

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2816-I

Appeal MA11-281

Toronto District School Board

December 10, 2012

Summary: The appellant made a multi-part request to the board for records relating to a specific request for proposal. The board denied access to the responsive records on the basis of the discretionary exemptions in sections 6(1)(b)(closed meeting), 7(1)(advice or recommendation), 11(a), (c) and (e) (economic or other interests). The board also claimed the mandatory third party information exemption in section 10(1). The board's decision is partially upheld pursuant to sections 6(1)(b) and 10(1). The board is ordered to exercise its discretion for the records withheld under section 6(1)(b).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 6(1)(b), 10(1)(a), and (c). *Education Act*, R.S.O. 1990, c. E. 2, s. 207(2)(a), and (c).

Orders and Investigation Reports Considered: MO-1558-I, PO-2618.

OVERVIEW:

[1] The appellant made two requests to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a particular Request for Proposal (RFP) issued by

the board. This decision relates to the appellant's second request for records.¹ Specifically, the appellant sought:

1. The name(s) of the RFP's bidder(s).
2. The Bid Response(s) from the RFP's bidder(s).
3. The dates and times at which the Bid Responses were received by the [board].
4. Any bid evaluation documents and records respecting the RFP and the bidder(s).
5. Any documents or records respecting the reason(s) why there was no successful bidder.
6. Any documents or records respecting the decision not to select a bidder(s).
7. Any notification(s) from the [board] to the bidder(s) that they were unsuccessful.
8. Any record pertaining to the [board]'s plans with respect to the RFP or its subject matter in light of the fact that there has been no successful bidder.
9. If a Bid Response is currently under consideration or negotiation, any document or record pertaining thereto.
10. To the extent the [board] takes the position that any of the requests in paragraphs 1 through 9, above are subject to a disclosure exemption in MFIPPA, copies of those records or documents redacted so as to only not disclose the exempted information.

[2] The board issued a decision disclosing two records, and deny access to the remaining records citing the application of sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1)(a), and (b) (third party information), and 11(a), (c), and (e) (economic or other interests) of the *Act* to all of the withheld information in the records.

[3] During mediation, the board confirmed that there are no records responsive to parts 5 and 6 of the appellant's request. Further, the board confirmed that the records responsive to part 9 of the request are also responsive to part 8 of the request. The appellant confirmed that he does not take issue with the board's position regarding parts 5, 6 and 8 of his request.

[4] The adjudicator first assigned to this appeal sought and received representations from the board and eight organizations whose interests may be affected by the outcome of the appeal (the affected parties). The adjudicator received representations from the board and three affected parties. The matter was then transferred to a second adjudicator who sought and received representations from the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. The appeal was then transferred to me to issue the order.

¹ The appellant's first request is being dealt with in Appeal MA11-465 which is the subject of a related order being issued concurrently with this decision.

[5] In this order, I partially uphold the board's decision.

RECORDS:

[6] The following records in their entirety are at issue:

- Bid log sheets, containing the names of all bidders on the RFP (Record 1);
- Bid responses from the eight RFP (Records 2 – 9);
- Bid log sheet, containing the dates and times at which all bid responses were received by the board (Record 10);
- Bid evaluation document (Record 11);
- Briefing note (Record 19); and
- Report (Record 20).

[7] Record 3 is the bid proposal submitted by the winning proponent. As this record is also responsive to the appellant's first request (MA11-465), I considered the appellant's access to this record in the order that disposed of that appeal.

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to Records 19 and 20?
- B. Does the mandatory third party information exemption at section 10(1) apply to Records 1, 2 through 9, 20 and 11?
- C. Was the board's exercise of discretion proper?

DISCUSSION:

A. Does the discretionary exemption at section 6(1)(b) apply to Records 19 and 20?

[8] The board claims that section 6(1)(b) applies to exempt Records 19 and 20 from disclosure. Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[9] For this exemption to apply, the board must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

[10] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;² and
- “substance” generally means more than just the subject of the meeting.³

[11] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.⁴

[12] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.⁵

[13] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?⁶

[14] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution’s *in camera* meeting, not merely the subject of the deliberations.⁷

² Order M-184.

³ Orders M-703, MO-1344.

⁴ Order MO-1344.

⁵ Order M-102.

⁶ *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).

⁷ Orders MO-1344, MO-2389 and MO-2499-I.

Part 1 – a council, board, commission or other body, or a committee of one of them, held a meeting

[15] The board submits that Record 19 was submitted at an in-camera meeting of the committee of the whole board on September 7, 2010 and Record 20 was submitted to an in-camera meeting of the committee of the whole board on December 13, 2010.

[16] In support of its submission, the board provided an affidavit of the Senior Manager of Board Services and the Freedom of Information Coordinator for the board. She affirms that she attended the in camera meeting held on September 7, 2010. She further affirms:

- Record 19 was distributed to trustees at the in-camera session of the Committee of the Whole Board.
- Record 20 was distributed to the trustees of the committee of the whole Board.

[17] I accept that a committee of the board held two meetings and the first requirement of the test under section 6(1)(b) has been met.

Part 2 – a statute authorizes the holding of the meeting in the absence of the public

[18] The board submits that section 207(2) of the *Education Act* authorizes meetings of the board to be held in the absence of the public. Section 207(2) states in part:

A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves

(a) the security of the property of the board;

...

(c) the acquisition or disposal of a school site;

[19] The board submits that it exercised its discretion under these two subsections to hold in-camera meetings and provided this background information:

The purpose of the entire tender process was to enter into a contract with the successful bidder [and] have a solar panel system built on the rooftops of various Board owned schools. The successful bidder would derive income from selling power to the provincial electrical power grid under the Ontario Power Authority's "Feed In Tariff" program. The Board

derived benefits in several manners including through the repair of roofs older than 10 years on its schools.

[20] The board submits that the *Education Act* does not limit or qualify the definition of "security" and submits that the Supreme Court of Canada in another context has adopted broad definitions of terms which are not qualified in their home statute. Accordingly, the board suggests that the solar panel project deals with securing the physical assets of the board.

[21] Regarding paragraph (c) of section 207(2), the board submits that the records also relate to the disposal of the board's school sites. The board states:

As noted at p.1 of Exhibit A to the Affidavit of [named individual] under part 2 the "Purpose" section, the board's proposed model for the project was to lease out a portion of the affected school sites, on the roof tops, to the successful bidder who would place solar panel arrays, to be owned by the bidder, on the roof.

The board notes that the *Education Act* equates the term "disposal" with the leasing of part of a school site in s. 194(3) of the *Act* which reads in part:

(3) Subject to subsections (3.3) and (4), a **board has power to sell, lease or otherwise dispose of** any school site or part of a school site of the board or any property of the board, [emphasis in original]

[22] The board submits that in both cases, the subject matter of the in camera sessions dealt with the proposal and thus related to both the security of board property and the disposal of a school site and fell within the provision of section 207(2).

[23] Having reviewed the records and the board's representations, I am satisfied that the meetings were properly held *in camera* pursuant to section 207(2) of the *Education Act*. Prior decisions of this office have found that the term of "disposal" is also used in Ontario Regulation 444/98 where the term "disposition" is used in the context of sale, lease or "other disposition", such as the granting of an easement.⁸ In Order MO-1558-I, Adjudicator Laurel Cropley found the following in regard to the term "disposition":

In essence, this term is used to denote some form of transfer of ownership or use of the property. In my view, both terms should be similarly characterized to relate to the purchase, sale, lease or other similar transfer of rights of use of the property (land and/or premises).

⁸ Orders MO-1558-I and MO-1590-F.

[24] I adopt this approach in the current appeal and find that the subject matter of the records relates to the leasing of a portion of the school sites. Thus, in keeping with the findings in these earlier decisions, the meetings were in relation to the disposal of school sites and thus the board was within the ambit of section 207(2) of the *Education Act* when it went in camera for the two meetings. Accordingly, I find the board has met part two of the test for the application of section 6(1)(b).

Part 3 – the disclosure of the record would reveal the actual substance of the deliberations of this meeting

[25] In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term “deliberations”:

In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.

[26] The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

[27] The board notes that in the case of record relating to the September 7, 2010 meeting, the contents of the record formed the subject matter of deliberation of the board. The board provided as evidence the affidavit of the Senior Manager of Board Services and the Freedom of Information Coordinator for the board who affirms that record 19 was distributed to trustees at the in camera meeting and was used by them as a basis for deliberations on the recommendations contained therein. The affiant also submits that record 20 relating to the December 13, 2010 meeting contains information about the subject matter and deliberations of the board's September 7 meeting.

[28] The appellant submits that the affiant does not specify that disclosure of the records would reveal the actual substance of the deliberations that took place at the *in camera* meetings.

[29] The board submits that the appellant's arguments are based solely upon his reading of the non-confidential portions of the affidavit. The board submits that the affidavit fully addresses the fact that disclosure of the content of both records 19 and 20 would reveal the actual substance of the board committee *in camera* meeting.

[30] I have reviewed the records and the parties' representations and I find that the board has established that disclosure of the records would disclose the actual substance of the deliberations at the September 7, 2010 meeting. Both records contain detailed information and issues that required discussion by the committee. I accept that the records and thereby the substance was deliberated on at both *in camera* meetings.

[31] The appellant did not argue the application of the exceptions in section 6(2) and I find that none of them apply. Accordingly, I find that Records 19 and 20 are exempt under section 6(1)(b) subject to my review of the board's exercise of discretion set out below.

B. Does the mandatory third party information exemption at section 10(1) apply to Records 1, 2 through 9, 10 and 11?

[32] The board and the affected parties rely on section 10(1)(a) and (c) to exempt Records 2 through 9⁹ and Records 1, 10 and 11 from disclosure. The board submits that Records 2 through 9 are the bids submitted by each of the contractors and disclosure of Records 1, 10 and 11 would reveal the substance of information provided by the third parties in Records 2 through 9. Section 10(1) states, in part:

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

⁹ As stated above, I will not be considering Record 3, the winning bid proposal, in this order.

[33] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹⁰ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.¹¹

[34] For section 10(1) to apply, the board and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[35] The appellant concedes that Records 2 through 9, the bid documents submitted by the affected parties, would reveal information that is either trade secret, scientific, technical, commercial, or financial information and thus would satisfy the first part of the three part test. However, the appellant questions whether Records 1 and 10 would contain any of the protected information.

[36] Based on my review of the records, I find that Records 2 through 9 contain commercial, financial, technical information within the meaning of how those terms have been defined in past orders.¹² Record 11, which is the bid evaluation document contains commercial and financial information and also meets the first criteria of the three part test.

[37] Regarding Records 1 and 10, the board has not established that disclosure of the names of the various contractors and the submission date and time of their respective bids would reveal any of the types of information protected in section 10(1). Accordingly, I find that this information does not satisfy the first part of the three part test. As each part of the test must be met, I find Records 1 and 10 do not qualify for exemption under section 10(1). As no other mandatory exemptions apply to these

¹⁰ *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.).

¹¹ Orders PO-1805, PO-2018, PO-2184, MO-1706.

¹² Order PO-2010.

records and the board has not claimed the application of any further discretionary exemptions, I will order these records disclosed to the appellant.

Part 2: supplied in confidence

Supplied

[38] The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.¹³

[39] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.¹⁴

In confidence

[40] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁵

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.¹⁶

¹³ Order MO-1706.

¹⁴ Orders PO-2020, PO-2043.

¹⁵ Order PO-2020.

¹⁶ Orders PO-2043, PO-2371, PO-2497.

[42] The board submits that Records 2 through 9 were all submitted by the affected parties in confidence to the board. As evidence, the board provided a copy of the Request for Proposal document, entitled, "Request for Proposal DW10-153P for Rooftop Solar Photo-Voltaic Energy Project" and the affidavit of the Senior Manager of Building Design and Renewal for the board. An affected party submits that while it was aware the board is subject to the *Act*, it also was aware of the protection afforded by the section 10 exemption when it prepared and submitted its bid. Thus, the affected party submits that it had a reasonable expectation of confidentiality for the confidential information in the bid when it was submitted to the board.

[43] The board and the affected party submits that section 17 of the RFP provides that the bid documents will be treated in confidence. This section states:

The Bid and any accompanying documentation submitted by Bidder prior to the Closing Date and Time specified in this Information shall become the property of the Board and shall not be returned. The Bid shall be subject to the [Act]. Bidder's proposal shall be received and held in confidence by the Board unless and to the extent that it is or must be disclosed pursuant to any Freedom of Information and Privacy legislation or instructed by the Courts of the Province of Ontario or the evaluation and award process adopted by the Board for this solicitation.

[44] The appellant submits that the above quoted section does not reasonably stand for the proposition that bids submitted to the board would be held in confidence. The appellant states:

- a. RFP s. 17 stipulates that the bids, once received, are [the board] property, and will not be returned to the bidders. That is, the bidders understand that their bids, once submitted, are no longer in their control.
- b. This section alerts all bidders that, as a public institution subject to MFIPPA, [the board] cannot guarantee that the bids will be kept confidential and they in fact might not be kept confidential. The circumstances under which confidence would not be maintained are explicitly stated to include disclosure pursuant to the very context in which these submissions are made: an MFIPPA request.
- c. [The board] reserves to itself the right to disclose the bids as it sees fit in "*the evaluation and award process adopted by the Board for this solicitation.*" In other words, [the board] explicitly warned bidders that [the board] would keep the bids confidential unless [the board] were to decide not to do so. That is, it provided no assurance of confidentiality at all.

[45] The appellant further submits that any company working in the solar industry in Ontario seeking to take advantage of the Ontario Power Authority's Feed in Tariff (FIT) program for solar energy generation must undergo an application process to have its project approved. The FIT program is administered by the Ontario Power Authority which is an institution under the provincial *Act* and thus:

The RFP bidders, and [the board], were therefore aware, or ought to have been aware, that being a successful bidder would mean that some of the information contained in the successful bidder's bid would be submitted to the Ontario Power Authority where there was also no reasonable expectation of confidentiality.

[46] Based on my review of the records and the representations of the parties, I find that the bids (Records 2 – 9) were supplied in confidence to the board with a reasonably-held expectation of confidentiality. I make this finding notwithstanding the parties' awareness that their bids would be subject to the provisions of the *Act*.¹⁷ Adjudicator Frank DeVries, in Order PO-2618, found that a confidentiality provision did not nullify an expectation of confidentiality, when he considered the application of section 17(1) [the provincial equivalent of section 10(1)] and stated the following:

Although I agree with the appellant's general statement that parties who seek to do business with the government must be prepared to submit to a higher and more transparent level of disclosure, in my view this does not mean that parties ought to have no expectations of confidentiality for any of their proposals. Section 17(1) of the *Act* clearly provides that certain third party information may be denied to requesters if the requirements of section 17(1) are met, and that is the issue that is being reviewed in this appeal.

[47] I adopt Adjudicator DeVries' approach for the current appeal. The affected parties had both an implicit and explicit expectation of confidentiality when they supplied their bid proposals to the board. And I find that part two of the test for the application of section 10(1) has been met for these records.

[48] The board did not make submissions on whether the information in Record 11 was supplied in confidence. Record 11 is a document containing the board's evaluation of the various bid proposals and includes information which would have been supplied by the affected parties in response to the request for proposals. For the information supplied by the affected parties, including the Photo-Voltaic output and lease rate, I find that this information was supplied with a reasonable expectation of confidentiality and meets part two of the test under section 10(1).

¹⁷ See Order PO-1688 where the adjudicator found that the affected parties held a reasonable expectation of confidentiality despite the fact that the confidentiality clause contained the reference that the proposals were subject to the provisions of the *Act*.

[49] However, I find that the scoring information in Record 11 does not meet the “supplied” aspect for the application of section 10(1). This information was produced by the board for its scoring and evaluation purposes and was not supplied by the affected parties. I find that this portion of Record 11 does not qualify for exemption under section 10(1). Further, as the board has not claimed any additional discretionary exemptions and no other mandatory exemptions apply to this information, I will order it disclosed.

Part 3: harms

[50] To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.¹⁸

[51] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.¹⁹

[52] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 10(1).²⁰

[53] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.²¹

Section 10(1)(a): prejudice to competitive position

[54] The board submits that disclosure of the records could reasonably be expected to prejudice the competitive positions of the affected parties who submitted bids. The board submits that the solar project which is the subject matter of the records, sought to take advantage of the Ontario government FIT program. The board notes that the FIT program is a province-wide initiative to subsidize the construction of electrical generation projects and thus it is evident that similar business opportunities will be available to contractors wishing to bid on future projects. The board further notes that the large number of bids received in response to the RFP is evidence of the degree of competition in the marketplace for this type of business.

¹⁸ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹⁹ Order PO-2020.

²⁰ Order PO-2435.

²¹ Order PO-2435.

[55] The board submits that the content of the bids goes beyond mere pricing and instead provides descriptions of the specialized methods to be used by each bidder to maximize the goals of the proposed project. The board states:

As noted in Exhibit "A" page 1 Item 2 ("Purpose") the board invited the bidders to formulate alternative business models and provide the associated business cases to achieve the goals of the project.

[56] The affected parties submissions also emphasize the prejudice to their competitive positions should disclosure occur. The affected parties submit that the nature of the project was one that required unique solutions and innovation. One affected party states the following:

The RFP relates to a project to develop a solar photo-voltaic ("Solar PV") energy system on the rooftops of various schools under a lease arrangement to convert sunlight into electrical energy (the "Project"). The challenges to making the system viable are financial as well as technological and accordingly, careful analysis of the component costs and cost projections as well as technical and experience with the design, installation and maintenance of these systems are key.

[57] The affected parties also emphasized the competitive marketplace for "green" energy solutions and one affected party submits:

Ontario, like many other jurisdictions has expressed an interest in continuing to explore the use of renewable energy solutions, including Solar PV energy systems. The growth potential in this area is another factor that makes it reasonable to expect that disclosure of the Protected Information would undermine, in a significant way, [the affected party's] investment and competitiveness in delivering such systems.

[58] The two affected parties who provided representations also included a copy of their bid proposals with the information they would like withheld severed. Another affected party also included submissions on the particular information he wished withheld.

[59] The appellant submits that the parties resisting disclosure have not provided detailed and convincing evidence of the harm in sections 10(1)(a) or (c). The appellant also notes that the board's contract has been awarded to a specified affected party and thus the argument cannot be made that this affected party would suffer a loss, or another party would have undue gain should the information be disclosed.

[60] As stated above, the failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can

be inferred from other circumstances. In the present appeal, having reviewed the records at issue, and the circumstances surrounding this appeal, I am satisfied that the disclosure of portions of the records, could reasonably be expected to result in the harms identified in section 10(1)(a). I base my findings on the representations of the parties on the competitive nature of the solar energy marketplace and the detailed information included in the records. I find the board's argument that the contractors were asked to provide specified alternative business models in their proposals to achieve the goals of the project to be borne out by the content of the records.

[61] In particular, I find the portions of the bid proposals which include the affected parties' financial and commercial information, business structure, clients, references, methodologies, schedules and reports to qualify for exemption under section 10(1)(a). I will provide a copy of the bid proposals to the board with the information I find exempt under section 10(1)(a) highlighted.

[62] Similarly, I find that the disclosure of the Photo-Voltaic output and lease rate in Record 11 could reasonably be expected to prejudice significantly the competitive position of the affected parties and thus is exempt under section 10(1)(a).

[63] However, I am not satisfied that the other portions of the records remaining at issue qualify for exemption under section 10(1)(a). The remaining portions of the records do not contain information which, if disclosed could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group, or organizations. I find that I have not been provided with sufficiently persuasive representations establishing that the information contained in these portions of the records qualify for exemption under section 10(1)(a). This information, which qualifies as commercial information, relates to the affected parties' prior work history, experience and qualifications. Other information relates to the affected parties' past projects and consists of non-detailed or general information about the company or the proposal. This information appears to be public information or information that is not treated confidentially by the affected parties. Accordingly, I will consider whether this information is exempt under section 10(1)(c).

Section 10(1)(c): undue loss or gain

[64] One of the affected parties argues that disclosure of portions of its bid proposal could reasonably be expected to result in undue loss to itself and undue gain to its competitors such that the information should be withheld under section 10(1)(c). The affected party's representations are similar to those set out above regarding harm to its competitive position upon disclosure of the information at issue. For the reasons set out above, I find that the information remaining at issue, is not exempt under section 10(1)(c). I find that the affected party has not provided sufficient evidence to establish that disclosure of this commercial information, which is non-detailed and general

information about the affected party or the proposal, could reasonably be expected to result in the harm set out in section 10(1)(c). Accordingly, I find that this section does not apply and the information should be disclosed to the appellant.

C. Was the board's exercise of discretion proper?

[65] The section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[66] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[67] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²² This office may not, however, substitute its own discretion for that of the institution.²³

[68] The appellant submits that the board improperly exercised its discretion to withhold the information that it exempted under section 6(1)(b). The appellant submits that a finding requiring the board to re-exercise its discretion would prove fruitless and instead submits that I need to make a finding on the application of the exemption claims.

[69] The board did not submit representations on its exercise of discretion and even when given a chance to respond to the appellant's representations, it again declined to do so. Further, I am unable to discern from its representations on the application of section 6(1)(b) what considerations, if any, the board considered in applying this exemption to Records 19 and 20. Accordingly, I will order the board to exercise its discretion in applying section 6(1)(b) to Records 19 and 20 and to provide representations on this exercise of discretion, taking into consideration the following factors:

- the purposes of the *Act*, including the principles that
 - information should be available to the public

²² Order MO-1573.

²³ section 43(2).

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

ORDER:

1. I order the board to disclose the information in Records 1, 2, 4 – 9, 10, and 11 by providing the appellant with a copy of the records by **January 18, 2013** but not before **January 11, 2013**. A highlighted copy of the records identifying the information to be withheld is enclosed with the board's copy of the order. To be clear, I have highlighted the information to be **withheld** in the records.
2. I uphold the board's decision relating to the remaining information which I have found exempt under the mandatory exemption in section 10(1).
3. I order the board to exercise its discretion with respect to Records 19 and 20 taking into account the factors set out above in paragraph 69 and to advise the appellant and this office of the results of this exercise of discretion, in writing. If the board

continues to withhold all or part of these records, I also order them to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The board is required to send the results of its exercise of discretion, and its explanation to the appellant, with a copy to this office, by no later than **January 4, 2013**. If the appellant wishes to respond to the board's exercise of discretion and/or its explanation for exercising its discretion to withhold the information, it must do so within 21 days of the date of the board's correspondence by providing me with written representations.

4. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original signed by: _____
Stephanie Haly
Adjudicator

_____ December 10, 2012