the information. Evidence amounting to speculation of possible harm is

[17] The information on page 2 of record 7 is distinct from the information that populated the column relating to the first affected party's bid on page 1 of the same record, which was drawn directly from the economic bid statement.

not sufficient. In its reconsideration submissions, the OPA expressed concern that I had not adequately incorporated the evidence of its opinion provider into my consideration of the potential for harm with disclosure of record 7.[18] It does not follow from my determination that a reasonable expectation of harm had not been established that evidence was not adequately considered. It is the persuasiveness of the evidence with respect to *disclosure of the specific information at issue* that matters. This point is especially relevant in this reconsideration order where information that was of the greatest concern to the first affected party has been removed from consideration for disclosure.

[67] In evidence provided during the initial inquiry, the OPA's Vice President, Electricity Resources described record 7 as representing data resulting from the scoring of the bids to the costs and revenues of each proponent. The evidence of the first affected party upon reconsideration, along with that available from the OPA during my initial inquiry, may indeed have led to a different finding on section 17(1) as regards record 7. However, with the economic bid statement information no longer at issue, the argued harms become more remote and speculative, and are insufficient to meet part 3.

[68] I find that the disclosure of the remaining information in record 7 could not reasonably be expected to result in harm by equipping competitors with knowledge of what the successful proponent offered. I further find that disclosure cannot reasonably be expected to result in prejudice to the first affected party's ability to successfully negotiate this type of contract in the future. Accordingly, I reject the submission that disclosure of the adjusted values in record 7, with "reverse engineering" through reference to the RFP and the OPA's bid evaluation documentation, could reasonably be expected to result in the "same injuries" as if the economic bid statement itself were disclosed.

[69] Nor am I persuaded that disclosure of the remaining information at issue in record 7 could reasonably be expected to result in harm under section 17(1)(b) by making "proponents less inclined to provide that information to the OPA in the future."[19] As I noted in Order PO-2987 (at page 21), "the language of section 17(1)(b) does not refer to proponents or businesses being 'less inclined' to provide information. It refers to information "no longer being supplied." I also find the reference in Order PO-2987 to Order MO-1781 even more compelling in the circumstances of this reconsideration, where sensitive financial information has been removed from the scope:

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[18] The OPA's submission on this point extends to the other records, and my findings under section 18; this submission is addressed in the next section of the order.

[19] As submitted by the OPA and outlined in Order PO-2987, page 18; source: Affidavit of VP, Electricity Resources, at paras. 42 to 45.

> In Order MO-1781, Senior Adjudicator David Goodis addressed a similar argument that "if this sort of confidential information is disclosed, it is highly likely that, in other competitions held by government institutions, qualified bidders will either not participate or not provide the detailed confidential information here in issue for fear of its disclosure." The Senior Adjudicator stated:
>
> > In the circumstances, there is no reasonable basis for a finding that additional information, apart from that found exempt under sections 10(1)(a) and/or (c) [the equivalent provisions in the municipal *Act*], should be withheld under section 10(1)(b). Once the more sensitive financial and/or commercial information is removed from the records, there is no reasonable basis for additional paragraph (b) concerns.

[70] Similarly, I find that disclosure of the calculated and adjusted costs remaining at issue in record 7 could not reasonably be expected to result in undue loss to the OPA under section 17(1)(c) due to the submission of fewer, or less comprehensive, proposals. Returning to the OPA's opinion provider's comment that "overly broad disclosure will influence company decisions as to whether to pursue public sector work," I find that the narrow set of calculations or figures resulting from the OPA's own evaluation of the first affected party's bid could not reasonable by expected to result in undue loss or gain to the first affected party, the OPA or any other contemplated recipient.

[71] As I stated in Order PO-2987, consideration of the disclosure or exemption of information relating to procurement must be:

> … approached thoughtfully, with consideration of the tests developed by this office, as well as an appreciation of the commercial realties of a procurement process and the nature of the industry in which the procurement occurs (Order MO-1888). In each case, the quality and cogency of the evidence presented, including the positions taken by affected parties, the passage of time, and the nature of the records and the information at issue in them must be considered. Furthermore, 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 (see Order MO-2496-I).

[72] I have followed this approach in this reconsideration request. Having considered the information remaining at issue in record 7, in the context of the representations of the first affected party and the OPA, I find that a reasonable expectation of harm respecting its disclosure has not been established. As all three parts of section 17(1)

must be met, I find that section 17(1) does not apply to the information at issue on the second page of record 7.

D. Should the finding in Order PO-2987 that section 18 does not apply be reconsidered?

[73] In addition to challenging the finding on section 17(1) to record 7, the OPA's reconsideration request also takes issue with my finding in Order PO-2987 that section 18 does not apply to records 4 to 7. Specifically, the OPA requests that I reconsider Order PO-2987 "on the grounds that [I] fettered [my] discretion and was in contravention of the rules of natural justice."

Alleged Fettering of Discretion

[74] The OPA submits that in Order PO-2987 I "fettered [my] discretion by:

> (a) Following IPC policies, rules and precedents without regard for the specific circumstances of the case;
> (b) Disregarding legally relevant factors, namely the expert evidence...; and
> (c) Failing to exercise independent judgment.[20]

[75] The OPA refers to *Dharamraj v. Canada (Ministry of Citizenship and Immigration)*[21] in support of the first and second points, above, noting that in *Dharamraj,* an immigration officer's decision was set aside because the officer had followed the Immigration and Refugee Board's "assessment of risk" policy without conducting her own analysis of the facts. The OPA notes my reference to Order MO-1888, and submits:

> At page 19 of Order PO-2987, the adjudicator cites Order MO-1888 as authority to rely on past IPC orders to determine disclosure of information issues relating to a procurement process and states:
>
> > As past orders of this office have acknowledged, the disclosure of information relating to a procurement process must be approached thoughtfully, with consideration of the tests developed by this office, […]
>
> Rather than fairly evaluating the evidence before her, the adjudicator treated past IPC orders and tests as binding upon her and in so doing, excluded valid reasons for the exercise of her discretion, failed to consider the OPA's evidence and failed to exercise independent judgment. The

[20] Page 1, August 23, 2011 submissions of the OPA.
[21] [2006] F.C.J. No. 853 (F.C.T.D.), para. 25.

> reasoning of Order MO-1888 should not be extended so far as to justify an adjudicator's fettering of discretion.
>
> Respectfully, the adjudicator's fettering of her discretion is manifest on page 29 of her Order [relating to section 17(1) of the *Act*]. Only after referring to Order MO-2496-I does she vaguely conclude that:
>
> > In the circumstances of this appeal, I find the OPA's arguments regarding the scoring and scoring rubric in records 4 to 6 and the evaluation summary in record 7 to be speculative and insufficiently persuasive to support a finding that sections 18(1)(c) or (d) apply to them.

[76] The OPA disputes the finding on section 18 with respect to records 4 to 6 because of concerns about the exploitation and manipulation of the OPA's procurement scoring process and interference by the appellant with the concluded contract and project. The OPA refers to the "uncontroverted" evidence of its expert[22] supporting the application of sections 18(1)(c) and (d) to records 4 to 7. As I understand it, the OPA is arguing that it was not reasonable for me to draw the conclusions I did at page 29 in stating [as excerpted in the OPA's representations]:

> I note that the different levels of scoring outlined in the rubric flow rather naturally from the rated criteria on which they are based. In my view, what is important to the integrity of procurement scoring are the responses provided by a proponent as part of the process, not the content of the rubric matrix itself. In other words, knowledge of the rubric will not assist a proponent if they cannot demonstrably meet the basic criteria of the RFP through the content of their bid (see Order PO-2657).

[77] The OPA submits that "the view of the adjudicator on page 29 was not available in the record of evidence." Next, the OPA asserts that:

> In light of the evidence marshalled by the OPA, the adjudicator had a duty to consider that evidence, rather than to dismiss it based on unsourced views and conclusions in past orders.

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[22] In related submissions, the OPA challenged my reference in Order PO-2987 to its expert as a "consultant," suggesting that my use of the latter term demonstrates that I did not give due accord to the weight of this individual's "expert" evidence. Apart from dismissing this submission as unfounded, I will not deal further with this aspect of the OPA's submissions except to state that in conducting an inquiry under section 52(1) of the *Act*, this tribunal is not bound by the traditional (common law) rules of evidence nor, as stated in s. 52(2), by the *Statutory Powers Procedure Act.* In the circumstances, it was not, as argued by the OPA, necessary for me to making any finding at all regarding its opinion provider's "expert status."

[78] The OPA's concern about "unsourced views and conclusions" forms the basis of its position that Order PO-2987 also represents a violation of the rules of natural justice.

Alleged Violation of the Rules of Natural Justice

[79] The OPA submits that my findings respecting the application of section 17(1) and 18 to the records in Order PO-2987 were based on issues that had not been raised between the parties. The OPA refers to the *audi alteram partem* rule, stating that "no party's interests shall be judged without a fair hearing in which every party is given the opportunity to respond to the evidence against it." The OPA submits that the decision in Order PO-2987 was made based on information that was not disclosed to it as an "adversely affected party." The OPA specifically identifies the following concerns:

- That the OPA was not permitted an opportunity to respond to, or comment on, the effect and/or implications of the second affected party's consent to disclosure (under section 17(3) of the *Act*) of the information relating to it;
- That it was not advised that the consent of the second affected party under section 17(3) would be viewed as a determinative factor with respect to the application of section 18 of the *Act*;
- That I held the view (expressed at page 21) that "… at least some of the same information in Record 7 that the OPA seeks to withhold is publicly available;"
- That I factored in the passage of time, leading me to reject the OPA's argument that disclosure of the scores and evaluation summary could inject instability into the procurement process and the concluded contract because the project was "well underway;"
- That I reached conclusions about the relationship between the procurement process, scoring and rubric, without providing sources or an opportunity to respond;[23] and
- That I considered comments from Commissioner Cavoukian's 2006 Annual Report (at page 27 of Order PO-2987) "to reach the conclusion that transparency and accountability ensure 'the protection of both fairness in the procurement process and the best interests of the public'," without providing the OPA with notice that I would rely on it and an opportunity to reply.

[80] The OPA submits that had it been provided with an opportunity, it would have submitted evidence to counter these conclusions, for example, from proponents who oppose release of scoring records such as records 4 to 7, or "to substantiate how the principles elucidated by Dr. Cavoukian in fact favour withholding Record 4-7 in this case." The OPA submits that the section 18 harms resulting from disclosure of record 7 are comparable to the section 17(1) harms the first affected party would suffer with the record's disclosure.

[23] The OPA refers, in particular, to the conclusion on page 29 of Order PO-2987: "In other words, knowledge of the rubric will not assist a proponent if they cannot demonstrably meet the basic criteria of the RFP through the content of their bid."

[81] The OPA submits that the findings in Order PO-2987 were based on factors that had not been raised between, or by, the parties and to which they were not provided an opportunity to respond. According to the OPA:

> … This conduct constitutes a violation of the rules of natural justice, the right to be heard, and the right to a fair hearing. These errors constitute fundamental defects in the adjudication process and jurisdictional errors, thereby meeting the grounds for reconsideration outlined in section 18.01(a) and (b) of the *Code of Procedure*.
>
> …
>
> Without reconsideration of Order PO-2987 and correction of these defects, an injustice will be done to the OPA and irreparable harm will occur. Such harms have been detailed and provided in the evidence already before the Tribunal.
>
> The OPA respectfully submits that if the evidence submitted by the OPA is given fair consideration, the only reasonable outcome is to uphold the withholding of Records 4-7.

Findings

[82] The OPA's request seeks reconsideration of my finding in Order PO-2987 that the discretionary exemption in section 18 does not apply to the scoring methodology (records 4 to 6) and evaluative summary (record 7). Notwithstanding the conviction of the OPA's position, however, I conclude that the OPA's request for reconsideration does not fit within any of the grounds for reconsideration set out in section 18.01.

[83] It ought to be stated up front that the reconsideration process established by this office is not intended to provide a forum for re-arguing or substantiating arguments made (or not) during the inquiry into the appeal. Before addressing the OPA's concerns about the alleged fettering of discretion and violations of natural justice, I will first provide the context for my conclusion that the OPA's reconsideration request represents an attempt to re-argue issues that were decided by me in Order PO-2987, which is the final order disposing of Appeal PA09-413.

[84] In Order PO-2538-R, former Senior Adjudicator John Higgins had received a reconsideration request regarding Order PO-2405 from the LCBO and an affected party. It was argued that the Senior Adjudicator's findings (in Order PO-2405) were based on factual misapprehensions and incorrect interpretations of relevant principles and law, which resulted in various defects or errors qualifying for reconsideration under sections 18.01(a) and (c) of the *Code*.

[85] The decision of Senior Adjudicator Higgins in Order PO-2538-R includes an in-depth discussion of the *Chandler* case,[24] and other applicable case law, in relation to the reconsideration power of this office, and its adjudicators. The Senior Adjudicator wrote:

> The LCBO cites *Chandler* …, one of the leading authorities on the law of *functus officio* and reconsiderations. The LCBO quotes the following passage from the judgment of Justice Sopinka:
>
> > 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*.[25]
> >
> > **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 judgments 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.** [LCBO's emphasis.]
>
> I note that in *Chandler*, Justice Sopinka, for the majority, states that it is "necessary to consider (a) whether [the tribunal] had made a final decision, and (b), whether it was, therefore, *functus officio*." In this case, it is clear that Order PO-2405 was a final disposition of the issues before me. Justice Sopinka also comments, just before the passage quoted by the LCBO, that "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals."

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[24] *Chandler v. Alberta Assn. of Architects* (1989), 62 D.L.R. (4th) 577 (S.C.C.).
[25] [1934] S.C.R. 186.

The following passage from *Chandler*, which immediately follows the quotation provided by the LCBO in its representations, contains the following qualification on the principle of "flexibility" that is highly relevant in this case:

> Accordingly, *the principle* [of *functus officio*] *should not be strictly applied where there are indications in the enabling statute that a decision can be reopened* in order to enable the tribunal to discharge the function committed to it by enabling legislation. …
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. [Emphasis added.]

Chandler goes on to find that because the tribunal was mistaken as to which power it was exercising, and what its authority was, it had not fully exercised its statutory powers and therefore had not "used up" its jurisdiction. The LCBO does not argue that this is the case here; in Order PO-2405, it is clear that I fully exercised the authority granted to the Commissioner under section 54(1) of the *Act,* which states:

> After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

As well, the *Act* confers no express reconsideration power on the Commissioner. For this reason, in my view, the principle of "flexibility" ought to be exercised with caution in relation to decisions made under a delegated authority from the Commissioner.

…

With respect to Order PO-2405, the parties requesting reconsideration do not allege that they made an error; rather, they argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect. This is, in essence, the argument put forward by the parties with respect to the following: the nature of the mediation; the fact that I did not make a broader finding that some of the information in one of the records was personal information (which was an independent finding of my own, on an issue that had never been raised before me at all); **and the fact that I did**

> **not find certain information to be exempt under sections 18(1)(c) and (d).** It is also the basis of the affected party's argument about whether the dispute is finally settled. **In my view, these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases such as *Grier v. Metro Toronto Trucks Ltd.*[26]**
>
> **On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to the LCBO and the affected party**. … As Justice Sopinka comments in *Chandler*, "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.[27] [emphasis added]

[86] In the reconsideration process related to Appeal PA09-413 and the order resulting from my inquiry, PO-2987, I have already concluded that a procedural defect existed because I had omitted to seek the first affected party's representations on the application of section 17(1) to record 7. Granting the reconsideration under section 18.01(a) of the *IPC Code of Procedure* and inviting representations from the first affected party, and other parties, was required to remedy this defect. This was done.

[87] However, the first affected party's reconsideration request is qualitatively different than the OPA's reconsideration request, which I conclude is based on simple disagreement with my decision, notwithstanding that it was framed in language associated with the principles of administrative fairness and natural justice.

[88] In relation to the alleged fettering of discretion, the OPA submits, variously, that I: rigidly followed policies and/or precedent "without conducting [my] own analysis of the facts; did not fairly evaluate the evidence before me; failed to consider the OPA's evidence; and reached "vague" conclusions about the evidence.[28] On the subject of the alleged violation of natural justice, the OPA suggests that I breached the *audi alteram partem* rule, by effectively judging its interests without providing a proper opportunity to respond to the evidence weighing against a finding that section 18 applied. The factors that the OPA submits it ought to have been able to respond to include: the implications of the second affected party's consent to disclosure (under section 17(3) of the *Act*) of the information relating to it, particularly as that factor was mentioned by me in the order as weighing against the application of section 18; the passage of time; my own unsourced views and conclusions about the procurement context, and

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[26] (1996), 28 O.R. (3d) 67 (Div. Ct.).
[27] See also the discussion of reconsideration in Order PO-2879-R, cited by the first affected party.
[28] Paragraph 7 on pages 3 & 4, OPA's August 23, 2011 submissions.

Commissioner Cavoukian's comments about procurement transparency in her 2006 Annual Report.

[89] The OPA's expressed concerns about the alleged "fettering of my discretion" in Order PO-2987 are not substantiated, based as they are primarily on assertions that I did not duly consider the evidence before me. Notably, with respect to the OPA's suggestion that I "vaguely concluded" (on page 29) that the scoring records and the evaluation summary were not exempt under section 18, I would observe that this "vague" conclusion is followed by reasons that continue for four more pages to page 33. I find that the OPA's concerns about my decision that are categorized as representing the fettering of discretion merely represent disagreement with my findings in Order PO-2987.

[90] With respect to issues of "natural justice," I am satisfied that the OPA's concerns about not being permitted to provide evidence respecting the effect of the second affected party's consent to disclosure with respect to either section 17 or section 18 have been addressed by this reconsideration process, generally. The OPA suggests that it would have provided evidence from (other) proponents who oppose the release of scoring records such as records 4 to 7. The first affected party has provided complete submissions in this regard.

[91] Other points expressed by the OPA about the alleged violations of natural justice in Order PO-2987 appear to suggest that the OPA ought also to have been provided an opportunity to respond to various factors considered in my determination. Given the many factors the OPA argues it should have been able to respond to prior to the issuing of Order PO-2987, it almost appears to be suggested that advance notice of all of the factors I considered relevant in my decision-making should have been communicated to the OPA. Contrary to the OPA's assertion, however, I was not, as an adjudicator from this office, under an obligation to "provide … an opportunity [to parties] to respond to [my] factual assumptions regarding the scoring records regarding such issues."

[92] The process followed by this office in adjudicating on appeals is an inquiry process, as opposed to a pure adversarial process. In Order PO-1940, Adjudicator Laurel Cropley explained that:

> As an administrative tribunal, the Information and Privacy Commissioner (the IPC) functions in a somewhat different capacity from other tribunals. While the majority of administrative tribunals operate under an "adversarial" model, the IPC has "inquisitorial" elements. Although the rules of natural justice and procedural fairness applicable to other tribunals similarly apply to IPC inquiry processes, the extent to which an adjudicator may "inquire", on his or her own initiative, into the issues on appeal is heightened under this model.

[93] From this perspective, my consideration of the "passage of time" is not a fresh issue as asserted by the OPA, nor is my reference in Order PO-2987 to comments made by Commissioner Ann Cavoukian in her 2006 Annual Report, which I note is a public document. In any event, these comments were intentionally placed at the commencement of my reasons under section 18 of the *Act* to contextualize the findings.

[94] My decision in Order PO-2987 respecting the application of section 18 of the *Act* to the scoring and evaluative records was based on the facts, the nature of the exemption claims, the analysis of established precedent of this office, and the evidence presented.

[95] As stated, the burden of proof rested on the OPA to adduce evidence of a reasonable expectation of the forecasted harms under section 18(1)(c), (d) or (e) occurring with disclosure. The evidence presented, in the specific circumstances of the appeal, did not persuade me that the forecasted harms could reasonably be expected to result from disclosure. In conclusion, and with reference to my findings with respect to the first affected party's reconsideration, I find that OPA has not established that there was a fundamental defect in the adjudication process, a jurisdictional defect in my decision, or an error or omission in my decision for the purposes of section 18.01 of the *Code*.

[96] The Supreme Court of Canada in *Chandler* has acknowledged and confirmed the sound policy basis for respecting the finality of decisions of administrative tribunals. Notwithstanding the OPA's arguments, Order PO-2987 was a final decision on the facts and issues before me, based on the full exercise of the authority delegated to me by the Commissioner under section 54(1) of the *Act*. Accordingly, I find that I am *functus officio* and not in a position to reconsider my finding on the application of section 18 in Order PO-2987.

[97] Given my finding that the information remaining at issue in this reconsideration is not exempt under sections 17 or 18, it must be disclosed to the appellant. The provisions of Order PO-2987 will be amended to reflect the narrowing of the scope of the information at issue in this reconsideration.

ORDER:

The provisions of Order PO-2987 relating to record 3 are not affected by this reconsideration order. The provisions of Order PO-2987 relating to records 4 to 7 are amended as follows:

1. I order the OPA to disclose the portions of records 4 to 7 remaining at issue (as identified in this order), which I have found do not qualify for exemption, to the appellant by **April 25, 2012**, but not before **April 19, 2012**.

Before disclosing the non-exempt portions of records 4 to 6 to the appellant, the OPA ought to sever the information that does not relate to the following parts of the RFP submissions: electrical connection point and islanding [3.3.1]; municipal and regional appeals [3.3.3]; and community outreach [3.3.4]. The severance may include total point scores.

Record 7 is to be disclosed in part. A copy of record 7 in the form that is to be disclosed to the appellant (with the information removed from the scope of this reconsideration severed), is enclosed with this order.

2. In order to verify compliance with this reconsideration order, I reserve the right to require the OPA to provide this office with a copy of the records disclosed to the appellant pursuant to provision 1.

Original Signed By: March 16, 2012
Daphne Loukidelis
Adjudicator