Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3146-I

Appeal PA10-87-2

Ontario Power Authority

December 11, 2012

Summary: The appellant represents a not-for-profit environmental protection organization. He requested records from the OPA relating to the proposed project to construct a gas-fired electricity plant in Oakville, Ontario. The OPA granted partial access to the responsive records and withheld a number of them pursuant to sections 17(1) (third party information) and 18(1) (economic interests). The appellant appealed the OPA's decision and raised the public interest override in section 23. In addition, the appellant believed that additional records should exist. The adjudicator upheld the section 17(1) and 18(1) exemptions for a number of records and ordered the OPA to disclose other records. In addition, the adjudicator deferred her decision on specific records pending third party notification and clarification from the OPA. Finally, the adjudicator found that the OPA's search for responsive records was reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1)(c) and (d), 23, 24.

OVERVIEW:

[1] The appellant represents a not-for-profit environmental protection organization. He submitted a four-part request to the Ontario Power Authority (OPA) under the *Freedom of Information and Protection of Privacy Act* (the *Act)* for a number of categories of information relating to the proposed project to construct a gas-fired electricity plant in Oakville, Ontario, including specific information about the successful bidder (the third party).

[2] Initially, the OPA issued an interim access decision to the appellant in which it identified 23 responsive records (set out on an attached index) and indicated that it was denying access to them in their entirety based on sections 18(1)(c) and (d) (economic and other interests). The OPA indicated further that records 1 to 4 were also being withheld pursuant to section 17(1) of the *Act* (third party information). The OPA indicated that it had notified the parties that submitted proposals in response to the Request for Proposals (RFP) (the affected parties), and that a final decision would be issued upon receipt of their representations.

[3] Prior to the issuance of the OPA's final decision, the appellant clarified and narrowed the request. Following receipt of the third party's representations, the OPA issued an access decision in which it granted partial access to the response to the RFP submitted by the third party (record 3), and to the Agreement (record 3A). The OPA denied access to the remaining records, pursuant to the sections 17(1) and 18(1)(c) and (d).

[4] In its decision, the OPA noted that as a result of the narrowing of the request, the appellant had removed records 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 14, 16, 19, 20 and 21 from the scope of the request.

[5] The appellant appealed the OPA's decision. In his letter of appeal, the appellant confirmed that he was only interested in seeking records 3, 7, 11, 15, 17, 18, 22 and 23. He also raised the possible application of the "public interest override" in section 23 of the *Act*, and indicated that he believed more records should exist.

[6] During mediation a number of issues were resolved and other issues were raised. A few additional issues were resolved after mediation was completed. Mediation did not resolve all of the issues, and this file was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*.

[7] I sought and received representations from the OPA, the third party and the appellant. The representations of all parties were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[8] Initially, in this order, I determine that additional notification of affected parties is necessary before I can dispose of certain records. As well, I find that one of the records at issue has not been provided to me. In these circumstances, I will defer my decision regarding these records pending notification of affected parties and clarification from the OPA.

[9] In this order, I find that the mandatory exemption at section 17(1) applies to some of the records for which it was claimed, but that certain other records do not meet the three-part test. I also find that section 18(1) applies to some of the records

for which it was claimed, in full or in part. I also determine that the public interest override in section 23 does not apply and that the OPA's search for responsive records was reasonable.

Preliminary matters

Records and notification issues

Identification of records

[10] It should be noted that the withheld portions of record 3 are identified as "pages." However, each "page" is, in fact, a distinct document which may contain one or more pages. For example, page 52 of record 3 is a 33-page agreement with a number of schedules. To avoid any confusion, I will refer to each "page" in record 3 as "document", and where necessary, will refer to each page within the document as document number, dash, page number. For example, page 3 of document 52 of record 3 will be referred to as document 52-3 of record 3.

Record 17

[11] In the index of records provided by the OPA, record 17 is described as an "OPA document summarizing total point scores arising out of Stage 3…" The copy of record 17 provided to this office is not the same as that described in the index of records or as described in the confidential portion of the affidavit provided by the "procurement expert." Moreover, the OPA's representations and affidavits contain confusing comments and descriptions of record 17.

[12] On my review of record 17 (as provided to this office), I note that its contents are virtually identical to the contents of records 18 and 23. Accordingly, any decision I make regarding the copy of record 17 that was sent to this office will similarly apply to the same information in records 18 and 23.

[13] I will not address access issues relating to record 17 as it is described in the index (which I will refer to as record 17a), but will address that record in the final order, once the issue has been clarified by the OPA and all parties have had an opportunity to address any issues arising from this clarification.

Notification and section 17(3)

[14] In its representations, the third party indicates that it no longer objects to disclosing documents 10, 11, 12, 16, 17, 19, 36, 94, 125, 126, 135 and 136 of record 3. In addition, the affected party indicates that it no longer objects to disclosing documents 24, 32, 60, 85 and 130 of this record as long as other parties identified in the records consent to disclosure.

[15] Section 17(3) states:

> A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

[16] Although section 17(3) is worded as discretionary, in my view, it would be highly unlikely that an argument could be made that the section 17(1) harms could reasonably be expected to occur should disclosure be made where the third party consents to that disclosure. Accordingly, I will not consider the possible application of section 17(1) to documents 10, 11, 12, 16, 17, 19, 36, 94, 125, 126, 135 and 136 of record 3.

[17] However, the OPA has claimed the application of section 18(1) for documents 10, 11, 12, 16, 17, 19, 94, 125, 126, 135 and 136 of record 3, and I will consider the application of this section to these documents. As no other exemptions have been claimed for document 36, it should be disclosed to the appellant.

[18] Although the third party has no section 17(1) concerns regarding documents 24, 32, 60, 85 and 130, these pages relate to other parties who have not had an opportunity to comment on them. Accordingly, I will defer my analysis and decision regarding documents 24, 32, 60, 85 and 130 pending notification of the parties referred to in them.

[19] As a result of the above, I will consider whether the mandatory exemption at section 17(1) applies to documents 52, 86, 87, 88, 89, 124 and 165 of record 3 only in the following discussion.

RECORDS:

[20] The records remaining at issue consist of the following:

- Undisclosed portions of the third party's proposal (record 3 - documents 10, 11, 12, 16, 17, 19, 52, 86, 87, 88, 89, 94, 124, 125, 126, 135, 136 and 165).

- The evaluation records relating to the four proponents, indexed as records 7, 11, 15, 17, 18, 22 and 23.

ISSUES:

A: Does the mandatory exemption at section 17(1) apply to record 3 (documents 52, 86, 87, 88, 89, 124 and/or 165)?

B: Does the discretionary exemption at section 18(1)(c) and/or (d) apply to records 7, 11, 15, 17, 18, 22, 23, and/or record 3 (documents 10, 11, 12, 16, 17, 19, 94, 125, 126, 135 and 136)?

C: Did the OPA exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the exemptions?

E: Did the OPA conduct a reasonable search for records?

DISCUSSION:

A: Does the mandatory exemption at section 17(1) apply to record 3 (documents 52, 86, 87, 88, 89, 124 and/or 165)?

[21] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[22] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

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

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

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[24] The third party submits that the records contain commercial and financial (document 52), scientific (document 124) and technical (documents 86, 87, 88, 89 and 165) information. The OPA agrees that document 52 contains commercial information and that documents 86 to 89 contain technical information. However, it characterizes document 124 as containing technical and commercial information and document 165 as containing commercial information.

[25] These types of information have been defined in previous orders to mean:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical

[1] *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.).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[26] I adopt these definitions for the purposes of this appeal.

[27] The appellant does not dispute that the records at issue in this discussion contain one or more of the types of information defined above.

Analysis and findings

Document 52

[28] The third party describes document 52 as a "commercial agreement between [the third party] and [another named company] (the fourth party) related to the procurement of lands…" The third party points out that this is a private agreement between it and the other party. The OPA essentially agrees with this description, describing it as an agreement between the third party and the fourth party. Having reviewed document 52, I agree that the document, in its entirety, pertains to the buying and selling of land and falls within the definition of "commercial information" as that term is defined above.

Document 124

[29] The third party describes document 124 as "a community survey of opinions regarding power plants in Ontario." The third party states that the company that prepared the survey "specializes in conducting quantitative and qualitative research studies on public opinion." In claiming that this document contains scientific information, the third party states:

> [The named study] reflects information belonging to an organized field of knowledge in the social sciences. [The named study] discloses its authors' confidential methodology and approach to its survey. It also includes sensitive data regarding community approval of natural gas power plants.

[30] The OPA describes this document as "a Community Survey prepared by another fourth-party entity and marked *strictly privileged and confidential*." The OPA takes the position that this document contains technical and commercial information.

[31] Having reviewed this document, I am satisfied that it is a survey conducted by an expert in the social sciences field and that it contains the characteristics of a scientific study, such as methodology, approach and results.

Documents 86, 87, 88, 89 and 165

[32] The third party indicates that these documents were generated as part of its presentation to the Ministry of the Environment [the MOE] and consist of a memorandum, e-mail, attendees list and the presentation itself. According to the third party, these documents contain "technical engineering information regarding [the third party's] environmental strategy, in particular, [the third party's] emission targets at that time." The third party submits that its environmental strategy "was designed in furtherance of [its] commercial interests."

[33] The OPA essentially agrees with the third party and notes that documents 86-89 "touch on the planning and scheduling of a meeting about [the third party's Environmental Review Report]," and that they contain technical information. The OPA submits that the presentation contained in document 165 qualifies as commercial information.

[34] Document 165 contains presentation slides. In an affidavit sworn by a registered professional engineer (the engineer) employed by the third party, the engineer indicates that "[t]he documents related to the Presentation to the MOE were disclosed to the OPA to support the evaluation process with respect to environmental permitting developed by the OPA in the procurement process."

[35] Based on my review of the information contained in the document and the submissions made by the OPA and the third party, I find that the slides in document 165 contain technical information within the meaning of that term as defined above, as they were prepared by a professional in the engineering field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

[36] With respect to documents 86 to 89, I find that portions of documents 86 and 87 contain technical information. These portions are essentially the same information as is

contained in document 165. Other portions of these two documents contain information that would qualify as commercial information.

[37] With respect to the remaining information in documents 86 and 87, although I accept that the third party has included this information in the package that was prepared for the OPA, this information does not qualify as commercial or technical information. These remaining portions simply set out scheduling information and/or general comments on the nature of the presentation. I find that these portions either do not contain technical information, or the references made are too general to fall within the definition.

[38] Document 88 is an e-mail exchange between the MOE and the third party relating to the meeting at which the Presentation was made. This document sets out the nature of the MOE's participation in the meeting and makes general reference to the third party's commercial interests, but does not, in and of itself, fall within the definition of commercial information.[3]

[39] Similarly, document 89 is simply a list of individuals who attended the presentation meeting. This document does not contain any of the information identified above.[4]

[40] Since the section 17(1) exemption requires that all three parts of the test be met, I find that documents 88 and 89, in their entirety, and portions of documents 86 and 87 do not qualify for exemption under section 17(1).

[41] As no other exemption claims have been made for documents 88, 89 and the portions of 86 and 87 that do not qualify for exemption, I will order that they be disclosed to the appellant. For greater certainty, I have highlighted the portions of documents 86 and 87 that are to be disclosed to the appellant.

[42] Having found that documents 52, 124, 165 and portions of documents 86 and 87 contain the type of information referred to above, I will go on to determine whether they meet the remaining parts of the section 17(1) test.

Part 2: supplied in confidence

Supplied

[43] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[5]

---

[3] See: Order PO-2010.
[4] Ibid.
[5] Order MO-1706.

[44] 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.[6]

[45] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[7]

In confidence

[46] 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.[8]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[9]

---

[6] Orders PO-2020, PO-2043.
[7] See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).
[8] Order PO-2020.
[9] Orders PO-2043, PO-2371, PO-2497.

Representations

[48] In addressing this issue generally, the OPA provides some background information on the procurement process as follows:

> Every proponent will regard at least some of its internal information as commercially sensitive and will therefore seek to protect that information through confidentiality agreements. In order for Government purchasers to secure access to the kind of information necessary to carry out a proper evaluation in relation to an RFP, it is essential to create a valid and effectual contractual infrastructure so that the supplier or contractors can identify confidential information and thereby foreclose it from discovery through the FOI process.
>
> This type of management infrastructure is known as 'Information Governance.' It is part of the overall process of risk management within the private sector. It encompasses the rules, policies, and procedures which govern the integrity, security and use of proprietary information within an organization. The concern of a proponent in relation to an RFP is that any trade secrets revealed or ascertainable from the information provided may become known by competitors or others (e.g. potential take-over investors) who could exploit this information to their benefit, and to the detriment of the proponent who reveals it.

[49] The third party notes that the "Bid Package" was prepared and submitted to the OPA in response to the RFP, and indicates that the documents discussed under this heading were all included in the Bid Package. The third party states further that the Bid Package was submitted with an expectation that it would be kept confidential, noting that it did not receive information from its competitors.

[50] The OPA agrees with the third party's expectation of privacy at the time the bids were submitted. In addition, OPA states that the RFP contains an explicit expectation of confidentiality provision. The confidentiality provision indicates generally that all information provided by proponents is subject to the *Act*. The provision goes on to require proponents to clearly indicate which portions of the bids contain proprietary or confidential information. Finally, the confidentiality provision clearly states that if this is not done, the proponent "will be automatically deemed to certify to the OPA that no portion of the [bid] contains proprietary or confidential information for which confidentiality is to be maintained by the OPA…"

[51] The OPA refers to specific pages of the third party's confidentiality statement that were expressly identified. Of the records remaining at issue in this discussion, the OPA refers only to documents 124 and 165.

[52] In its submissions, the appellant also refers to this confidentiality provision in the RFP and points out that the OPA did not refer to documents 52 or 85-89. Regarding the third party's expectation of confidentiality, the appellant submits that "many of the records should be accorded a different level of confidentiality during the process which declines significantly or is eliminated after the process is concluded, and to an even greater extent given the project is not going forward." The appellant does not explain the basis for this position.

[53] In his affidavit, the engineer confirms that the third party expressly requested that specifically identified documents be maintained in confidence. He attached to his affidavit page 2 of the Bid Package which contains the confidentiality statement listing the portions of the third party's proposal that contain "proprietary or confidential information." I note that the list refers to documents 52 (Tab 3.2.4), 124 (Tab 3.3.3) and 165 (Tab 3.3.3); but documents 86 and 87 (Tab 3.3.1(2)) are not listed. In its reply submission, the third party also confirms that document 52 was identified on the list.

[54] In addition, the third party reiterates its position that it submitted all materials to the OPA with an expectation of confidentiality whether the materials were specifically identified in the confidentiality statement or not.

[55] With respect to each of the documents, the third party provides the following submissions:

Document 52

[56] The third party notes that it did not own the land on which it proposed to construct the Oakville Generating Station, and included the agreement it had reached with the fourth party along with its bid to assure OPA that it could secure the site if the contract was awarded to it.

[57] The third party refers to a confidentiality provision in the agreement with the fourth party which stipulates that it be maintained strictly in confidence by the third party. The third party indicates further that the confidentiality provisions acknowledge that the agreement is to be provided to OPA as part of the bid package but requires the third party to expressly require that OPA maintain it in confidence.

Documents 86, 87, 124 and 165

[58] The third party notes that it expressly claimed that these documents were to be maintained in confidence. Referring to Order PO-2018, the third party submits that this office has found that explicit confidentiality provisions weigh significantly in determining this part of the section 17(1) test.

[59] In addition, apart from sharing documents 86, 87 and 165 with the MOE, the third party indicates that it has never shared these documents with any other party, including through the procurement process, the related Ontario Municipal Board hearing and court applications. It continues that it has consistently treated document 165 "in a manner that indicates a concern for its protection from disclosure."

[60] The OPA's submissions generally echo those of the third party and indicate that the OPA kept proposals and evaluation documents in secure locations at all times.

Analysis and findings

[61] All of the documents at issue were contained in the third party's bid package. I am satisfied that they were all supplied to the OPA in the sense contemplated above.

[62] With respect to the documents identified on the third party's confidentiality statement, it appears that the OPA misstated the relevant document numbers. Based on my own review of the confidentiality provision, I am satisfied that the third party intended that documents 52, 124 and 165 be treated confidentially. Accordingly, I find that documents 52, 124 and 165 were provided to the OPA explicitly in confidence.

[63] I do not accept the appellant's position that there should be different levels of confidentiality or that post-bidding decisions should retroactively impact the expectation of confidentiality at the time the records were supplied. As I noted above, in order to satisfy the "in confidence" component of part two, the third party is only required to establish that it had a reasonable expectation of confidentiality, either implicit or explicit, at the time the information was provided. Moreover, this expectation must have an objective basis.

[64] As I indicated above, the third party explicitly identified documents 52, 124 and 165 as being supplied in confidence. In my view, this expectation was objectively reasonable in light of the confidentiality statement contained in the RFP.

[65] At the same time, I find that, with one exception, any other expectation of confidentiality that the third party claims to have held with respect to the remaining portions of its bid package was not objectively reasonable. The confidentiality statement in the RFP clearly stated that unless the information was specifically identified, the assumption would be that the information was not confidential. That being said, as I indicated above, the portions of documents 86 and 87 that met the first part of the section 17(1) test contain the same information that is found on document 165. Although the third party did not identify the specific documents (documents 86 and 87) on its list of documents that it wished to be kept confidential, it did identify the information that is contained in these documents. In my view, it would lead to an absurd result to find that the information contained in documents 86 and 87 was not implicitly provided in confidence as to do so would completely undermine the third

party's intent to identify document 165 and to expect that the information contained in it would not be disclosed.

[66] Accordingly, I find that documents 52, 124 and 165, and the relevant portions of documents 86 and 87 were supplied to the OPA with a reasonably held expectation of confidentiality.

Part 3: harms

General principles

[67] 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.[10]

[68] 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.[11]

[69] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[12] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[13]

Document 52

[70] Document 52 is described as an "option agreement." As I indicated above, it is a private, commercial agreement between the third party and the fourth party, and consists of an option agreement relating to the procurement of land. The third party states that it did not own the land on which it proposed to construct the Oakville Generating Station, and that document 52 was included with its bid to assure the OPA that it could secure the site if the contract was awarded to it.

[71] The third party takes the position that the disclosure of document 52 could reasonably be expected to prejudice the competitive position of both it and the fourth party, and that it qualifies for exemption under section 10(1)(a). It states:

---

[10] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[11] Order PO-2020.
[12] Order PO-2435.
[13] Order PO-2435.

> The [agreement] contains confidential information stipulating what steps [the third party] was prepared to take in order to secure the … site. It is a complex agreement that reflects hard-fought negotiations between the parties to the agreement. If this information is disclosed publicly it will seriously prejudice [the third party's] position in negotiations for the purchase of future parcels of land. Any concessions made by [the third party] in the [the option agreement] would be known to future vendors. Potential vendors would undoubtedly turn to [the option agreement] as a starting position for negotiations with [the third party]. [The third party's] competitors could also use these terms as part of their agreements.
>
> The [option agreement] also contains unique provisions related to required zoning …. For example, the agreement defines the obligations of each party to seek certain approvals and the cost responsibility and remedies available to each. Release of this information would reasonably be expected to impair the negotiating position of [the fourth party] and/or [the third party]. If this information was known to [the third party's] or [the fourth party's] competitors, the parties would be deprived of a competitive advantage in future negotiations or land purchase negotiations.

[72] The appellant does not directly address this element of the application of the exemption in section 17(1)(a).

Finding

[73] After reviewing the representations of the third party and document 52, I am satisfied that its disclosure could reasonably expected to significantly prejudice the competitive position of the third party and/or the fourth party. The option agreement was entered into between the third party and the fourth party to ensure that certain land could be secured. The agreement reflects the negotiated terms agreed to between these two parties. Furthermore, the agreement was provided to the OPA (minus the financial items) to assure OPA that the third party could secure the site if the contract was awarded to it.

[74] In considering the circumstances of this appeal, it is significant that the proposed Oakville Generating Station is not proceeding. I am satisfied that, in these circumstances, the disclosure of this option agreement between the third party and the fourth party would provide competitors of those parties with significant information relating to the competitive position of those parties. As a result, I find that disclosure of this record could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of these parties.

[75] Accordingly, I find that document 52 qualifies for exemption under section 17(1)(a) of the *Act*.

Documents 165 and the relevant portions of 86 and 87

[76] As noted above, document 165 is a series of presentation slides used in a presentation made by the third party to the MOE. The third party indicates that this document was disclosed to the OPA to support the evaluation process with respect to environmental permitting developed by the OPA in the procurement process. In addition, the portions of documents 86 and 87 remaining at issue contain essentially the same information as some of that contained in document 165.

[77] In support of its position that document 165 (and those portions of 86 and 87 that reflect this information) qualifies for exemption under section 17(1)(a), the third party states that these documents contain "technical engineering information" regarding the third party's environmental strategy, in particular, its emission targets "at the time." It then states:

> These targets were subject to change over the course of the project depending on [the third party's] negotiations with its suppliers, community groups and regulatory bodies. This flexible environmental strategy was designed in furtherance of [the third party's] commercial interests …

[78] In the affidavit sworn by the engineer, provided by the third party with its representations, the engineer states:

> Release of the documents related to the Presentation to MOE could reasonably be expected to adversely impact [the third party's] future procurements. Prior to the MOE presentation, [the third party] made a number of internal strategic decisions regarding disclosure of its environmental capabilities and alternatives. [The third party] does not disclose its intended final environmental commitments until it is obligated to do so in order to provide it with more flexibility and leverage with respect to: community relations, design, regulatory approvals, supplier negotiations (procurement) and contract scheduling. Disclosure of the contents of the MOE Presentation would provide competitors, suppliers and opponents with information regarding [the third party's] environmental strategy. If [the third party] suppliers were aware of the specific commitments [the third party] made to the MOE prior to public announcement, this would provide suppliers with greater leverage when negotiating for price and delivery schedules as they would know what [the third party's] commitments were. If [the third party's] strategy regarding its environmental commitments on this project was disclosed, competitors

> and suppliers would reasonably be expected to infer that [the third party] would take a similar approach on future projects.

[79] The third party also reiterates that these documents relating to its presentation to the MOE were submitted in confidence to the OPA and that, with the exception of disclosure of the OPA and the MOE, these documents have never been disclosed to any other party.

[80] Although the appellant does not specifically address each record for which section 17(1) is claimed, he does challenge the section 17(1) claims generally, and states:

> … it is highly unlikely that disclosing most elements of a response to an RFP, after such RFP has been concluded either causes the proponent harm or would result in such information being more difficult for the OPA to secure. While it may be plausible that information about itself and its affiliates that is not directly relevant to the project (though it may be relevant to assessing a proponents ability to execute the project) puts a disproportionate burden on those providing such information, information relating to projects themselves do not place bidders in a weaker competitive position once a Procurement Process is completed. The bid information is so specific to the location in question and the time, supply and demand dynamics of suppliers, commodity prices, cost of capital etc. that once a contract is in place, disclosure of such information is of limited value with respect to other projects. In fact increased transparency in the manner in which these Procurement Processes are conducted and the inputs on which proposals are judged would seem to be a very effective manner in which to entice further competition, including from foreign entities who may be less familiar with our Procurement Processes.

[81] The appellant then refers generally to certain orders of this office in support of its position.

[82] I also note that the appellant raises the possible application of the public interest override to the records, which I review below.

Finding

[83] After considering the submissions made by the parties and reviewing the information contained in document 165 and the relevant portions of documents 86 and 87, I accept that these documents reveal specific commitments made by the third party in its presentation to the MOE, and that this information was provided to the OPA in support of the third party RFP. I also accept the third party's evidence that it made a number of "internal strategic decisions" regarding disclosure of its environmental

capabilities and alternatives, and that it only makes its final environmental commitments public when it is obliged to do so – to ensure that its negotiating position vis-à-vis suppliers and other parties is not compromised before negotiations are complete.

[84] I acknowledge the appellant's argument that the information relating to this procurement is specific to it. However, as I noted above, the project is not proceeding, and I accept the third party's position that if its strategy in this procurement process were disclosed, competitors and suppliers would reasonably be expected to infer that the third party would take a similar approach on future projects.

[85] I am satisfied that, prior to finalizing its environmental commitments, the disclosure of the information contained in a confidential presentation made to the MOE could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the third party.

[86] Accordingly, I find that documents 165 and the portions of 86 and 87 remaining at issue qualify for exemption under section 17(1)(a) of the *Act*.

Document 124

[87] As indicated above, document 124 is a survey prepared for the third party by a company that specializes in conducting research studies on public opinion, which was supplied in confidence to the OPA in support of the third party's RFP.

[88] The third party takes the position that this record qualifies for exemption under section 17(1)(c) of the *Act*, as disclosure of this record could result in undue loss or gain to any person, group, committee or financial institution or agency. The third party states:

> The [community survey study] was undertaken at a significant cost [to the third party]. [The third party] paid approximately $35,000 for [the study]. The [study] contains detailed, specific representations on community views, not only on [the specific project], but also with regard to previous [third party] projects. Disclosure of [the study] would be a windfall to [the third party's] competitors and opponents because (a) they would gain the benefit of a costly scientific study at no cost to them, and (b) they would learn confidential information about a number of [the third party's] past projects that could be used to advance their own interests.
>
> For all of these reasons it is submitted that disclosure of [the study] would result in a reasonable expectation of harm to [the third party] ….

[89] The appellant does not directly address this issue.

Finding

[90] Based on my review of document 124 and the representations of the third party, I am satisfied that disclosure of this document could reasonably be expected to result in the harm set out in section 17(1)(c). The study, conducted by a research company and paid for by the third party, is a significant community survey. Although some portions of the study are specifically addressed to the particular project at issue, other portions of it of a more general nature, addressing perspectives on projects of this nature, messaging and other matters. Because this record was paid for by the third party, and addresses matters in addition to the specifics of this project, I am satisfied disclosure of it could reasonably be expected to result in undue gain to the third party's competitors and others, as they would reap the benefit of the information in the study without having had to pay for it.

[91] Accordingly, I find that document 124 qualifies for exemption under section 17(1)(c).

[92] In summary, I find that documents 88 and 89, and portions of documents 86 and 87 of record 3 are not exempt under section 17(1). As no other exemptions have been claimed for these documents, they should be disclosed to the appellant. As I indicated above, for greater certainty, I have highlighted the portions of documents 86 and 87 that are not exempt. I find further that documents 52, 124, 165 and the remaining portions of documents 86 and 87 qualify for exemption under section 17(1) of the *Act*.

B: Does the discretionary exemption at section 18(1)(c) and/or (d) apply to Records 7, 11, 15, 17, 18, 22, 23, and/or 3 (documents 10, 11, 12, 16, 17, 19, 94, 125, 126, 135 and 136)?

[93] As noted above, the OPA has claimed the application of sections 18(1)(c) and (d) to the information contained in Records 7, 11, 15, 17, 18, 22, 23, and 3 (documents 10, 11, 12, 16, 17, 19, 94, 125, 126, 135 and 136. These exemptions state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of

> the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[94] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[95] For sections 18(1)(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[14]

[96] 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 18.[15]

[97] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[16]

[98] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[17]

Section 18(1)(c): prejudice to economic interests

[99] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have

---

[14] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[15] Orders MO-1947 and MO-2363.
[16] Order MO-2363.
[17] See Orders MO-2363 and PO-2758.

economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[18]

[100] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[19]

Section 18(1)(d): injury to financial interests

[101] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[20]

Representations

[102] The OPA provides extensive submissions on the application of this exemption to the records at issue, and has attached to its submissions two affidavits, sworn by individuals involved in the RFP process, concerning the impact of disclosure on the OPA.

[103] By way of background, the OPA indicates that the records at issue relate to the RFP for a gas-fired power generation plant in Oakville, Ontario. The OPA explains its four-stage RFP process in some detail and indicates that this process is consistently used by it to review proposals.

[104] The OPA indicates that stages one and two are "pass/fail" stages whereas stage three involves a qualitative analysis of the bids that passed the first two stages. The OPA has asked that I not disclose the details relating to stage three for confidentiality reasons. The OPA states further that stage four of the process applies the data resulting from stage three "directly to the costs and revenues of each proponent." The OPA notes that each proponent provided its own costs and revenue data and did not know that provided by each other.

---

[18] Orders P-1190 and MO-2233.
[19] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[20] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

[105] After describing each of the documents of record 3 at issue in this discussion, the OPA indicates that the third party's proposal was selected at the conclusion of the RFP process, but notes that the Oakville project "is not proceeding," although both the RFP and the final contract are publicly available on its website.

[106] The OPA submits that the appellant is seeking both the third party's proposal and "information closely held by the OPA pertaining to how it evaluates proposals."

[107] Noting that previous orders of this office have generally not upheld the section 18(1) claims for RFP scores due to insufficient evidence that their disclosure would result in the section 18(1) harms,[21] the OPA submits that it has endeavored to provide the requisite evidence in this appeal. To support its arguments in this appeal, the OPA provides an affidavit sworn by a "procurement expert," who provides his opinion relating to the commercial ramifications of disclosure of the records at issue (the harms component of the section 18(1) exemption).

[108] The OPA submits that disclosure of the records at issue "will negatively impact its economic interests and competitive position because it will undermine OPA's RFP processes." The OPA also provides specific representations on the application of the exemptions to each of the records, which I review in detail below.

[109] The appellant also provides lengthy representations on the application of the section 18(1)(c) and (d) exemptions, and takes the position that the disclosure of records contained in the RFP response and the evaluation records do not qualify for exemption under these sections.

[110] The appellant notes that, if the purpose of section 18(1)(c) is to "protect the ability of institutions to earn money in the marketplace," it is inapplicable to the OPA as it does not earn money. The appellant states that the OPA is a monopoly whose mission is "[to] ensure that electricity needs are met for the benefit of Ontario both now and in the future... [and to] plan and procure electricity supply from diverse resources and facilitate the measures needed to achieve ambitious conservation targets." He also states:

> The economic interest of the OPA is securing power for Ontarians in the most efficient manner possible, consistent with the financial interest of the Government of Ontario. Providing access to the RFP Response or the Evaluation Records during the pendency of an RFQ or RFP process (together "Procurement Process") could prejudice the OPA's economic interest or the Government of Ontario's financial interest because participants would have access to one another's submissions and how they are being evaluated, allowing participants to tailor subsequent

[21] See, for example: Order P-1190.

> submissions (including their bid prices) accordingly. However, once an RFP process has been concluded, and particularly in the process with respect to the Oakville Power Generation Station (the "OPGS") where a binding contract was executed between [the third party] and the OPA, the OPA's economic interests and the Government of Ontario's financial interests have been satisfied, its bargaining completed. In fact disclosure of the RFP Response and Evaluation Records provide participants (and future participants in other OPA Procurement Processes) with valuable feedback with respect to the manner in which the OPA evaluates responses to its RFQs and RFPs. Armed with this information, participants can address future Procurement Processes better informed of the manner in which the OPA responds to submissions, thereby enhancing, not impairing, the OPA's economic interests. Put simply, it is the appellant's position that the bidding process can only be better served by allowing participants to know how they are graded and what their score is.

[111] Concerning the application of the exemption in section 18(1)(d), the appellant refers to the statement made in Order P-1398 that the harm sought to be avoided by this section is injury to the "ability of the Government of Ontario to manage the economy of Ontario" and to "protect the broader economic interests of Ontarians." The appellant then states that the documents at issue in this appeal:

> … relate to the procurement by the Government of Ontario of a $1.2 billion power generation facility. There is no doubt there is significant economic interest at stake for Ontarians. In such a context, permitting Ontarians the ability to confirm that the RFP and Evaluation Records reflect a fair Procurement Process, including consistency with the provisions established by the OPA, are absolutely appropriate and would not cause injury to the financial interest of the Government of Ontario and Ontarians but would in fact be a further check to ensure that such injury does not occur.

[112] The appellant then comments on the status of the OPA as follows:

> As to the OPA's competitive position, the OPA has no competitors. It is a monopoly established by the Government of Ontario. Similarly, [the third party] having entered into a binding contract with the OPA is not negatively impacted by disclosure of its successful bid or the Evaluation Records with respect to itself and other competitors. Nor is the Government of Ontario's ability to manage the economy impaired by permitting the disclosure of how proponents were assessed in a Procurement Process. Assuming a Procurement Process is run in a manner consistent with its terms, the RFP Response and Evaluation Records should in fact underpin and strengthen the legitimacy of the

> subsequent contract award and the credibility of the OPA and the Government of Ontario.
>
> The argument that proprietary economic information would be disclosed is overbroad: while there may be some limited commercial information that would impair [the third party's] competitiveness were it disclosed, the number of these is limited largely because the economic model of each facility of this type is bespoke and impacted by a number of factors (e.g. location, environmental factors, diverse construction challenges, access to utilities, etc.) that change from site to site. In [one of the affidavits provided by the OPA, the affiant] concludes that disclosing just the scores in the Evaluation Records are "usually of very little value to anyone." While the appellant in fact believes that there is value in those scores because they provide context to the decision to award a contract pursuant to a Procurement Process and provide insight into the relative merits of different proposals, given their limited value in [the affiant's] view it would be difficult to understand how he or the OPA would object to their disclosure. While [the affiant] is concerned with the prospect of "negative campaigning" in future RFPs by proponents who have had access to past evaluation records, this concern is easily mitigated by limiting comparisons to competitors in RFP responses. Moreover, it is difficult to understand how highlighting the comparative merits of different proposals would negatively impact a bid. In fact, key relevant distinctions may be identified, so long as such information is evaluated critically and adjusted for the bias of the source that one would imagine is the approach with respect to the entire bid in any event.

[113] In its reply representations, the OPA takes issue with a number of the appellant's arguments. It states that the purpose of the section 18(1)(c) exemption to protect "economic interest" of an institution includes both the ability of the institution to earn money in the market place and to spend less money in the market place. The OPA points out that the appellant admits that providing access to an RFP response or evaluation records during the pendency of the RFP process could prejudice the OPA's economic interests. The OPA provides confidential representations on this issue, and refers to the affidavit evidence it provided which details the harm to the OPA which would result in future projects through disclosure of the records.

[114] In addition, the OPA states that it has competitors for the resources of the proponents who bid on projects. It also points out that proponents who make proposals as part of the OPA RFP process have competitors, and that the same organizations and affiliates may (and do) compete for multiple OPA projects with similar or identical RFP requirements. It also provides specific representations relating to certain records, which I address below.

[115] In addition to the general representations set out above, the parties have provided specific representations on some of the particular records at issue, which I will consider below in addressing the application of the section 18(1)(c) and (d) to the specific records or categories of records for which they are claimed.

Record 3 (documents 10, 11, 12, 16, 17, 19, 94, 125, 126, 135 and 136)

[116] As indicated above, the third party stated in its representations that it no longer objects to disclosing these documents, which form part of record 3 and form part of the third party's successful bid.

[117] The primary focus of the OPA's concern about the disclosure of these records is that the third party may be affected by disclosure. It reviews the RFP process and then states:

> … corporations are concerned with the usage of that company's proprietary information. The disclosure of trade secret information may have widespread adverse consequences including the loss of business opportunity, termination of licence or franchise arrangements, and so forth. It may also result in an increase in the prices charged to that supplier or contractor for the goods or services or other items of commerce that the supplier of contractor must purchase to perform the contract.
>
> In purchasing goods, services or construction, the government acts in a private capacity.
>
> Insofar as the failure to provide adequate protection for confidential supplier and contractor information discourages top quality suppliers from bidding, the public suffers rather than benefits by reason of its information disclosure rules.
>
> One impact is that companies such as top quality suppliers stop placing bids for government contracts.

[118] These documents consist of certain appendices which formed part of the third party's proposal, an appraisal report, a Stakeholder Log and summaries of certain information received by the third party from others.

[119] As mentioned above, the OPA's primary concern regarding disclosure of these records is the impact it may have on other third parties in future projects, and their possible reluctance to provide information if the OPA is unable to protect this information in this appeal. However, since the third party in this appeal no longer objects to disclosure of these records, I am not persuaded that these concerns exist for

the records at issue in this discussion. In the circumstances, and in the absence of detailed and convincing representations that these records qualify for exemption under section 18(1)(c) and/or (d), I find that documents 10, 11, 12, 16, 17, 19, 94, 125, 126, 135 and 136, which form part of record 3, do not qualify for exemption under section 18(1), and I will order that they be disclosed.

Records 7 and 11

[120] These two records are the checklists for the proposal completeness requirements for stages 1 and 2 respectively. The OPA provides very few representations in support of its position that these two records qualify under sections 18(1)(c) and/or (d). The appellant points out that affidavit provided by the OPA agrees that it is "very difficult to see how the disclosure of this information could give rise to a reasonable expectation of harm to the OPA or the proponent," and the OPA's reply representations do not address this issue.

[121] In the circumstances, and in the absence of detailed and convincing representations that these two records qualify for exemption under section 18(1)(c) and/or (d), I find that records 7 and 11 do not qualify for exemption under section 18(1), and I will order that they be disclosed.

Records 15, 17, 18, 22 and 23

[122] Record 15 is the "Evaluation of Related Criteria" for stage 3 of the evaluation process in respect of the third party's proposal.

[123] Records 17, 18 and 23 consist of the Evaluation and selection Process for stage 4. The information contained in the charts is identical on all three records. Records 18 and 23 are duplicates and contain one additional comment that is not contained on Record 17. Record 17 also differs from the other two as it contains signatures and dates at the bottom of the record, whereas records 18 and 23 do not.

[124] Record 22 is the OPA document relating to the RFP evaluated cost model in respect of the third party.

[125] All five of these records relate to the evaluation process used by the OPA.

[126] The OPA reviews the RFP process in some detail. With respect to the application of section 18(1) to these five records, the OPA states that "over-disclosure of information of the evaluation process in relation to an RFP can … compromise the government's unique economic interests." It states that the OPA takes great measures to maintain confidentiality of these records, and states disclosure of information about the deliberative process will result in a rise in prices which will affect the OPA. It states:

In most if not all cases, the disclosure of the internal scoring information relating to an RFP undermines the integrity of the RFP process.

The Ontario Court of Appeal considered an argument about the harm resulting from the release of RFP scores. In *Ontario (Ministry of Transportation) v. Cropley*[22], the court stated:

> In this case, the future harm (to the Ministry, the Government, and to the bidding consultants) that might reasonably be expected from the disclosure of the scores is that the tender price would be manipulated, thus compromising the integrity of the bidding system and affecting the competitive positions of the bidding consultants. The question is whether knowing the scores of competitors would permit a consultant to adjust its bids for future tenders.
>
> The Commissioner considered this potential harm carefully. She observed that, in order to be able to manipulate the evaluation process, *a party would require in addition to the scores, information not known within the industry but closely held by Ministry*. She also examined the scoring on the records at issue and concluded there were variations in the scores for each company across different projects. In some cases, the same evaluator assigned different scores to the same company with respect to different projects. *Consistency in the scoring for each company across projects would be necessary to manipulate future bids* and, given that such consistency was not observed, the Commissioner concluded that disclosure could not reasonably be expected to result in the alleged harms. [emphasis added]

Information "not known within the industry but closely held by" the OPA accurately describes the Point Allocation Targets on Record 15 and the scoring records contained in records 17, 18, 22 and 23.

The OPA does not use analysis of evaluators which is entirely discretionary. Rather, the evaluator's discretion involves determining how the point allocation targets have been met.

---

[22] Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

> Providing point allocation targets contained on Record 15 to the public and future proponents will allow parties to manipulate future RFP processes.
>
> Proponents in an RFP tend to pitch their proposals so that they come as close as they can to what they think the customer is looking for. Very often, they "gild the lily" even if they do not actually misrepresent the facts.

[127] The OPA provides an example of how future OPA RFP processes could be manipulated, and then states:

> Parties and proponents with access to Records 15, 17, 18, 22 [and 23] will therefore know how other parties' proposals were (and will be) impacted if they do not strive for optimal result (in this instance, conformity with the By Law).
>
> Providing the Point Allocation Targets to proponents removes the holistic approach of requesting information from proponents on the broader basis of the Rated Criteria and replaces it with a more stringent pass/fail criteria which an informed proponent will attempt to exploit. …
>
> The disclosure of scoring sheets and the Point Allocation Targets will make it more difficult for the OPA to differentiate between truly strong bids, and those which are merely being carefully presented.
>
> Pursuant to the reasoning above, Record 15 is the Record which the OPA feels the disclosure of which is most likely to result in harm to the OPA. It contains not only the scores…but the OPA's confidential basis for awarding the scores. Record 15 is a highly sensitive document in view of the information it reveals about the OPA's deliberative process. Disclosure of Record 15 will result in a material risk of harm resulting from the impact on future RFP processes. …
>
> Records [17] 18, 22 and 23 contain not only the OPA's model for awarding contracts, but proponent financial information with respect to their proposal. Record 22 focuses exclusively on [the third party's] information, while Records [17], 18 and 23 contain financial information provided by each proponent. These records could be used to reverse engineer proponent information, lessen price competition and discourage future RFP participation.

[128] The appellant takes issue with the OPA's position. After reviewing the OPA's arguments on record 15, he notes that this record sets out the scores awarded to the successful proponent. He then states:

> The rationale the OPA rely on … to support continuing to deny disclosing this information is that proponents with past RFP information will see criteria as de facto requirements of an RFP and that proponents will "gild the lily" to make their bids look as close to the criteria as possible. The concern is that bidders who do not perfectly meet the criteria may opt not to bid. This is possible, though given the sophistication of the bidders responding to OPA RFPs, some of the most sophisticated companies in Canada and globally, there is surely an appreciation that they will score well on some counts and not on others and on balance they can consider bidding accordingly. The concern regarding gilding the lily, or presenting a bid in its most favorable light, is relevant to every aspect of the RFP process and is a core requirement of evaluators of proposals in determining their credibility, no matter how specific the criteria.
>
> Providing the scores in Record 15 is no more likely to increase the burden to determine the credibility of a proponent's submission than it is to decrease it… In fact, providing the criteria in Record 15 would allow participants, if only after the fact to know what the OPA was looking for and (with the other records at issue) the consequences to one's score of satisfying various criteria, which in itself conveys useful information about the importance the OPA places on various bid elements. It is certainly a peculiar argument that bidders and the people of Ontario are best served by a process that forces bidders to *speculate* as what the customer is looking for rather than *knowing* what the customer is looking for, the degree of importance placed on that element (reflected in awarded scores) and addressing it to the best of their ability.
>
> Finally, as noted in IPC Order MO-2088, where to be fair the IPC did reject disclosure of some elements of an RFP, it decided that with respect to the remainder, if the other elements of an RFP Response were not made public it would give an unfair advantage to those with successful bids as they alone would know what it took to win:
>
> > In addition, with respect to the City's position that disclosure would signal to parties bidding on future contracts what the City is looking for, it seems to me that not disclosing information could equally result in similar harm to the City. If the successful proponent was the sole party aware of what information was required in order to submit a successful bid based on the City's representations, it would

> have an unfair advantage in future proposals, because it would be aware of "exactly what the City was looking for." I reject the City's argument that disclosure of the records remaining at issue would result in harm on that basis.

[129] The appellant also provides representations disputing the OPA's position on Records 18, 22, 23 [and 17]. It states that these records apparently contain the OPA's Evaluation and Selection Process, the model for awarding contracts and proponent financial Information regarding their proposal, and that the OPA concern is that these models could be used to reverse engineer proponent information that would lessen price competition and discourage future RFP participation. It states:

> However, even if it were possible to reverse engineer proponent information, given the specific requirements of the proposal stipulated by the OPA, the eventual price that was disclosed and the bespoke nature of these projects, it is unlikely that any material sustainable knowledge could be transferred to other projects. Moreover, given the fluidity of the market constant changes in a bidder's cost of capital (which is particularly material in projects extending over long time periods), the supply and demand dynamics of a bidder's supply partners, etc., there is limited utility in assuming that the variables in past bids could be relied on in future bids.
>
> Finally with respect to the Evaluation Records, in similar circumstances the IPC has required disclosure. Specifically, for example, in Order MO-1919 the Adjudicator concluded with respect to evaluation and scoring of proposals in response to an RFP by the City of Toronto, as follows:
>
> > I do not accept the City's submissions regarding the harms that would arise should the information at issue be disclosed. The majority of the records that the City claims are exempt under sections 11(c) and (d)[23] all relate to the evaluation and scoring of the various proposals submitted by the affected parties in response to the RFP. Page 3 as stated above contains a fee breakdown. Pages 5, 6, 8 and 9 of the Group I records all relate to scoring, ranking or comments about the various submissions of the affected parties. The City's submission that disclosure of this information would telegraph to potential bidders what the City is looking for in a successful proposal and thus could reasonably be expected to prejudice its economic interests or be injurious to its financial interests is unsupported. In

[23] Similar to sections 18(1)(c) and (d).

> fact, I am unconvinced that the City would not receive better proposals once organizations are aware of the way in which the City evaluates a proposal.

[130] In the portion of its reply representations which address these specific records, the OPA states:

> With specific regard to record 15, proponents are advised of the criteria which they are to satisfy. What is detrimental, as outlined in [one of the affidavits], is providing proponents with the ability to manipulate future REP processes — not through the knowledge of the requirements, but through the elicitation of other parties' confidential information and the application of detailed negotiation criteria thereto. The way to avoid the harm manifest in disclosure of the Evaluation Records is to not release the records to any party, successful proponent or otherwise. All parties remain aware of "exactly what the OPA is looking for," but none is more able to manipulate future OPA RFP processes than any other. …

[131] In response to the appellant's quotation from Order MO-1919, the OPA distinguishes that decision from the circumstances in this appeal on the basis that the city's position in that Order was unsupported by the evidence, and refers to the following "remainder of the paragraph not quoted by the appellant:"

> The City has not provided "detailed and convincing" evidence that disclosure of these pages of the Group I records could reasonably be expected to either prejudice economic interests or competitive position, or be injurious to its financial interests.

[132] It then states that, by way of contrast, the OPA in this appeal has provided third party expert evidence about the harms the OPA will suffer through disclosure of the Evaluation Records.

Record 15

[133] Record 15 is the "Evaluation of Related Criteria" for stage 3 of the evaluation process in respect of the third party's proposal.

[134] The OPA has now indicated that it is prepared to provide access to the headings of each of the rated criteria contained on this record. It maintains its position regarding the application of section 18(1)(c) and (d) to the other portions of this record, which are the specific detailed Point Allocation Targets under each of the rated criteria, as well as the scoring of the rated criteria for the third party's proposal.

[135] Based on the representations of the OPA, I am satisfied that the disclosure of the detailed Point Allocation Targets will result in the harms under section 18(1)(c) and (d). These descriptions of the specific information necessary to meet the Point Allocation Targets are very detailed, and provide the exact nature of the information required to meet the criteria. In my view, this information is similar to the "closely held information" referred to in *Ontario (Ministry of Transportation) v. Cropley*.[24] I am satisfied that, based on the representations of the OPA, including the affidavit evidence provided, disclosure of this detailed information would reveal the OPA's confidential basis for awarding specific scores. Disclosure of this information would reveal information about the OPA's deliberative process, and I am satisfied that it will result in a material risk of harm, as it will impact future RFP processes.

[136] I have also considered the OPA's representations that disclosure of the actual scores for each rated criteria awarded to the third party will result in the harms under sections 18(1)(c) and (d). I accept the appellant's position that previous orders have determined that specific scores may not qualify for exemption under sections 18(1)(c) or (d); indeed, in Order PO-1993[25], I determined that disclosure of the specific scores given across different contracts, without access to closely held information (which was not at issue in that appeal) would not permit the manipulation of the RFP process.

[137] The information at issue in this appeal is somewhat different from that in Order PO-1993, and I have taken that into account in determining this issue. I note, however, that many of the arguments made in the current appeal were also made in Order PO-1993 and rejected by me.

[138] Although I accept that the affidavit sworn by a "procurement expert" is useful in understanding the RFP process, I find that there is very little information provided in his affidavit that is different from the arguments that have been made in previous decisions dealing with either the section 17(1) or 18(1) claims. I understand that he has had discussions with private sector contractors which reflect a distinct dissatisfaction with the freedom of information regime and its application to information provided by private sector businesses to government bodies as part of the procurement process. However, I find that his affidavit does not provide an objective and balanced view of this issue and fails to recognize or understand the difference between the interests at stake in the public and private sector, relying on an untenable assumption regarding the interests at stake. These incorrect assumptions are reflected throughout his affidavit, but are clearly stated at paragraph 36:

> Where information is disclosed to the government as a regulator, or is acquired by the government as an official record keeper, or through the exercise of police power, the public has an interest in that information, because the government is obtaining that information on the public behalf

[24] See Footnote 22.
[25] See Footnote 22.

> in the performance of a public duty and for a public purpose. In contrast, in purchasing goods, services or construction, the government acts in a private capacity. It is no different from any other customer. The public has no interest in the information concerned beyond the derivative interest that a shareholder might have in information obtained by a corporation. In an RFP, information is disclosed to the government as a prospective customer for the specific purpose of allowing it to make a purchase decision. From a commercial perspective, it is logical to assume that the information concerned will be used only for that purpose – as is the case with customers generally to whom such information may be provided.

[139] The affiant continues on after this paragraph to discuss certain "attitudes" held by "some authorities on public procurement" that the state should be accountable to the public, and appears to discount the importance of this aspect of the issue. In general, I find that although the "procurement expert" has considerable experience in the area of procurement both with the private and public sector, in the circumstances of this appeal, he functions primarily as a representative of the OPA who provides argument in favour of the application of the exemption. Accordingly, I will consider the information and opinions he renders in this manner.

[140] With that in mind, I have reviewed the scores at issue in record 15. There are four categories of information under the scoring which include the actual score attained and information about how those scores relate to the point allocation targets. I am satisfied that the first three categories are sufficiently connected to the closely held information that they should be maintained in confidence. I do not find that the same considerations apply to the final category. Although I recognize that disclosure of this category of scores for each criteria will provide some information about the degree to which the proponent has met the point allocation targets, without the additional confidential information, including the values given to each criteria, I am not persuaded that any proponent could manipulate the process based on these figures alone. The same rationale applies to the final score provided at the end of the chart, which is replicated on records 17, 18 and 23.

[141] Accordingly, I find that disclosure of the final column and the final score could not reasonably be expected to result in the section 18(1)(c) or (d) harms and this information should be disclosed to the appellant. The remaining portions of this record that the OPA has withheld qualify for exemption under sections 18(1)(c) and (d).

Records 17, 18, 22 and 23

[142] Records 17, 18 and 23 are similar documents, and consist of the Evaluation and Selection Process for stage 4.

[143] I note that the OPA has indicated that it is prepared to disclose some small bits of information contained in these records – specifically, the signatures and dates on record 17, and the general heading on record 23. It is not, however, disclosing the specific entries on the records. Since this information is the same on all three records, I would assume that it would also be disclosed on the other two. However, since it is not clear, I will order the OPA to disclose the headings on records 17 and 18.

[144] Record 22 is the OPA document relating to the RFP evaluated cost model in respect of the third party.

[145] Looking at these records, I note that much of the information set out in them was provided by the proponents and/or would reveal information provided by them. The information on record 22 is contained in the third party's confidentiality request. Based on the third party's representations and those made by the OPA, I am satisfied that disclosing much of the information on these records could reasonably be expected to compromise the OPA's economic interests *vis-à-vis* those of the proponents who in all likelihood, submitted the information in confidence. Moreover, I am satisfied that disclosure of other portions of the tables set out on these records may impact on the OPA's economic interests with respect to the Point Allocation Targets. Accordingly, I find that disclosure of portions of records 17, 18 and 23 and record 22 in its entirety could reasonably be expected to result in the harms in sections 18(1)(c) and (d).

[146] However, I am not persuaded, by the totality of the evidence submitted in this appeal, much of which is referred to above, that disclosure of the remaining portions of records 17, 18 and 23 could reasonably be expected to result in similar harms. Some of this information is also contained on the portions of record 15 that I have ordered disclosed, and the rest does not provide information that would enable anyone to manipulate the process or reveal otherwise exempt information. Some of this information refers to the winning bidder and the basis on which the bid was accepted. Although the third party may have submitted certain information with an expectation that it would be maintained in confidence, I am not persuaded that the third party could reasonably be expected to suffer any of the harms contemplated under section 17(1) for the disclosure of this information on which its bid was accepted. Similarly, the OPA's submissions do not persuade me that it would suffer any harm under section 18(1) as a result of the disclosure of information that confirms the information at issue on these records was the basis for its acceptance of the bid, as disclosing this information merely confirms whether or not the individual bids met its requirements.

[147] I have highlighted the information that is not exempt on the copy of record 17 that I will provide the OPA along with this order. This information should be disclosed to the appellant. As identical information is contained in records 18 and 23, these records should also be disclosed to the appellant in accordance with the highlighting on record 17.

C: Did the institution exercise its discretion under section 18? If so, should this office uphold the exercise of discretion?

[148] I have found above that record 22 and portions of records 15, 17, 18, and 23 qualify for exemption under section 18(1). The section 18 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.

[149] 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.

[150] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[26] This office may not, however, substitute its own discretion for that of the institution.[27]

[151] In its representations the OPA states that it did not consider irrelevant factors in exercising its discretion, and that there was no bad faith in making its decision. The OPA also indicates that it considered the following factors in exercising its discretion to deny access under section 18(1):

- that disclosure of these records will not increase public confidence in the operation of the OPA. The OPA refers to an independent fairness review that was conducted of the RFP process, and that is publicly available. It also refers to the other information that is available to the public, including the identified Rated Criteria;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution or others. The OPA states that the records contain very sensitive information, and that the project is, in any event, not going forward;
- that the historic practice of the OPA is to "never disclose proponent bids or scoring sheets" to ensure that the RFP process is not compromised;
- that the appellant does not have a compelling need to receive the information; and

[26] Order MO-1573.
[27] section 54(2).

- that the appellant is not seeking his or her own personal information.

[152] The appellant argues that disclosure would increase public confidence in the RFP process, and refers to its concerns that certain aspects of the RFP process were mishandled by the OPA. It also disputes that disclosing the Rated Criteria addresses concerns about whether the scoring was fair, and states that disclosure would provide parties with more insight into the decisions made.

[153] The appellant also disputes the OPA's position that there is no benefit to disclosure because the project is not going forward. It again states that access to the records is relevant to understand whether the process was flawed. It also refers to the interest in disclosure because the third party is seeking compensation for the project *not* going forward.

[154] The appellant also states that, notwithstanding whether the OPA's practice has been to withhold records of this nature, the records ought to be disclosed. In addition, the appellant refers to his interest in accessing the records to address concerns it has about the RFP process.

[155] In its reply representations, the OPA responds to the matters raised by the appellant. It also states that the appellant's representations do not suggest that the OPA invalidly exercised its discretion, but rather that the exemptions ought not to apply.

Analysis

[156] A number of the arguments made by the appellant in support of his view that the OPA did not properly exercise its discretion are similar to the ones made under the issue of the application of section 18(1), and I address those issues in my discussion of section 18(1) above.

[157] In the circumstances of this appeal, I am satisfied that the OPA properly exercised its discretion to apply the section 18(1) exemption to the records or portions of records to which this exemption applies. I make this finding based on my review of the specific portions of records remaining at issue, the representations of the OPA regarding its exercise of discretion, as well as the very significant amount of information that has been disclosed and is publicly available regarding the project and the RFP process used.

[158] Accordingly, I find that the OPA considered relevant considerations and did not take into account irrelevant considerations, and I uphold the OPA's exercise of discretion to apply section 18(1) to the records or portions of the records which qualify under that exemption.

D: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) and 18(1) exemptions?

[159] In this appeal the appellant argued that there is a compelling public interest in the disclosure of the records, and that section 23 of the *Act* applies. That section states:

> An exemption from disclosure of a record under sections 13, 15, **17, 18,** 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[160] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[161] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[28] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[29]

[162] A public interest does not exist where the interests being advanced are essentially private in nature.[30] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[31]

[163] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[32]

[164] Any public interest in *non*-disclosure that may exist also must be considered.[33]

Representations

[165] The appellant's representations on the public interest in the disclosure of the records focus on its concerns about the project in general, and about the procurement

---

[28] Orders P-984, PO-2607.
[29] Orders P-984 and PO-2556.
[30] Orders P-12, P-347 and P-1439.
[31] Order MO-1564.
[32] Order P-984.
[33] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

process. It refers to concerns it has about the safety of the project, as well as the large monetary value of the project. The appellant states that, in his view, the procurement process was flawed, and that disclosure is in the public interest: to better understand whether the procurement processes whereby billions of taxpayer dollars are expended are adhered to or whether there are in fact deficiencies in such procurement processes.

[166] The appellant refers to certain specific information in some of the records, and relies on these to identify aspects of the process that he believes reveal deficiencies or "irregularities" in the process.

[167] The appellant notes that, although this is not the forum to review the specifics of these alleged deficiencies, these issues are submitted to "highlight the public interest in understanding the manner in which billions of dollars are spent" and to address the public interest in the process.

[168] The appellant also asserts that the compelling public interest clearly outweighs the purpose of the exemption. He states:

> The exact concern highlighted repeatedly by the OPA in their submission that competition would potentially be diminished if competitors were to have confidential information disclosed, is dwarfed by the concern of competitors where Procurement Processes themselves are flawed.

[169] In its initial representations, the OPA submits that there is no public interest in the records. It refers to the fact that the public already has a mechanism for verifying the fairness of the process. It also states that the public interest in this information does not exist because the project is not proceeding. The OPA also notes that the records remaining at issue are "only a small percentage" of the documents available about the procurement process, and states:

> The remaining records largely relate to the internal RFP methodologies of the OPA and the financial, commercial and technical information of third parties which were confidentially provided to the OPA.
>
> In this case, the withheld records are simply not required to address any compelling public interest consideration.

[170] The OPA also refers to the public interest in non-disclosure of these records, given the nature of the information contained in them and the harms in disclosure.

[171] In its reply representations, the OPA strongly argues against the appellant's position that there are safety concerns, or concerns regarding the procurement process, stating that these concerns are "conjecture" and that there is "absolutely no evidence" supporting these concerns. It also notes that the records at issue would, in any event,

not address the specific concerns raised by the appellant, even if they were valid. It also notes a number of the specific documents which were disclosed in this appeal and which address the questions raised, and states:

> … even if the issues raised by the appellant concerned a compelling public interest, which is not admitted but expressly denied, the issues raised by the appellant have no relation to the records which the appellant seeks access to.

Findings

[172] As noted above, previous orders have stated that the first requirement to establish that section 23 applies is that there must be a "compelling public interest in disclosure," and that the word "compelling" means "rousing strong interest or attention."[34] Although I accept the appellant's position that there is a public interest in issues relating to the construction and operation of a gas-fired electricity plant in the Southwest Greater Toronto Area, particularly given the scope, impact and cost of the proposed project, and the fact that the project is not proceeding, I am not persuaded that a compelling public interest exists in disclosure of the records remaining at issue in this appeal. These records comprise discrete portions of the third party's proposal which were provided to the OPA in confidence, and portions of the OPA's records relating to the RFP process. After considering the representations of the appellant and the information in these records, I am not persuaded that there exists a "compelling" public interest in the disclosure of these records sufficient to override the section 17(1) and 18(1) exemptions in this appeal.

[173] In making this decision, I note that a considerable amount of information relating to this project has been disclosed, both through public disclosure of information, as well as in the course of this request and appeal. In these circumstances, and in the absence of specific information from the appellant, I am satisfied that the amount of information already made available to the public is sufficient to enable the public to engage in public debate on the issues relating to the project. Indeed, some of the arguments and evidence provided by the appellant are based on information disclosed by the OPA.

[174] Accordingly, in this appeal, I have not been provided with sufficient evidence to indicate that the public has a compelling interest in the disclosure of the records to which sections 17(1) and 18(1) have been found to apply, and I find that section 23 does not apply.

[175] As a result, I find that documents 52, 124 and 165 and portions of documents 86 and 87 of record 3 are exempt under section 17(1), and that record 22 and the portions of records 15, 17, 18 and 23 identified above are exempt under section 18(1)

---

[34] Order P-984.

E. Did the OPA conduct a reasonable search for records?

[176] The appellant takes the position that additional records relating to the Site Registration for the Oakville Generating Station and a Change in Legal Form ought to exist.

[177] In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether OPA has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the OPA's decision will be upheld. If I am not satisfied, further searches may be ordered.

[178] A number of previous orders have identified the requirements in reasonable search appeals.[35] In Order PO-1744, Acting-Adjudicator Mumtaz Jiwan made the following statement with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[179] I agree with Acting-Adjudicator Jiwan's statement.

[180] Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

[181] Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

---

[35] See Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920.

Representations

[182] The OPA provides representations, as well as an attached affidavit sworn by the former Project Manager for the RFP, in support of its position that it conducted a reasonable search for responsive records.

[183] The OPA indicates that the former project manager and the OPA's Procurement Coordinator searched for both the hard copy files and the electronic files for responsive documents, and that all files were reviewed. The affidavit sworn by the former project manager provides additional details regarding the searches that were conducted. The OPA then asserts that no other documents related to the request exist.

[184] The OPA also directly addresses two specific search issues raised by the appellant. The appellant's representations address the OPA's position on these two issues.

[185] The first issue is the existence of a specific Change in Legal Form. The OPA refers to the appellant's apparent belief that two entities with different names are the same, and were required to complete a Change of Legal Form document. It then states that these entities are not the same, and that no such form was completed. It also refers to more detailed information about why no such form was completed in the attached affidavit.

[186] The appellant responds by stating that it does not have the belief the OPA attributes to it. It also states that if there is no Change in Legal Form document, one of the proponents would be ineligible to participate in the RFP for certain reasons identified by the appellant.

[187] The second issue concerns the existence of a "Site Registration Form." The OPA states that there is no specific "Site Registration Form," but that this information was contained in each proponent's Registration Form. The attached affidavit also provides more details about the processes used.

[188] The appellant responds to the OPA's position by stating that, if no "Site Registration Form" exists, certain requirements in the RFP "appear not to have been satisfied," and it refers to a specific requirement in the RFP.

[189] In its reply representations, the OPA refers to and relies on the position it took in its initial representations.

Findings

[190] As set out above, in appeals involving a claim that responsive records exist, the issue to be decided is whether the OPA has conducted a reasonable search for the

records as required by section 24 of the *Act*. In this appeal, if I am satisfied that the OPA's search for responsive records was reasonable in the circumstances, the OPA's decision will be upheld. If I am not satisfied, I may order that further searches be conducted.

[191] In Order M-909, I found that a reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request. In addition, I made the following finding with respect to the obligation of an institution to conduct a reasonable search for records:

> In my view, an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[192] I adopt the approach taken in the above orders for the purposes of the present appeal.

[193] In this appeal, OPA located numerous records responsive to the request. The OPA also provided a detailed affidavit by an individual directly involved in the searches for responsive records and in the RFP process. This affidavit describes in some detail the nature of the searches conducted and the results of the searches. In addition, it explains in some detail why certain records do not exist and therefore why they were not located.

[194] The appellant believes that certain records ought to exist. The appellant also states that if certain records do not exist, there was a problem or deficiency in the RFP process.

[195] I have considered the representations of the parties on the issue of the reasonableness of the searches conducted. Based on the representations of the OPA and the attached affidavit, I am satisfied that the searches conducted for records responsive to the request were reasonable. The searches were clearly conducted by individuals with a direct knowledge of the responsive records. Furthermore, the OPA has addressed the issues raised by the appellant concerning why certain specific records don't exist. Although the appellant believes these records ought to exist, and identifies his concerns that they don't exist, I find that I have not been provided with sufficient evidence to satisfy me that the searches for these records were not reasonable. Accordingly, I find that the searches for responsive records were reasonable, and I dismiss this aspect of the appeal.

INTERIM ORDER:

1. I order the OPA to disclose documents 10, 11, 12, 16, 17, 19, 36, 88, 89, 94, 125, 126, 135, 136 and the highlighted portions of documents 86 and 87 of record 3, records 7, 11, the final column and total amount on record 15 and the headings and highlighted portions of record 17 (and corresponding information on records 18 and 23), by providing the appellant with copies of these records by **January 17, 2013** but not before **January 11, 2013**.

2. I defer my decision on documents 24, 32, 60, 85 and 130, pending notification of other affected parties.

3. I defer my decision on record 17a, pending clarification and additional representations on the application of section 18(1) to this record.

4. I uphold the OPA's decision to withhold the remaining records and parts of records from disclosure.

5. The OPA's search for responsive records was reasonable and this part of the appeal is dismissed.

6. I remain seized of the issues in this appeal pending final determination of all outstanding issues.

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

Original Signed by: December 11, 2012
Laurel Cropley
Adjudicator