Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3148

Appeal PA10-106

Ontario Power Authority

December 19, 2012

Summary: This order addresses the appeal from the decision of the Ontario Power Authority (the OPA) responding to a community organization's request for access to information relating to a new power generation facility in northern York Region. The OPA denied access to bid evaluation team and scoring records variously under sections 14(1)(e), 17(1)(a) & (c), 18(1)(c) & (d), and 21(1). This appeal was placed on hold pending the outcome of reconsideration requests in Appeal PA09-413, a related appeal with several records in common. In this order, the adjudicator finds that the appellant is qualified to bring an appeal to this office under section 50(1) of the *Act*; that some information is not responsive to the request; and that none of the claimed exemptions apply to the records. The adjudicator is not required to consider the OPA's exercise of discretion under sections 14 or 18, or the application of the public interest override in section 23. The responsive portions of the records are ordered disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1, 2(1) (definition of "personal information"), 2(3), 10(1), 14(1)(e), 17(1)(a) and (c), 18(1)(c) and (d), 21(1), 28(1), and 50(1).

Orders and Investigation Reports Considered: Orders PO-2987, PO-3062-R, PO-3055, PO-2917, PO-2758, PO-2657, PO-1983, PO-1816, PO-1747, PO-1745, MO-1360-I and MO-2063.

Cases Considered: *London Property Management Association v. City of London*, 2011 ONSC 4710 (Div. Ct.); *Ontario (Ministry of Labour) v. Ontario (Big Canoe)* (1999), 46 O.R. (3d) 395 (C.A.); *Ontario (Ministry of Transportation) v. Cropley* (2005), 34 Admin. L.R. (4th) 12 (C.A.).

OVERVIEW:

[1] This appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) shares a similar factual context and some records with another appeal handled by this office, PA09-413. In Order PO-2987, the first order issued in relation to Appeal PA09-413, I described the context in the following manner:

> Following a review conducted to evaluate the province's energy needs, the Ontario government concluded that additional power generating capacity was required to contend with increased energy demand and aging infrastructure, as well as its commitment to replace coal as an energy source. Several rapidly developing areas of the province were identified as requiring this additional capacity, including northern York Region.
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> In July 2008, the Ontario Power Authority (the OPA) issued a Request for Proposals (RFP) for the construction and operation of a new power generation facility in northern York Region. This appeal relates to records created during that RFP process, which led to the selection of a proposal to locate the gas-fired peaking generation facility in King Township.[1]

[2] Appeal PA10-106, the appeal now before me, resulted from a community organization's request to the OPA for records related to the RFP. The requester sought the following information:

- The names and addresses of all Independent Panel members who reviewed the RFP and who awarded the northern York Region contract (if these two review and award entities are separate please list the names separately); and

- The points awarded under the rated criteria to proposals submitted by four different [named] companies at six different [specified] sites in the following categories:

    a. Electrical Connection Point (Section 3.3.1 of the RFP).
    b. Islanding Capability (Section 3.3.1 of the RFP).
    c. Environmental Assessment (Section 3.3.2 of the RFP).
    d. Municipal and Regional Approvals (Section 3.3.3 of the RFP).
    e. Community Outreach (Section 3.3.4 of the RFP).
    f. EPC Arrangements (Section 3.3.5 of the RFP).
    g. Equipment Availability (Section 3.3.6 of the RFP).
    h. Fuel Supply (Section 3.3.7 of the RFP).
    i. Water Use (Section 3.3.8 of the RFP).

[1] With reference to the Ontario Power Authority website.

j. Water Supply (Section 3.3.9 of the RFP).
k. Proposed Milestone Date for Commercial Operation (Section 3.3.10 of the RFP).

[3] The OPA notified the RFP evaluation team members of the request as affected parties under section 28(1) of the *Act* in order to seek their views on disclosure of the information responsive to the first part of the request. Concurrently, the OPA advised the requester that the contract was awarded by members of the OPA's Board of Directors, whose names and addresses were available on its website. The OPA also advised that since the fourth named company's proposal did not proceed to the rated criteria stage, no scores were available. The OPA attached an index of records to the letter, describing the responsive records and listing the exemptions claimed for denying access.

[4] Based on the affected parties' responses to notification, the OPA sent the requester a decision and a revised index of records. The OPA confirmed that it was denying access to the RFP evaluation team members' names and addresses, pursuant to sections 17(1) (confidential third party business information), 18(1)(c) and (d) (economic or other interests), and 21(1) (personal privacy) of the *Act*.[2] The OPA confirmed that access to the scoring records was being denied under sections 18(1)(c) and (d).

[5] The requester (now the appellant) appealed the OPA's decision to this office, which appointed a mediator to explore settlement. During mediation, the appellant's representative clarified that she still sought access to the names and business addresses of the RFP evaluation team members. The appellant accepted that the proposal of the fourth named company was never scored and also clarified that she seeks only the numerical scores contained in the evaluation records for the remaining three proponents, and not any narrative comments. The appellant maintained that there exists a compelling public interest in the disclosure of the requested information, thereby raising the possible application of section 23 of the *Act*.

[6] A mediated resolution to the appeal issues could not be reached, and the appeal was transferred to the adjudication stage of the process where an adjudicator conducts an inquiry under the *Act*. As the adjudicator assigned to the appeal, I started my inquiry by seeking the OPA's representations.

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[2] In the index of records provided to the appellant with the March 31, 2010 decision letter, the OPA referred to section 28(1) of the *Act* as one of the grounds for denying access to record 1. Section 28(1) is not an exemption; rather, it provides for notification of parties whose interests may be affected by an institution's disclosure of confidential business information or personal information. Notification is discussed in greater detail, below. However, as section 28(1) cannot be relied on to withhold information, it will not be addressed further in this order as a basis for denying access, notwithstanding the repeated reference to it in the index provided by the OPA with the September 2012 revised decision.

[7] After reviewing those initial representations, I concluded that supplementary representations from the OPA would be required prior to seeking submissions from the appellant because the OPA had claimed a new discretionary exemption, section 14 (law enforcement), to the record identifying the RFP evaluation team members. In the Supplementary Notice of Inquiry sent to seek representations on the late-raising of a new discretionary exemption and on the exemption's application, I advised the OPA that its new position respecting another issue raised – Scope of the Request/Responsiveness – would be sent to the appellant for response at the next stage of the inquiry. I also advised the OPA that I had concluded that it would not be necessary to seek the appellant's views on the OPA's submissions respecting the appellant's legal standing, although I would address the matter in the order ultimately written to dispose of the appeal.

[8] After receiving the OPA's supplementary representations, I sought the appellant's representations on the issues, providing copies of the relevant, non-confidential portions of the OPA's representations.[3]

[9] Upon receipt of these representations, I sought reply representations from the OPA. I asked the OPA to address the appellant's submissions on the public interest override and the exercise of discretion under sections 14 and 18. Upon receipt of the OPA's reply, I asked the appellant for sur-reply representations on the public interest override's application in the circumstances of this appeal. I also stated:

> You may also comment on the OPA's representations on its exercise of discretion, if you wish. Please note, however, that although the OPA appears to have conceded at an earlier point in this inquiry that the names of RFP evaluators do not constitute "personal information" for the purpose of the definition in section 2(1) of the *Act*, its representations on the exercise of discretion under section 14 in Reply re-introduce the notion that this information is "personal information" and, therefore, related to the issue of personal privacy. The burden of proof remains on the OPA in this regard.

[10] I concluded my inquiry into the appeal, initially, after receiving the appellant's sur-reply representations early in 2011. These sur-reply representations confirmed that the "Evaluation and Selection Process" document (identified as record 7), which was at issue in the related appeal (PA09-413), is not at issue in this appeal.

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[3] The OPA consented to the sharing of its representations in their entirety, with the exception of versions of the records submitted (at Tab B). I did not share the portion of OPA's submissions arguing that "…The appellant does not have the ability to commence an appeal under FIPPA" [pages 5-11] but I did provide the appellant with the portion relating to "status and identity of the requester."

[11] I issued the decision resolving Appeal PA09-413 (Order PO-2987) in July 2011. Shortly after it was issued, the order was subject to reconsideration requests by the successful proponent and the OPA. As the successful proponent's reconsideration request related, in part, to the failure to properly notify it as a party whose interests may be engaged by the disclosure of one of the records at issue, I agreed and granted the request to reconsider Order PO-2987.

[12] Concurrently, I decided to seek additional submissions from the affected parties in Appeal PA10-106 because of the nature of the reconsideration of Order PO-2987. At the time I sought these representations from the three affected parties, the OPA was only claiming the section 17(1) exemption in relation to the names and business addresses of the RFP evaluation team in record 1.[4] I advised the third parties that:

> The OPA has neither claimed nor argued that the information at issue in records 2 to 6 is exempt under section 17(1) in this appeal.
>
> Section 28(1)(a) of the *Act* provides that:
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> > Before a head grants a request for access to a record, … that the head has reason to believe might contain information referred to in subsection 17 (1) that affects the interest of a person other than the person requesting information … the head shall give written notice in accordance with subsection (2) to the person to whom the information relates."
>
> Section 13.01 of the *IPC Code of Procedure* states that "The IPC may notify and invite representations from any individual or organization who may be able to present useful information to aid in the disposition of an appeal."
>
> To be clear, the only information in the spreadsheets that the appellant is seeking is the numerical scores awarded for certain components of the bids, as described in the introduction to this [Notice of Inquiry].
>
> Accordingly, notwithstanding there not being a claim of section 17(1) by the OPA respecting records 2 to 6, I am exercising my discretion to seek the views and/or consent [under section 17(3)] of the three affected parties identified in these records, in part because section 17 is a mandatory exemption.

[4] The OPA did not claim that section 17(1) applied to any of the scoring records until it applied section 17(1) to record 6, relating to the third affected party, in its September 2012 decision letter.

[13] Two of the three affected parties had already been contacted with respect to the "Evaluation of Rated Criteria" scoring records because the same records were also at issue in Appeal PA09-413. In Appeal PA09-413, one of the affected parties did not object to the disclosure of information it had provided to the OPA during the bidding process and provided a consent form to that effect. When contacted in this appeal regarding records 3, 4 and 5, however, that affected party did not respond. The affected party whose bid scoring is represented by record 6 also did not respond. The successful proponent, whose scoring record is identified as record 2 in this appeal, provided representations.

[14] In March 2012, I issued Reconsideration Order PO-3062-R to address the two reconsideration requests received regarding Order PO-2987. While I varied the provisions of Order PO-2987 with respect to record 7, the bid evaluation summary, I did not change my findings with respect to the scoring records at issue.[5] Reconsideration Order PO-3062-R was itself the subject of a second reconsideration request by the successful proponent. As I was not available, Adjudicator Donald Hale took responsibility for addressing the issues raised by the successful proponent's reconsideration request of Reconsideration Order PO-3062-R.

[15] Adjudicator Hale's decision on the reconsideration of Reconsideration Order PO-3062-R was sent to the parties on May 14, 2012. In his reconsideration decision, Adjudicator Hale upheld my decision to order the OPA to disclose a severed copy of the scoring record of the successful proponent to the appellant, although he varied the order provisions relating to record 7.

[16] Once Adjudicator Hale's decision on the second reconsideration request relating to Appeal PA09-413 was issued, this appeal was taken off hold. In the interim, Appeal PA10-106 had been re-assigned to Adjudicator Jennifer James, who contacted the OPA to explore the possibility of a revised decision with regard for the final outcome of Appeal PA09-413. In her June 2012 letter to the OPA, Adjudicator James stated:

> If the OPA decides to revise its decision, the affected parties must be given written notice under section 28(1) of any revised decision granting access to the records at issue in this appeal.

[17] After notifying the affected parties, the OPA issued a revised decision letter to the appellant in September 2012, disclosing portions of records 2, 3 and 4 consistent with the version of those same records disclosed pursuant to Reconsideration Order

[5] Notably, certain information in the scoring records was removed from the scope of Reconsideration Order PO-3062-R by the appellant. Order provision 1 stated, in part: "Before disclosing the non-exempt portions of records 4 to 6 to the appellant, the OPA ought to sever the information that does not relate to the following parts of the RFP submissions: electrical connection point and islanding [3.3.1]; municipal and regional appeals [3.3.3]; and community outreach [3.3.4]. The severance may include total point scores."

PO-3062-R.[6] The OPA maintained its denial of access to records 1, 5 and 6, in their entirety.

[18] The appeal was subsequently reassigned to me to issue the order. Prior to preparing the order, it was necessary to resolve concerns with the legibility of the records disclosed to the appellant and to confirm the appellant's intentions with respect to the scope of the information sought. Further, in the cover letter provided to this office with a copy of its revised September 2012 decision, the OPA stated:

> We have revised our decision letter and made these productions without prejudice to our positions set out in response to our submissions to the IPC on all issues…

[19] Accordingly, the representations set out in this order date to the original inquiry into Appeal PA10-106. The representations in this complex appeal are lengthy and the circumstances are complicated. Only relevant portions of the parties' representations are excerpted or summarized in this order, but I have considered them in their entirety.

[20] In this order, I conclude that the responsive portions of the RFP bid evaluation team record and the scoring records are not exempt under the exemptions claimed by the OPA, and I order them disclosed.

RECORDS:

[21] The records at issue in this appeal consist of a one-page record titled "Northern York Region RFP Evaluation Team" (record 1) and five "Evaluation of Rated Criteria" spreadsheets (records 2 to 6).

ISSUES:

A. Is the appellant qualified to bring an appeal to this office?
B. Should the OPA be permitted to claim the discretionary exemption in section 14 to record 1 at the inquiry stage?
C. What information in records 1 to 6 is responsive to the request?
D. Does record 1 contain "personal information"?
E. Would disclosure of record 1 endanger life or physical safety according to section 14(1)(e)?
F. Would disclosure of records 1, 2 or 6 harm the interests of a third party under section 17(1)(a), (b) or (c)?
G. Would disclosure of the records harm the economic interests of the OPA under sections 18(1)(c) or 18(1)(d)?

[6] Order provision 1 of Reconsideration Order PO-3062-R; see footnote 5.

DISCUSSION:

A. PRELIMINARY ISSUE – Is the appellant qualified to bring an appeal?

[22] Following receipt of the request in this matter, the OPA processed it in accordance with the *Act*, issuing a decision in response to the request. Once that decision was appealed to this office, the matter proceeded through the intake and mediation stages and then to adjudication, where an inquiry was commenced. The OPA first raised concern with the "status of the appellant" and its capacity to bring an appeal to this office in response to the Notice of Inquiry I sent seeking submissions. For the reasons that follow, I dismiss the OPA's challenge to the appellant's status as a qualified appellant under the *Act*.

[23] In initial representations, the OPA states: "It is significant to note, at the outset, that [the appellant] is not a corporation of any form… As such, the OPA cannot be certain who is requesting the information or for what purpose they intend to use it." These submissions form the basis of the OPA's challenge to the appellant's entitlement to pursue an appeal of the access decision respecting records related to the OPA's RFP for the gas-fired peaker plant in northern York Region.[7]

[24] The OPA argues that it is "unable to make full and complete representations with respect to an appeal commenced by a non-existent entity," including being unable to address the significance of the information to the requester in its exercise of discretion. The OPA also argues, with some elaboration, that the appellant's lack of status under the *Act* results in an absence of a statutory basis for this appeal, which consequently deprives this office of the jurisdiction to continue this appeal and/or make an order under the *Act.* The OPA takes the position that:

- The authority for the Commissioner to hear the appeal is found in section 50 of the *Act*, which endows "a person who has made a request … [to] appeal any decision of a head… to the Commissioner;" however, since "person" is not defined in the *Act*, a "plain, common sense reading of s. 50 suggests that the twice-used term 'person' refers to a natural person," which the appellant is not.
- Further, as the *Legislation Act* defines "person" to include corporations and the appellant is not a corporation, "it has no standing to make a request or appeal under the *Act* … unless it can provide evidence that it is a legal entity…"
- This office cannot "read in a significant addition to statutory language that is not mandated by an omission in the language itself or called for on a reading of the legislation as a whole…".

[7] As stated, the OPA maintains this position in the revised decision letter of September 12, 2012, stating: "We have revised our decision letter and made these productions without prejudice to our positions … on all issues and particularly that related to [the appellant's] inability to qualify as [a] person under the *Act*."

[25] The OPA refers to Interim Order MO-1360-I, a decision of former Senior Adjudicator David Goodis, which addressed a similar challenge to the status of a requester, an "unincorporated association." The OPA notes that in this appeal, "there is no evidence that the appellant is an association of any sort." The OPA's remaining representations on this issue question the interpretation in Interim Order MO-1360-I of the Williams Commission Report[8] comments on the status of persons under the *Act.* These arguments focus on the potential for "fraud and abuse" of this office's functions and appeal processes by "aliased individuals" and "fictional characters". The OPA concludes this portion of its submissions by stating:

> Requiring an appellant to be a person can only result in an institution being able to more completely respond to an appeal. …
>
> [P]rocedural fairness and natural justice require that the IPC must abide by the statutes which provide it with its administrative powers by not taking jurisdiction over this appeal. Otherwise, the OPA's ability to respond to a request, to make full submissions in this appeal, and to consider whether the decision ultimately arrived at in this appeal is reasonable will all be hindered.

[26] I did not provide the OPA's submissions on this particular preliminary matter to the appellant, as I concluded it was not necessary to seek the appellant's representations on its own standing before this tribunal.[9]

Analysis and findings

[27] The objection by an institution to a requester having the requisite capacity to appeal a decision of a head to this office has been addressed in several previous orders.[10] The key order remains Interim Order MO-1360-I, which addressed this same issue in circumstances remarkably similar to the ones before me in this appeal. Although the OPA seeks to distinguish Interim Order MO-1360-I, I am satisfied that it is on point, and I find that its conclusions are applicable in this appeal.

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[8] The long title of the Williams Commission Report is *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).

[9] However, as noted previously, other portions of these submissions were provided to the appellant because I concluded they may relate to the exercise of discretion and section 23 (public interest override), regarding which the appellant's representations would be necessary.

[10] See Orders 164, MO-1360-I and MO-2063.

[28] I will begin by setting out the purposes of the *Act*, as described in section 1:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
> (ii) necessary exemptions from the right of access should be limited and specific, and
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[29] The task of statutory interpretation must be approached in a manner consistent with the purposes of a statute. It is also important to promote the internal consistency and coherence of the statute's provisions. Achieving the first stated purpose of the *Act* requires an interpretation of the provisions relating to access, and the access process, that supports this purpose.[11] Past decisions on this issue have reviewed sections 10(1) and 50(1) of the *Act* for proper context. These sections state, in part:

> 10. (1) … every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, …[12]
>
> 50. (1) A person who has made a request for,
> (a) access to a record under subsection 24(1);
> (b) access to personal information under subsection 48(1); or
> (c) correction of personal information under subsection 47(2),
> or a person who is given notice of a request under subsection 28(1) may appeal any decision of a head under this *Act* to the Commissioner.

[11] Interim Order MO-1360-I.

[12] Part of section 10(1) is omitted here. At the time the request was submitted in this appeal, the current opening phrase "Subject to subsection 69(2), …" did not yet appear in the provision. This opening clause relates to the application of the *Act* to records coming into the custody or control of a hospital after January 1, 2007. 2010, c.25, s.24.

[30] In this appeal, the OPA advances an interpretation of these two provisions that would limit the making of requests or filing of appeals with this office to natural persons or, alternatively, incorporated associations or "legal entities." Since the *Act* does not define "person," the OPA relies on the *Legislation Act*,[13] which defines "person" to include corporations. While the OPA is correct in asserting that the *Act* offers no definition of "person," that is where my agreement with its position ends.

[31] In addressing the capacity of a similarly unincorporated (community) association in Interim Order MO-1360-I, former Senior Adjudicator David Goodis also turned to the legislation that guides statutory interpretation. At the time that appeal was decided in 2000, the relevant guiding statute was the *Interpretation Act*,[14] since replaced by the *Legislation Act*. Beyond the definition of "person" noted by the OPA, the *Legislation Act* includes another definition that is notable here. Section 87 states, in part:

> In every Act and regulation, …
>
> "individual" means a natural person; ("particulier")
>
> "person" includes a corporation; ("personne")[15]

[32] The definition of "individual" is significant here. It conveys an intention to draw a distinction between a natural person and a "person", which (as stated) the *Legislation Act* defines as including a corporation. In my view, the OPA's position conflates the definitions of "individual" and "person." The use of the word "includes" in the definition of "person" signals that it is not an exhaustive definition of the term. In Interim Order MO-1360-I, the former Senior Adjudicator made a similar point, stating, "… the definition, by use of the word 'includes'", is open ended, and thus the words that follow do not restrict the meaning of 'person'."

[33] Furthermore, other provisions of the *Legislation Act* relating to that statute's intended application lend additional support to a more liberal interpretation of the term "person" than the OPA urges me to accept. These provisions contemplate giving effect or meaning to words or phrases that are consistent with both legislative intent and the context of the particular statute in question.[16]

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[13] *Legislation Act, 2006*, S.O. 2006, CHAPTER 21 Schedule F.
[14] R.S.O. 1990, CHAPTER I.11; repealed July 25, 2007; replaced by the *Legislation Act*, *supra*.
[15] Under consideration in Interim Order MO-1360-I was a definition of "person" under the now-repealed *Interpretation Act, supra,* that stated: "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law; ("personne").
[16] See *Legislation Act, supra,* sections 46, 47 and 50.

[34] As was the case in Interim Order MO-1360-I, I do not accept that the use of the word "person" in sections 10(1) and 50(1) of the *Act* excludes an unincorporated association from participating in the access to information regime established in Ontario by the statute. I adopt Senior Adjudicator Goodis' articulation of the legislative intent behind the first purpose of the *Act* in Interim Order MO-1360-I:

> The Legislature intended that government information which is not exempt should be disseminated to the public at large, and restrictions on the capacity of an individual or organization to make a request based on technical grounds, such as whether an organization is incorporated, would undermine its intention.

[35] Assistant Commissioner Brian Beamish conveyed his agreement with this conclusion in Order MO-2063, stating that "technical and bureaucratic obstacles to the right of access are not consistent with the stated purpose of the *Act*."

[36] I agree with the reasoning set out above. Accepting the OPA's technical arguments about the status of the appellant would disqualify this appellant (and, by implication, many others) from participating in the access to information scheme of this province, or seeking recourse through an appeal to this office. This would be an unsustainable interpretation of the entitlements afforded by the *Act* to pursue access to government-held information to support meaningful participation in the conduct of public affairs.

[37] Additionally, I am satisfied that a broader interpretation of "any person" in sections 10(1) and 50(1) of the *Act* is consistent with the following comments in the Williams Commission Report:

> The central and animating principle of freedom of information law should be that the individual is entitled, as of right, to obtain access to government information. Stated this broadly, however, the principle raises a number of important questions.
>
> First, it must be asked whether "any person" should be entitled to exercise this right of access, or whether the right should be restricted to a certain category of persons, such as residents or Canadian citizens, or to persons who have a particular need for the information. Almost all of the freedom of information statutes in place in other jurisdictions confer the right of access on "any person," without adopting limitations of this kind.
>
> We think it unwise to restrict access to persons who can demonstrate a need for the information in questions. We accept as a basic premise that members of the public should be entitled to have access to government

> information simply for the purpose of scrutinizing the conduct of public affairs.
>
> … We recommend, therefore, that the right of information be conferred upon "any person" who chooses to exercise rights under the legislation.[17]

[38] Based on my consideration of the facts and the persuasive precedent offered by Interim Order MO-1360-I, I find that unincorporated associations fall within the scope of the word "person" in sections 10(1) and 50(1) of the *Act*. The appellant in this appeal has the capacity to make a request and appeal any decision under the *Act*, to the same extent as a natural person or a corporation.[18]

[39] Before concluding, I would add that I am not persuaded by the OPA's submissions that the appellant's status – as a "non-existent entity" or otherwise – has in any way inhibited the OPA in making "full and complete representations" in this appeal. This much is clear from the material before me.

[40] Accordingly, because I am satisfied that the appellant is a qualified appellant, I dismiss the OPA's objections to the appellant's standing before this tribunal. In this context, I need not address the OPA's further submissions respecting my jurisdiction to continue this appeal or to make an order under the *Act.*

B. PRELIMINARY ISSUE - Should the OPA be permitted to claim a new discretionary exemption at the inquiry stage of the appeal process?

[41] In the representations provided in response to the initial Notice of Inquiry, the OPA claimed that the discretionary exemption at section 14(1)(e) applies to the RFP evaluation team members' names and business addresses in record 1.

[42] The Confirmation of Appeal that this office sent to the OPA after opening Appeal PA10-106 advised the OPA of the 35-day deadline set by this office for claiming additional discretionary exemptions. After the new discretionary exemption was claimed at the inquiry stage, I asked the OPA (through the Notice of Inquiry) to provide representations in response to the following questions:

> 1. Has the appellant has been prejudiced in any way by the late raising of discretionary exemptions to the records. If so, how? If not, why not?

[17] Williams Commission Report at pp. 233-234. Interim Order MO-1360-I offers a more in-depth review and commentary on this part of the Report, which is not reproduced in this order.
[18] See Interim Order MO-1360-I.

2. By allowing the OPA to apply additional discretionary exemptions to the records, has the integrity of the appeals process in any way been compromised?

[43] The OPA maintains that the appellant has not been prejudiced by the late raising of section 14(1)(e) in relation to record 1. The stated reason for allowing the late claim of greatest significance to the OPA is that:

> If [the OPA] is not permitted to raise s.14(1)(e) and Record 1 is ordered disclosed, it would create 'onerous' prejudice to the Evaluation Team Members, whose information is contained in the record.

[44] In asserting this position, the OPA relies on past orders of this office that identify the particular nature of the harms section 14(1)(e) (and section 20 of the *Act*) seeks to protect against and the importance of considering these harms in evaluating "prejudice" in this context. The OPA submits that since its representations describe threats and "the danger to the lives and physical safety of Evaluation Team Members … should Record 1 be disclosed," this office ought to err on the side of considering the exemption in section 14(1)(e), even if doing so would lengthen the appeal process.

[45] The OPA notes that the appellant has been provided with an opportunity to submit representations not only on the late raising of section 14(1)(e) but also on the exemption itself. The OPA argues that since the appellant will have had the opportunity to respond fully during the inquiry, no prejudice has been suffered. Further, the OPA submits that the "35-day policy is not inflexible and the circumstances of this case suggest [that the appellant] would not be caught off guard or 'surprised' by the OPA's reliance on s. 14(1)(e)."

[46] Finally, the OPA maintains that there would be no compromise to the appeals process if the additional discretionary exemption claim were permitted since the appellant had not yet been asked to submit representations in the appeal at the time the OPA raised section 14(1)(e). The OPA provides further representations, but it is not necessary to set them out in their entirety to further support my decision on the issue.[19]

[47] Having been provided with an opportunity to review the OPA's representations on the late raising of an additional discretionary exemption, the appellant points to an absence of evidence that there have been any events that would justify or support the claim to section 14(1)(e) in the first place. The appellant submits that the late raising of the exemption "contributes to the delay and prejudices the appeal."

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[19] For example, the OPA refers to Order PO-1840 where the institution persuaded the adjudicator to permit a late raised exemption claim because it had changed the statutory basis upon which it was withholding the record. Here, the OPA states that it is "no longer arguing the application of the s.21 exemption which it previously had claimed." However, the OPA's reply submissions clearly suggest that record 1 ought to be withheld under the personal privacy exemption. See Issue D, below.

Analysis and findings

[48] I have decided to permit the OPA to claim the additional discretionary exemption in section 14(1)(e) outside this office's 35-day policy. This finding is unrelated to the merits of the exemption claim. Rather, it is based on my conclusion that there has been neither prejudice to the appellant, nor compromise to the integrity of the appeals process, as a consequence of the late raising of the exemption claim.

[49] The objective of the 35-day policy established by this office is to provide institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced. These principles have been discussed at length in a number of orders.[20]

[50] Importantly, a number of previous orders have also recognized that the harm identified in either section 14(1)(e) or section 20 is different from the harms contemplated by other exemptions contained in the *Act*, since they relate to the health and safety of an individual. Section 14(1)(e) provides an exemption for records where the disclosure could reasonably be expected to endanger the life or physical safety of an individual. Given the seriousness of this type of harm if established, this office has commonly afforded a greater degree of deference to late raised claims to its application.

[51] With consideration to the overall circumstances of this appeal, I am not persuaded that the late raising of this exemption delayed either the processing of this appeal or its completion. In other words, the need to invite representations on section 14(1)(e) following the OPA's decision to raise it (in relation to the names and business addresses of the evaluation team members) did not contribute in any significant way to the time required to adjudicate the appeal. Accordingly, I am satisfied that the late raising of section 14(1)(e) has not compromised the integrity of the appeals process or significantly prejudiced the appellant.

[52] Accordingly, I will consider the possible application of section 14(1)(e) to record 1 in this appeal, below.

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[20] See Orders P-658, PO-1858, PO-1880, PO-2500, PO-3098, MO-2226 and MO-2308. The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.)

C. What information in records 1 to 6 is responsive to the request?

[53] In its initial representations, the OPA raised this issue, stating:

> Although not articulated as an issue on appeal, the OPA's position is that an over-arching reason for limiting disclosure of the records on this appeal pertains to the responsiveness and relevance of the records at issue.

[54] The OPA's representations then set out considerations for the determination of the scope of a request discussed in past orders of this office, such as the relationship between responsiveness and relevancy, the need for a liberal interpretation of a request, the potential for responsive information to be contained in a record which is otherwise non-responsive (and vice versa) and the principles of severance.[21]

[55] The OPA argues that only two columns of information in the RFP evaluation team record fall within the scope of this request, since the appellant specifically seeks names and business addresses of the team members only. The OPA provided a version of the record severed according to this position and maintains that because the other three columns contain information not responsive to the request, the information ought to be withheld on this basis.

[56] With respect to records 2 to 6, the OPA submits that the appellant asked for "the points awarded under the rated criteria proposal" and made it clear that they were "not requesting any narrative comments, but just the numerical scores." The OPA argues that in this context, the only responsive parts of records 2 to 6 are the numbers of the rated criteria, the names of the rated criteria and the "according numerical scores." Copies of records 2 to 6 in the form proposed by the OPA to be responsive were provided to me.

[57] In response, the appellant explains that her request was based on information available to the public with respect to section 3.3 of the July 2008 RFP: the section, the specific criteria and the maximum point score available for each. She expresses particular interest in the scoring of section 3.3.1, which had two sub-components: electrical connection point and islanding capability. On the issue of responsiveness specifically, however, the appellant submits that all of the information requested is relevant "because it relates to the final scores awarded to the proponents in the different sites." The appellant argues that all sections are responsive and removing any of them would alter the total final scores by "severing the equation that generated the result," thereby rendering the information essentially "worthless."

[21] For the principles set out, the OPA cites a number of IPC orders, including Orders P-880, PO-2084 and PO-2867.

Analysis and findings

[58] Questions about the scope of the appellant's request in this appeal were not raised until the inquiry stage. On the face of it, the request seeks the names and business addresses of the RFP evaluation team and the scoring of the five proposals, but not the narrative comments. However, as the OPA challenged the responsiveness of certain information in its representations, I will confirm the appeal's scope before continuing with my analysis of the exemption claims.

[59] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. As the OPA acknowledged in its representations, this office has held that institutions are obliged to adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, therefore, any ambiguity in the request should be resolved in the requester's favour.[22] Further, to be considered responsive to the request, records must "reasonably relate" to the request.[23]

[60] Record 1 was identified by the OPA as responsive to the part of the appellant's request seeking the "names and business addresses" of the RFP evaluation team. Record 1 is a table containing five columns of information relating to the RFP evaluation team. The team members' names and addresses appear in the first and fifth columns. There is little dispute that this information is responsive to the appellant's request, and I find that it falls within the scope of that request.

[61] However, the OPA argues that the information in the other three columns is not responsive to the request and ought to be removed from the scope of the appeal. With regard to the information in the fourth column, however, I disagree. The appellant has quite specifically indicated that she wants to learn about, and consider the provenance of, the RFP evaluation team. As I understand it, this is the reason for wanting the "business addresses" of the individual team members. On my review of record 1, the information in the fourth column is obviously related to the addresses in the fifth column. In fact, to identify the address as relating to a business, the information in the fourth column, which is titled "Organization," must be considered in conjunction with it. I find, therefore, that the information in the fourth column is responsive to the request and I will consider the OPA's various objections to disclosure in relation to it, together with the first and fifth columns.

[62] I am persuaded, on the other hand, that the second and third columns in record 1 contain information that is not "responsive" to the request for "names and business addresses." Moreover, based on the appellant's representations, I am satisfied that the appellant is not seeking access to this type of information. Accordingly, I find that the

[22] Orders P-134 and P-880.
[23] Orders P-880 and PO-2661.

information in the second and third columns of record 1 falls outside the scope of the request, and I will not review it further in this order.

[63] Next, the OPA questions the responsiveness of portions of records 2 to 6, the scoring records. Based on the version of those scoring records provided by the OPA, I am urged to accept that only three columns are responsive to the appellant's request, namely those columns containing the rated criteria section number, its name and the score awarded to the criteria. While the appellant has confirmed that she does not seek the narrative comments (i.e., those that were referred to in the related appeal as the "scoring rubric"), she does, in fact, seek access to all numerical values.

[64] To the extent that the appellant's reference to "numerical scores" in the request may have been ambiguous, because it did not specifically identify other numbers that set the context for the total scores, such ambiguity ought to be resolved in the appellant's favour. As the appellant's position suggests, severing part of the equation that generated the result (i.e., score) in this instance would not best serve the purpose and spirit of the *Act.* Affording a liberal interpretation to the request, therefore, I find that the entire numerical context of each rated criteria's score is responsive to the appellant's request.[24] Accordingly, I find that the rated criteria section and name, as well as all columns containing numerical values related to the scores awarded,[25] fall within the scope of the request.

[65] I will now review the application of the exemptions claimed in this appeal to deny access to records 1 to 6.

D. Does record 1 contain "personal information"?

[66] The OPA opposes disclosure of the names and business addresses of the RFP evaluation team based on concerns articulated about the personal privacy and safety of the team members.

[67] Section 21(1) is a mandatory personal privacy exemption under which the head of an institution is obliged to "… refuse to disclose *personal information* to any person other than the individual to whom the information relates" (emphasis added) unless one of the six listed exceptions applies. The application of the exemption is therefore

[24] The "numerical context" includes the columns titled: Score, Maximum Points, Weighted Score, and Weight. Notably, the Maximum Points are responsive to the request, but these values are publicly available. Further, the OPA disclosed some of the scoring records at issue in this appeal pursuant to a revised decision issued in the other appeal described in the introduction to this order (Appeal PA09-413: Orders PO-2987, PO-3062-R, and the unpublished reconsideration decision issued May 14, 2012). In that order, entire rows of the scoring records relating to certain section 3.3 RFP Rated Criteria were disclosed: 3.3.1(a) (Electrical Connection Point); 3.3.1(b) (Islanding Capability); 3.3.3 (Municipal and Regional Approvals); 3.3.4(a) Community Engagement; and 3.3.4(b) Experience on Other Projects. The request in Appeal PA09-413 had a slightly different focus.

[25] The responsive columns in the scoring records, therefore, are columns 1, 2, and 16-19.

contingent on the records actually containing "personal information." If no such information is contained in a record, section 21(1) does not apply.[26]

[68] Accordingly, before considering the mandatory personal privacy exemption in section 21(1), I must first determine whether the record contains "personal information," according to the definition of the term in section 2(1) of the *Act.*

[69] In response to the appellant's request, the OPA decided to notify the members of the RFP evaluation team, pursuant to section 28 of the *Act*, to provide them with an opportunity to state their views respecting disclosure of the requested information. The relevant part of section 28 reads:

> Before a head grants a request for access to a record, …
>
> > (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

[70] Based on the documentation available in the appeal file, the notification read:

> One of the records sought is a list of the members of the evaluation team and their addresses. You may very well feel that the release of your name and address is a violation of your privacy rights. In addition, the OPA fears that the release of the names and addresses of the members of [the] evaluation team may expose them to unwanted negative publicity and thus may cause individuals not to be willing [to] participate in future such evaluations.
>
> We do not wish to overplay our fears here but we note that, in late 2008 and early 2009, angry members of the public picketed the homes of the employees of failed and failing financial institutions in the United States and the United Kingdom after news of their alleged outsized bonuses were released.
>
> Please advise … what your position is relating to the release [of] your name and address to the requester.

[26] Order PO-2758.

[71] During the mediation stage of this appeal, the mediator confirmed with the OPA that the appellant was seeking the *business* addresses of the team members, not home addresses.

[72] Given the background and notification described above, I provided the OPA with an opportunity to address the preliminary determination regarding "personal information" in the initial Notice of Inquiry. I noted that the term is defined in section 2(1) of the *Act* as recorded information about an identifiable individual that includes the following information:

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[73] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[27]

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[27] Order 11.

[74] However, I also directed the OPA's attention to sections 2(2), (3) and (4) of the *Act* because they also relate to the definition of personal information. In particular, I pointed out the wording of section 2(3), which states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[75] Section 2(4) provides the following additional clarification:

> For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[76] In its initial submissions, the OPA acknowledged that the names in record 1 did not qualify as personal information and that past decisions of this office had found affected parties' names, job titles and even professional designation do not qualify as personal information under the *Act.* The OPA advised that "the OPA is not maintaining an objection to disclosure of the records on the basis of sub-ss. 21(1) or 2(1)."[28] That being the case, I did not seek the appellant's representations on the definition of "personal information" in section 2(1) or the personal privacy exemption in section 21(1), and none were provided.

[77] However, in reply representations on the exercise of discretion under section 14(1)(e), the OPA re-introduced the notion that this particular information is "personal information," thereby implying that its disclosure could result in an unjustified invasion of the RFP evaluation team members' personal privacy.[29] For example, the OPA submits that the appellant has not "specifically articulate[d] why it should have a right of access to the personal information of others." Later, it is noted that "The OPA is seeking to protect the privacy of those individuals… and the appellant's submissions have not articulated why individual privacy is not a relevant consideration with respect to record 1."

Analysis and findings

[78] In view of the inconsistency of the OPA's characterization of the responsive information in record 1, and because the personal privacy exemption is mandatory, I must review the issue.

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[28] Initial representations of the OPA, at page 14, paragraphs 74-76.
[29] OPA reply representations, page 2, paragraphs 4 and 5.

[79] The *Act* was amended in April 2007 by adding sections 2(3) and 2(4). As outlined above, these provisions modify the definition of "personal information" to categorically exclude an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity;" and to clarify that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).[30] The intent of the amendment was to clarify the distinction between personal and business, professional or official capacity, and it essentially affirmed the approach this office had taken to the issue in many previous orders.

[80] The most frequently cited order from the time prior to the amendment outlined above is Order PO-2225, in which former Assistant Commissioner Tom Mitchinson provided the following explanation about the approach taken by this office in distinguishing between personal and business information:

> Based on the principles expressed in these [previously discussed] orders, the first question to ask in a case such as this is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> …
>
> The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[81] In Order PO-2825, an order which postdates the amendment, former Senior Adjudicator John Higgins considered this issue with respect to records related to the peer review of a research proposal, concluding that the "record was created and exists in an entirely *professional context*." With respect to the affected party (peer reviewer), the Senior Adjudicator noted that the individual was identified in a purely professional or official capacity and, "therefore, section 2(3) applies with the result that this information does not qualify as his or her personal information." Moreover, he concluded that the same conclusion would have been reached had he applied the approach taken by former Assistant Commissioner Mitchinson in PO-2225. In other words, the name of the peer reviewer was information associated with that individual in a professional capacity because he was acting in a professional capacity in reviewing the appellant's research proposal. Accordingly, the information appeared in an entirely

[30] Orders PO-2773, PO-2825 and PO-2834. See also *London Property Management Association v. City of London*, 2011 ONSC 4710.

professional context. Further, the former Senior Adjudicator was also satisfied that disclosure of the affected party's identity in the context of the peer review report would not reveal something of a *personal nature* about that individual.

[82] Similarly, in the present appeal, I find that the names and contact information relating to the RFP evaluation team members is information associated with them in their professional capacity. These individuals were acting in a professional, not personal, capacity in reviewing the Northern York Region RFP on the OPA's behalf. I am satisfied that review of the proposals submitted in response to the RFP was a professional undertaking, and I conclude that disclosure of the responsive information relating to the RFP evaluation team members would not reveal other personal information about them. Accordingly, I find that the RFP evaluation team members' names and business addresses fit within the scope of section 2(3) of the *Act.*

[83] I note that the business address of the first named team member, however, does not appear to be a corporate head office and may well be a residence. In this situation, I am satisfied that section 2(4) applies. As stated above, section 2(4) of the *Act* provides that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

[84] As information fitting within section 2(3) does not qualify as "personal information," section 21(1) cannot apply since the exemption can only be relied on to deny access to "personal information". In the circumstances, it is not necessary for me to review the issue of whether disclosure of the personal information would result in an unjustified invasion of personal privacy.

[85] However, I must still consider the OPA's other exemption claims in relation to the responsive information in record 1.

E. Would disclosure of record 1 endanger life or physical safety according to section 14(1)(e)?

[86] As discussed previously, the OPA first claimed section 14(1)(e) to deny access to the RFP evaluation team members' names and business addresses in record 1 during the inquiry stage of this appeal.[31] In Issue B, above, I decided that the OPA should be permitted to claim section 14(1)(e). I will now review the evidence provided by the OPA respecting the exemption's application to record 1.

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[31] The OPA also alludes to the application of section 14(1)(i) in paragraphs 83 and 109 of its initial representations. However, in its supplementary representations, at paragraphs 34-39, the OPA states that it is not relying on section 14(1)(i), even while submitting that there is an interrelationship between the two exemptions. As there is no express claim to section 14(1)(i), I do not deal with it in this order.

[87] Section 14(1)(e) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the life or physical safety of a law enforcement officer or any other person;

[88] In support of claiming section 14(1)(e) to deny access, an institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous, exaggerated or contrived.[32] There must be a logical connection between disclosure and the potential harm the institution seeks to avoid by applying the exemption.[33]

[89] In providing context for the claim that section 14(1)(e) applies to record 1, the OPA refers to previous successful claims to the exemption in relation to identities of physicians who perform abortions, and to information relating to the location of abortion clinics and animal experimentation facilities.[34] The OPA submits that the same threat of harm is present in the context of environmental activism as with anti-abortion and animal rights activism. According to the OPA,

> The threat of injurious environmental activism in the appeal at issue need not arise from the appellant itself. Order P-1499 held that disclosure to the appellant must be viewed as disclosure to the public generally. The risk to Evaluation Team members must therefore be calculated by considering the steps that environmental activist groups may take if they secure the names and addresses of the Evaluation Team members.
>
> The threat to Evaluation Team members is not frivolous or exaggerated. In Canada, environmental activists have gone to great lengths to convey their message.

[90] The OPA then provides examples of actions it alleges have been taken by named environmental organizations and alludes to an affiliation of sorts between a community group known to the appellant and one of the named organizations. The OPA also refers to gas pipeline bombings. Further, the OPA submits that

> The FBI has labeled environmental and animal rights extremists as one of the most serious domestic terrorism threats to the United States due to

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[32] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.). See also Order 188.
[33] Order P-948.
[34] The OPA refers to Orders P-1499 and P-1747.

> the volume of crimes, the huge economic impact, the wide range of victims, and the increasingly violent rhetoric and tactics…

[91] With respect to the exemption applying to members of a specific group, as in Order PO-1817-R, the OPA submits that future evaluation team members "should also be considered within the group of affected persons, as environmental activists will use this Order to justify disclosure of the information related to such persons as well."

[92] The appellant's representations on section 14(1)(e) challenge the sufficiency of the evidence tendered and suggest that the examples and comparisons provided by the OPA are "either exaggerated or not applicable to the Province of Ontario." The appellant points to the failure to make any link between its own actions and the harms the OPA alleges could reasonably be expected to occur with disclosure of record 1. According to the appellant,

> There have been no events in this case since it was filed with the IPC/O that would have supported the discretionary exemption: no arrests no violence no charges with respect to [the facility] in King Township. There has been no evidence of an escalating pattern of illegalities…

[93] The appellant provides a point-by-point refutation of the various examples of environmental activism (or "eco-terrorism") given in the OPA's representations, which were intended to illustrate the reasonableness of the expectation of harm with disclosure to the appellant. The appellant emphasizes the importance of considering the "actual history of events in the northern York Region procurement process," not "isolated international cases of violence wherein a label is attached to extreme acts, or suppositions of 'eco-terrorism'." The appellant continues:

> Despite the fact that they felt that their air quality would worsen, that their agricultural economy would be damaged, and despite the fear that the values of their homes and the quality of their lives would suffer in proximity to an industrial complex, their restraint has been remarkable. No one has been hurt, or bombed, or arrested.

[94] The appellant provides the example of the Enbridge Gas Ontario Pipeline Coordinating Committee, comprised of members who reviewed Enbridge's project related to the pipeline intended to service the same facility. The appellant notes that Enbridge routinely publishes the names, ministries, agencies, job description, addresses, phone numbers and email addresses of the Ontario Pipeline Coordinating Committee, which Enbridge presumably would not do "if it felt it would endanger those individuals or their places of business."

[95] In sur-reply representations, the appellant concludes with this statement:

> Unlike the [OPA], who used innuendo and suppositions to allude to safety concerns under section 14 in reply with respect to [record] 1, there is neither convincing evidence nor facts to support safety concerns for their evaluators. I did not provide a basis because there was none.

Analysis and findings

[96] To uphold the OPA's claim to section 14(1)(e) to deny access to record 1, I must be satisfied that a reasonable basis exists for believing that endangerment to the lives or physical safety of the Northern York Region RFP evaluation team members will result from disclosure of their names and business addresses. On my review of the evidence, I conclude that the OPA has not established a reasonable basis for such a belief, and I find that section 14(1)(e) does not apply.

[97] Past orders of this office addressing section 14(1)(e) and the related exemption in section 20[35] have identified a need to consider both the type of information at issue and the party who is requesting the information. This consideration assists in determining whether a link can be established between the specific information and the objective reasonableness of the alleged threat with disclosure of it to the requester. The lead authority on this exemption is a case that reached the Ontario Court of Appeal: *Ontario (Ministry of Labour) v. Ontario* (*Big Canoe*).[36]

[98] In *Big Canoe*, the Court considered the quality of the information contained in the records at issue (three brief internal memoranda) and, more specifically, whether it could be said to have a "potentially inflammatory" character. In reviewing the potential for threat or endangerment contemplated by section 14(1)(e), the Court in *Big Canoe* addressed the issue of the evidentiary foundation related to threatening behaviour by an appellant. In that case, the Court noted that the institution had:

> … provided a sworn affidavit indicating that the Requester had threatened persons in the OWA [Office of the Worker Advisor], including the deponent, and that the Requester had been legally restrained from entering certain premises of the WCB. The deponent was also familiar with the medical portion of the Requester's WCB file, which included reports expressing concerns that the Requester would act out his/her threats of violence against WCB staff. The evidence was uncontroverted.

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[35] Section 20 reads: "A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual."

[36] (1999), 46 O.R. (3d) 395 (C.A.). The appellant sought all records related to himself in the files at the Office of the Worker Advisor, an agency established to represent workers in proceedings under the *Workers' Compensation Act* (as it was then known).

[99] Accordingly, the Court of Appeal upheld the Divisional Court's decision quashing the order of the Inquiry Officer, who had ordered the disclosure of the three internal memoranda based on her conclusion that the harm contemplated by section 14(1)(e) had not been established.

[100] Applying the principles of *Big Canoe* in the circumstances of this appeal, however, the evidence before me is clearly insufficient to meet the burden of proof placed on the OPA by section 53 of the *Act* to establish the application of section 14(1)(e). First, I find that the names and business addresses of the five members of the Northern York Region RFP evaluation team is not information that is itself "inflammatory."

[101] Second, I am not satisfied that disclosure of the information to this appellant could reasonably be expected to endanger the life or physical safety of the RFP evaluation team members. In my view, the evidence simply does not establish a risk of threat from the appellant or the group she represents. In fact, the OPA has not provided any evidence that the appellant, or her community organization, have engaged in any type of behaviour that could reasonably be expected to threaten the lives or physical safety of the RFP evaluation team members. Specifically, I reject the submissions directed at linking the appellant with "domestic terrorists" without any evidentiary basis for doing so. In my view, therefore, any purported link between disclosure and the harms in section 14(1)(e) is exaggerated.

[102] In Order PO-2917, Adjudicator Steven Faughnan reviewed the Ministry of Community and Social Services' claim of the application of section 14(1)(e) to the full names of Family Responsibility Office (FRO) employees contained in the records. The ministry described 24 documented instances of threats being uttered against FRO employees in the preceding 8-9 year period and although it acknowledged that the appellant had made no threats, it submitted that "given the frequency and nature of the threats and harassment directed towards FRO employees by other clients, … there [was] a reasonable expectation that FRO staff and possibly their families may be harmed if records containing employee names are released into the public realm in this case through an IPC Order." Adjudicator Faughnan dismissed this argument on the basis that there was insufficient evidence linking the specific information at issue (the names) with disclosure to the appellant. The ministry's denial of access under section 14(1)(e) was not upheld and the names were ordered disclosed.[37]

[37] The ministry brought a judicial review application regarding the finding in Order PO-2917 that the same information did not fall under the exclusion in section 65(6). Adjudicator Faughnan's finding that section 14(1)(e) did not apply is not challenged in the judicial review proceeding: *Ministry of Community and Social Services v. John Doe, Requester, Affected Party, Ontario Public Service Employees Union, and Information and Privacy Commissioner*, Tor. Doc. 553/10 (Div. Ct.); application pending.

[103] Not only do I agree with this reasoning, but I also endorse Adjudicator Faughnan's acknowledgement that the disclosure of employee names provided in the context of their work duties relates to the need for institutions to operate in a transparent and accountable manner.

[104] Further, while the OPA is correct that disclosure to the appellant has been accepted in past orders as being tantamount to disclosure to the world,[38] I am satisfied that this factor takes on significance only where a reasonable basis has been established for believing that endangerment would result from disclosure of the particular information at issue. This is not the case in this appeal.

[105] Accordingly, I do not uphold the OPA's claim under section 14(1)(e), and I find that the names and the business addresses of the RFP evaluation team cannot be withheld on this basis. However, as the OPA has also claimed that section 17(1) applies to this information, I will review whether the mandatory third party information exemption applies to it, below.

F. Would disclosure of records 1, 2 or 6 harm the interests of a third party under section 17(1)(a), (b) or (c)?

[106] Relying on section 17(1), the OPA denies access to the names and business addresses of the RFP evaluation team in record 1 and the scoring record of the third affected party in record 6.

[107] The OPA's claim that section 17(1) applies to record 6 was made after the OPA re-notified the three affected parties, at the suggestion of this office, in July 2012. In response to the OPA's notification, counsel for the third affected party responded to the OPA, objecting to disclosure of the scoring record related to its bid (record 6). As discussed on pages 5 and 6 of this order, I had previously contacted the same party in November 2011 by sending a Notice of Inquiry that outlined the section 17(1) exemption and sought representations, but the third affected party did not respond at that time.[39]

[108] As noted, the OPA's initial claim regarding section 17(1) in this appeal was that it applied to record 1. However, as no specific part of this mandatory exemption was identified in relation to record 1, I stated the following in the initial Notice of Inquiry sent to the OPA:

> My preliminary view is that section 17(1) does not apply to this information. However, if the OPA wishes to pursue this exemption claim, it

[38] The OPA refers to Orders P-1499 and MO-1243.

[39] The Notice of Inquiry was sent on November 21, 2011, with representations due December 12. The third affected party's Notice of Inquiry was sent to its General Counsel at the company's head office.

> must specify which paragraphs of section 17(1) it is relying on and provide representations accordingly,

[109] In response, the OPA clarified that it is relying on paragraphs (a), (b) & (c) of section 17(1) to deny access to the names and business addresses of the RFP evaluation team.

[110] The relevant parts of section 17(1) state:

> 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; …

[111] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[40] 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.[41]

[112] Under section 53 of the *Act,* the burden of proof rests on the OPA to establish 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

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[40] *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.).
[41] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

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

Record 1

[113] The OPA submits that the names and business addresses in record 1 constitute "commercial information."[42] According to the OPA, although past orders have found that:

> names and addresses of commercial entities do not normally qualify as 'commercial information[,]' … a second line of cases holds that if the name of the business or commercial entity is linked with information it may become 'commercial information."[43]
>
> Record 1 includes the name and address of each Evaluation Team member. In Order PO-1816, the names of candidates for a position as administrator at the Ontario Aboriginal Development Program were successfully withheld. When linked with the other disclosed information, the names showed how each candidate fared with respect to each criteria, and his or her assigned standing. The adjudicator held this amounted to "buying, selling or exchange of merchandise or services."

[114] The appellant submits that the names and business addresses of the members of the evaluation team "cannot be considered confidential 'informational assets'." The appellant relies, in part, on section 2.10 of the OPA's RFP, which provides that the OPA is not required to treat as confidential "information that has been independently developed by the OPA and its advisors."

[115] As a starting point for my reasons on this issue, I agree with the first point raised by the appellant. The names and business addresses of the RFP evaluation team are not confidential third party business information of the type that the exemption in section 17(1) is intended to protect.

[116] The OPA relies on a line of orders from this office that have held names and addresses to be "commercial information" in a procurement or recruitment context. However, while the procurement context of some of those decisions is shared with this

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[42] As defined in past orders, "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; see Order P-1621.

[43] The OPA refers to Order PO-1983.

appeal, the relationships were otherwise distinguishable. In those orders, the names at issue belonged to individuals or commercial entities seeking to do business with government, either as proponents or as candidates for government contracts. Moreover, as the OPA acknowledges, the names were somehow linked with other information in a way that it qualified as "commercial information." In Order PO-1816, for example, the candidates' names were linked with evaluative information relating to their proposals and much of that had been disclosed to the appellant, who was one of the same candidates. This created a crucial link between the names and the commercial information for the purposes of the definition of the term in section 17(1) of the *Act.* That is not the case here.

[117] In this appeal, the withheld names and business addresses belong to the OPA's own RFP evaluation team. I am not persuaded by the OPA's evidence that a connection exists between the names and business addresses of its RFP evaluation team and other information, such that the former qualifies as "commercial information," as that term has been defined in past orders to mean "buying, selling or exchange of merchandise or services." Further, I can find no other possible link between the RFP evaluation team members' names and business addresses and any of other types of information protected under section 17(1).

[118] Given my conclusion that the names and business addresses of the RFP evaluation team do not fit within any of the categories of information in section 17(1), I find that this information does not meet the first part of the test for exemption under section 17(1). As all three parts of the test must be met, I find that the names and business addresses in record 1 do not qualify for exemption under section 17(1) of the *Act*.

[119] However, as the OPA also claims that record 1 is exempt under section 18, I will review the possible application of that exemption to it in the next section of this order.

Records 2 and 6

[120] As identified above, the OPA added the claim of section 17(1) as a basis for withholding record 6, the scoring record of the third affected party, in its entirety, only following that party's objection to disclosure of record 6 upon re-notification in July 2012.[44] Record 6 is the only scoring record of the five that is subject to the section 17(1) exemption claim *by the OPA*.

[44] Due to its initial position that section 17(1) did not apply to the scoring records, the OPA did not provide submissions in support of its application. Further, the second affected party whose RFP bid scores are represented by records 3, 4 & 5 did not respond to either my notification in November 2011, or OPA's re-notification in July 2012. The second affected party did, however, respond to notification by this office in Appeal PA09-413 and provided written consent to disclose the records responsive to that request under section 17(3).

[121] Notably, however, I received representations from the first affected party in December 2011 opposing disclosure of record 2. The first affected party asked me to consider the representations offered in the reconsideration process respecting Order PO-2987 because the scoring record in that appeal is the same as in this appeal. When contacted again by the OPA in July 2012, the first affected party referred to the representations on section 17(1) in relation to their scoring record previously provided, and did not provide further representations. The first affected party did not appeal the OPA's revised September 2012 decision respecting the partial disclosure of record 2. For the sake of completeness, however, I will consider the first affected party's representations on section 17(1) insofar as they identified concern with the effect of disclosing the numerical values for the scores in record 2, in their entirety.[45]

[122] In addition, due to the opposition to disclosure conveyed more recently by the third affected party, I considered whether this office ought to again seek its representations on the application of section 17(1) of the *Act* to record 6. However, since I had previously provided this opportunity in November 2011 and given my finding in Reconsideration Order PO-3062-R on the application of section 17(1) to the scoring records, including the subsequent (re)reconsideration decision that upheld it, I concluded that no useful purpose would be served by seeking additional representations on this issue, either from the third affected party or any other party to this appeal.

Representations

[123] At an earlier stage of this appeal, and before the final decision was issued in the related appeal, the first affected party expressed concerns regarding disclosure of the scoring information, in its entirety. Accordingly, I will outline certain portions of the representations as they relate to disclosure of the numerical values and "all bidders' scores."[46]

[124] The first affected party suggests that the points assigned to the bids are directly derived from the technical, commercial and financial information submitted by it in response to the Northern York Region RFP.[47] According to the first affected party,

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[45] This is distinct from the partial disclosure of the scores ordered in Order PO-3062-R. As confirmed at page 10 of Order PO-3062-R, based on the request in that appeal and the narrowing of the scope of the appeal by the appellant, only the following rows (and associated columns) of the scoring record were at issue: 3.3.1(a) & (b), 3.3.3 and 3.3.4(a) & (b) were at issue.

[46] These November 2011 representations do not address the "supplied" issue. The "harms" argument suggests that disclosure of all bidders' scores would permit a "very detailed comparison of the relative strengths and weaknesses of each project," thereby permitting competitors to precisely identify the aspects of their own bids that could be improved, which would prejudice the first affected party in future bids because it would have "to improve its own bid, at increased cost, to remain competitive."

[47] These submissions were provided by the first affected party in relation to the reconsideration request respecting Order PO-2987, and were incorporated by reference by this party regarding record 2 in the present appeal.

disclosure of the scores for each component would reveal the assessed content of each bid in relation to other bids or to the maximum point score.

[125] Further, the first affected party argues that since the intent of section 17(1) is to protect the confidential information of third parties from disclosure where harm may be established, even when the information about the first affected party is created by the OPA, as with the scoring record, it ought still to be considered part of the stream of confidential business information supplied to the OPA. According to the first affected party, the exemption ought not to be interpreted to permit the "forced disclosure of prejudicial information," in situations where disclosure would enhance the understanding of a third party's confidential information, simply because it was generated by a government institution.

[126] The first affected party submits that this approach is consistent with the "inferred disclosure" basis for finding that information has been "supplied" in that it contemplates information that "permits the drawing of accurate inferences" with respect to the confidential bid information supplied by a third party. The first affected party relies on Orders PO-2620 and PO-2043. The first affected party also argues that scoring records are distinguishable from a contractual document with negotiated terms because they are based solely on information supplied by third parties to which evaluative criteria are applied.[48]

[127] In its November 2001 affidavit evidence, the first affected party submits that release of the scoring for all the bids would permit accurate inferences to be drawn about which components the successful (or any) proponent decided to emphasize in its bid. As I understand it, the suggestion is that disclosure of the scoring would reveal the affected parties' bid strategy and this constitutes confidential business information "supplied" by proponents.[49] The first affected party's position on the "supplied" issue in the related appeal relied on an argument that linked disclosure of its scoring record with the concurrent disclosure of the bid evaluation summary that was record 7 in that appeal. The first affected party submitted that:

> Although Record 6 [the scoring record] was generated by the OPA, disclosure of the information in it, particularly should record 7 be disclosed, will reveal to competitors the relative merits of specific components of [our] bid, which in conjunction with the adjusted values in record 7, would allow quite accurate calculation of the Economic Bid Statement financial values. The level of detail about [our] bid that disclosure of record 6 would generate qualifies it as information "supplied"

[48] As argued in the first affected party's November 2011 reconsideration submissions regarding Order PO-2987 (paragraphs 43 & 44 of Reconsideration Order PO-3062-R) and adopted in this appeal.
[49] The first affected party's representations elaborate on this argument, but the confidential portions are not reproduced in this order.

> to the OPA because of the accurate inferences about [our] bid and, in conjunction with … record 7, [our] Economic Bid Statement…
>
> Disclosure of the points allocated to [our] NYR bid components would allow competitors to assess the relative strengths or weaknesses of [our] bid in great detail and identify specific ways to undercut or defeat future … bids [from us] for similar power plant facilities.

[128] As previously identified, the bid evaluation summary referred to as record 7 is not at issue in this appeal, as it was in the related appeal.[50]

[129] With respect to the scoring records at issue in Appeal PA09-413,[51] I outlined the OPA's representations respecting the "supplied" part of the section 17(1) test, as follows:

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

[130] As stated, the OPA's claim to section 17(1) to withhold record 6 in this appeal was made following the response from the third affected party in July 2012; I did not ask the OPA to submit further representations on its revised position on section 17(1) with respect to the scoring information in record 6.

[131] The appellant's representations focus on confidentiality and the alleged harms and do not expressly address the issue of whether the scoring records contain information that was "supplied" by the proponents to the OPA.

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[50] In any event, the final outcome respecting record 7 was that large portions were removed from the scope of the appeal by the appellant or ultimately withheld under section 17(1), pursuant to Adjudicator Hale's second reconsideration decision, dated May 14, 2012.

[51] As outlined previously, records 2, 3 & 4 in this appeal (PA10-106) are identical to records 4, 5 & 6 in Appeal PA09-413. Record 5 represents the scoring of a third bid by the second affected party, while record 6 is the score sheet for the third affected party's bid.

Analysis and findings

[132] With regard to part one of the test for exemption under section 17(1), I am satisfied that the numerical scores awarded in relation to each component of this RFP is related to the "buying, selling or exchange of merchandise or services." Therefore, I find that the information at issue in records 2 and 6 fits within the definition of "commercial information" and meets the requirements of the first part of the test.

[133] On review of records 2 and 6 and the other scoring records generally, however, I am not persuaded that the information in them was "supplied" by the affected parties for the purpose of section 17(1).

[134] This finding is consistent with Reconsideration Order PO-3062-R with respect to (virtually) the same scoring records at issue in Appeal PA09-413, which were also prepared in response to the Northern York Region RFP.

[135] At pages 16-17 of Reconsideration Order PO-3062-R, I wrote the following with respect to whether the scoring records were "supplied" for the purpose of part two of the test under section 17(1):

> … I reject the first affected party's submission that the information at issue in record 6[52] represents its "confidential informational assets," flowing from the stream of information supplied by it to the OPA for the purposes of this RFP process. In Order PO-2853, Adjudicator Donald Hale received the following submissions from an affected party with respect to evaluated criteria and scoring records prepared by the OLGC:
>
> > … [the affected party's] individual OLGC evaluation scoring clearly constitutes [its] Information Assets since such evaluation scoring contains confidential information about [the affected party], including [its] "trade secrets," "commercial information" and "financial information" supplied to the OLGC in the course of the OLGC RFP process, and which identifies [the affected party's] strengths and weaknesses in the OLGC RFP process, in particular, and in the marketplace, in general.
>
> Adjudicator Hale rejected that argument, noting that the scoring records before him did not contain the actual commercial or financial information that was submitted by the affected party in its proposal, but rather described the scoring process and the proposals in general. In the circumstances of this appeal, and based on my review of the records

[52] As stated, record 6 in the related appeal and its orders is the equivalent of record 2 in this appeal (PA10-106). Record 6 in this appeal was not at issue in Appeal PA09-413.

> themselves, I note that record 6 contains information which is more in the nature of the scoring records described in Order PO-2853. It does not contain the first affected party's, or any proponents', bid information. Indeed, I agree with the OPA that record 6 represents the application of "internally generated criteria" to the proponents' bid information to create a record resulting in a score for each proponent.
>
> Further, in my view, disclosure of the limited information remaining at issue in record 6 would not permit accurate inferences to be made with respect to any underlying non-negotiated confidential information supplied by the first affected party to the OPA. In this way, I find that the "inferred disclosure" exception discussed in past orders of this office is not engaged.[53]

[136] Based on that reasoning, and the guidance provided by past decisions of this office, I found that the information at issue in the scoring records in Appeal PA09-413 was not "supplied" and did not, therefore, meet the second part of the test for exemption under section 17(1). In finding that section 17(1) did not apply, I also concluded that disclosure of the information at issue in the first affected party's scoring record, combined with certain portions of record 7, would not reveal the "bid strategy or relative merits of the first affected party's bid."[54]

[137] In this appeal, the narrative comments of the scoring records are not at issue, only the numerical values. Further, as noted, the bid evaluation summary in record 7 is also not at issue, thereby diminishing the potential weight of the submission that linkage of the scoring records and the evaluation summary could reasonably be expected to reveal confidential informational assets supplied by the proponents to the OPA.

[138] In Order PO-3055, Adjudicator Catherine Corban reviewed the application of section 17(1) to records respecting an RFP for a telephone management system.[55] Adjudicator Corban stated:

> Previous orders have found that the disclosure of scores from evaluations in competitive bidding processes does not reveal the information actually

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[53] This footnote (number 16) in Reconsideration Order PO-3062-R referred the reader to pages 6 to 9 of Order PO-2371, and to Orders MO-1706, PO-2384, PO-2435, and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe* ([2008] O.J. No. 3475 (Div. Ct.).

[54] During the reconsideration of Reconsideration Order PO-3062-R, the first affected party argued that disclosure of scoring record related to its bid – the narrative component along with the scores – would reveal information from the actual bid submitted, many portions of which had been found exempt under section 17(1) by me in Order PO-2987. Adjudicator Hale dismissed this argument because, on his review of the bid itself, he did not accept that disclosure of the scoring record would reveal the exempt information identified by the first affected party.

[55] Order PO-3055 (Ministry of Community Safety and Correctional Services), at paragraphs 105-108.

> supplied by the proponents. Rather, they have characterized scoring information as information calculated or derived by institution staff based on a subjective evaluation of information that was supplied.[56]

[139] Adjudicator Corban found in Order PO-3055 that disclosure of the numerical scores assigned to the proponent's proposal, along with its name, would not reveal specific information from its proposal that had been "supplied" to the ministry for the purpose of section 17(1) of the *Act*.

[140] I agree with Adjudicator Corban's summary of this office's approach to the consideration of scoring values under part two of the section 17(1) test. I also adopt my finding in Reconsideration Order PO-3062-R, and Adjudicator Hale's finding in support of it in the second reconsideration of Order PO-2987, with respect to part two of the section 17(1) test. In this appeal, none of the information appears to have been directly supplied by a third party. Rather, I am satisfied that the numerical scores are the by-product of the OPA bid evaluation team's review of the proposals submitted in response to the Northern York Region RFP.

[141] Therefore, I find that disclosure of the scoring information at issue in records 2 and 6 would not reveal any information supplied by the first and third affected parties to the OPA. As this information does not satisfy the second part of the test for exemption under section 17(1) and all three parts of the test must be met, I find that section 17(1) does not apply.

[142] The OPA has also asserted a claim of sections 18(1)(c) and (d) to exempt records 2 to 6 and I will now review its possible application to the scoring records, as well as to the bid evaluation team's names and business addresses in record 1.

G. Would disclosure of the records harm the economic interests of the OPA under sections 18(1)(c) or 18(1)(d)?

[143] The OPA relies on sections 18(1)(c) and 18(1)(d) to withhold the responsive information in record 1, as well as records 2 to 6.

[144] As a consequence of the OPA's revised decision issued in September 2012, portions of records 2, 3 and 4 were released in a version consistent with the disclosure of the equivalent records in Order PO-2987, as upheld in Order PO-3062-R. Accordingly, in this order, I am considering the possible application of section 18 to the undisclosed, responsive, portions of records 2 to 4, while also considering whether the same exemptions apply to the responsive portions of records 5 and 6, in their entirety.

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[56] Adjudicator Corban references Orders MO-1237, PO-1816 and PO-1818.

[145] The relevant parts of section 18(1) 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;

[146] The purpose of section 18 is to protect certain economic interests of institutions. The Williams Commission Report[57] provides the following 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.

[147] For sections 18(1)(c) or (d) to apply, the OPA must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the OPA is required to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[58] It should not be assumed that harms under section 18 are self-evident or can be substantiated by submissions that merely repeat the words of the *Act*. 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.[59]

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

[148] 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 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

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[57] *Supra*, footnote 8.
[58] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[59] Orders MO-1947 and MO-2363.

reasonable expectation of prejudice to these economic interests or competitive positions.[60]

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

[149] 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.[61]

Representations

[150] The OPA submits that if the records are disclosed to the appellant, there is a reasonable expectation of harm to the OPA's economic interests and its competitive position due to the negative impact on its RFP processes. The OPA submits that:

> Part of the integrity of the OPA's bidding process has been based on proponents making their best efforts to provide evidence relating to the Rated Criteria. If proponents are aware of the contents of the scorecards, proponent submissions will become limited to information intended to satisfy the Point Allocation Targets.

[151] The OPA provides the following excerpts from the reasons of the Court of Appeal in *Ontario (Ministry of Transportation) v. Cropley,*[62] (*Cropley*) where arguments alleging harm resulting from release of RFP scores are addressed:

> 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 the Ministry. She also examined the scoring on the records at issue and concluded there were variations in the scores

[60] Orders P-1190 and MO-2233.
[61] 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.
[62] (2005), 34 Admin. L.R. (4th) 12 (C.A.); Order PO-1993.

> 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 in OPA's representations]

[152] Alluding to these reasons, the OPA submits that in requesting this particular information related to the procurement process, the appellant is seeking information "not known within the industry but closely held by" the OPA. The OPA suggests that a different result is demanded in this situation because "the RFP scores for one proponent who submitted multiple bids… were consistent where the projects were similar."

[153] The OPA argues that disclosing the scoring records to the public "will permit proponents to manipulate future RFP processes. Referring to the adage "gild the lily," the OPA outlines certain features of the scoring rubric (i.e., Point Allocation Targets) and submits that proponents with access to records 2 to 6 will know how to focus or pitch their proposals so as to be awarded the maximum number of points under the Rated Criteria. The OPA argues that this will lead to simplification of the Rated Criteria and, consequently, to bids that are not truly responsive to the criteria, but rather manipulated for effect, making it "more difficult for the OPA to differentiate between truly strong bids, and those which are merely being carefully presented."

[154] The OPA also forecasts harm resulting from the release of the scoring records, alleging that the records could be "detrimentally misconstrued and lead to economic harm to the OPA and the successful proponent…" in the form of a risk of litigation. The OPA mentions litigation brought by an organization affiliated with the appellant, and asserts that disclosure of the scoring records to municipalities or public groups may allow such entities to:

> … alter approvals given or in process just to stymie a successful proponent from constructing their plant. This would cause prejudice to the OPA's economic interests by resulting in undue cost and instability to the RFP process and the subsequent concluded contract. …
>
> The OPA has an economic interest in seeing the plant resulting from the RFP process constructed. Obstruction of that process through third party access to records 2-6 will only serve to damage the OPA's economic interests contrary to *FIPPA* sub-s. 18(1)(c). It would also be prejudicial to the OPA's financial interests contrary to sub-s. 18(1)(d).

[155] Although the OPA has claimed throughout that it is withholding record 1 pursuant to sections 18(1)(c) and (d), it offered no representations in support of the denial of access to this record under section 18.

[156] In her opening comments, the appellant submits that the OPA's submission that sharing scores after the contract is awarded would somehow lead to scores being manipulated in the future amounts to pure conjecture.

[157] Referring to the OPA's submission regarding the consistency of "RFP scores for one proponent who submitted multiple bids…," the appellant remarks that such consistency ought to be expected given that the proponent used the same environmental consultants, same methodology, same proximity to a connection point, and the same land types for each of their proposals. According to the appellant, "homogeneity across scores is not a predictor for that proponent for future projects [because] there are too many variables…".

[158] Noting the OPA's references to its own economic interests, the appellant submits that public accountability in the selection of power generation contracts demands that the OPA's interests be balanced with the public's need for a clear, competitive and transparent process. Additional submissions under this heading do not directly address the tests for exemption under sections 18(1)(c) and (d), but rather outline the anticipated actual cost of the contracted facility.

[159] The appellant, in representations that address the OPA's exercise of discretion in denying access to the scoring records under section 18, contrasts the OPA's decision to disclose the detailed financial contract for the facility (the "how" and the "when), while withholding the records that reveal the basis of the decision to enter into the contract with the successful proponent (the "who" and "why").

Analysis and findings

[160] As I wrote in Order PO-2987, it is in the public interest that the Ontario government, its agencies and its institutions, negotiate favourable contractual arrangements, and adhere to robust procurement processes.[63] However, accepting the existence of such a public interest does not alter the fact that an institution must submit sufficient evidence to establish that a claimed exemption applies to withhold government-held information that is otherwise subject to a right of access under the *Act*. In this appeal, I find that the OPA has not persuaded me that either section 18(1)(c) or section 18(1)(d) applies to the names and business addresses of the RFP evaluation team members in record 1 or the particular responsive information left at issue in the scoring records in records 2 to 6.

[63] Orders PO-2632 and PO-2987.

[161] I will address records 2 to 6 first, since this review dovetails to a certain extent with my review of the scoring records at issue in Appeal PA09-413.[64] In that appeal, the full score sheet information relating to three identified parts of each bid was at issue, including point allocation targets (the narrative) and the numerical scores.[65] Following the final decision in Appeal PA09-413, this responsive information was disclosed.

[162] In the present appeal, the appellant seeks the numerical scores for all of the rated criteria for the RFP, as contained in records 2 to 6, but not the narrative portions.[66]

[163] The OPA submits that disclosing the scoring records will lead to exploitation of future RFP processes, arguing that proponents with knowledge of the score sheet content will choose to tailor proposals in such a way as to merely satisfy, and obtain maximum scores from, the point allocation targets. The OPA suggests that such bids would be manipulated for effect, making it "more difficult for the OPA to differentiate between truly strong bids, and those which are merely being carefully presented."

[164] I addressed the same argument presented in Appeal PA09-413 at page 29 of Order PO-2987, as follows:

> The OPA postulates that third parties, namely future proponents, might act in certain ways if the information at issue is disclosed, including taking action to exploit or manipulate the RFP process. However, the OPA has not been able to point to experience with this happening or otherwise provide a reasonable basis for me to conclude that such "exploitation" might reasonably be expected to occur. Among the arguments I find to be speculative in nature is the OPA's assertion that disclosure of the information would result in proponents submitting "carefully presented" or "gilded" bids that are lower in quality because they are simply tailored to fit the criteria, rather than genuinely and comprehensively addressing the bid requirements. In my view, this argument presumes a lack of sophistication and integrity in the bid evaluation process that is without basis.
>
> …
>
> [W]hat is important to the integrity of procurement scoring are the responses provided by a proponent as part of the process, not the content

[64] The section 18 order provisions of Orders PO-2987 and PO-3062-R, as upheld in the unpublished reconsideration decision of Adjudicator Donald Hale, dated May 14, 2012.
[65] In addition, the appellant in Appeal PA09-413 later removed the total point scores awarded to each proponent from the scope of the appeal. This value appeared in the summative record (number 7), which is not at issue in this appeal.
[66] In Order PO-2987, I referred to the point allocation targets "narrative" as the scoring rubric or matrix.

> of the rubric matrix itself. In other words, knowledge of the rubric will not assist a proponent if they cannot demonstrably meet the basic criteria of the RFP through the content of their bid (see Order PO-2657).

[165] I adopt the reasoning above in rejecting the OPA's argument in this appeal. Moreover, given that the point allocation target narrative, or rubric, is not at issue in this appeal, I find that the factual basis underlying the argument here is even less persuasive.

[166] The OPA also submits that the question posed by the Court of Appeal in *Cropley*, *supra,* is relevant in this appeal; namely, whether knowing the scores of competitors would permit a consultant to adjust its bids for future tenders. In a section of the *Cropley* decision highlighted by the OPA, the court identified that in order to equip a competitor to manipulate the evaluation process, "a party would require in addition to the scores, information not known within the industry but closely held by the Ministry." In this appeal, the OPA has not demonstrated to my satisfaction that a meaningful connection exists between the scores/numerical values and any identifiable "closely held" information such that future exploitation of OPA RFP processes could reasonably be expected to result.

[167] In this context, therefore, I do not accept the OPA's submission that a different result (than *Cropley)* is demanded in this situation because "the RFP scores for one proponent who submitted multiple bids… were consistent where the projects were similar." Rather, I agree with the appellant that "homogeneity across scores" is not a reliable indicator of how that proponent would fare on future projects. Simply put, the OPA's evidence on this point does not persuade me that disclosure of the numerical values in the scoring records would lead to the economic harm or prejudice to financial interests the exemptions seek to protect against.

[168] The OPA also argues that disclosure of the scoring records carries with it the potential for interference with the concluded contract and construction of the plant, injecting extra cost and instability into the process. The OPA alludes to undue exposure to litigation risks. I dismissed these arguments as speculative in Order PO-2987 as follows (at pages 30-31):

> Other arguments presented by the OPA respecting the damage to its economic and financial interests under section 18 with disclosure of the scoring records revolve around the actions that could be taken by local authorities or the public as a result of disclosure. For example, the OPA refers to the rated criteria regarding local approvals and points to the municipality in this instance passing an interim control by-law in an attempt to delay the construction of the plant. In my view, the phrasing of its submission on this subject is worth noting. The OPA submits:

> If municipalities or public groups are able to view the [scoring rubric], they may alter approvals given or in process just to stymie a successful proponent from constructing their plant. This would cause prejudice to the OPA's economic interests by resulting in undue cost and instability to the RFP process and the subsequent concluded contract.

I find this argument to be entirely speculative. I have not been provided with any evidence that the interim control by-law referred to by the OPA, which is no longer in place, was connected in any way with awareness of information about the process, let alone the content of the scoring or evaluation records in records 4 to 7. Indeed, I accept the appellant's submissions about her group's motivation in seeking access and in this light, it seems just as likely that the actions taken by municipal officials and/or the public in opposition to the project was influenced by the non-disclosure of this type of information by the OPA.

Further, and as suggested above in relation to the interim control by-law, the passage of time is relevant. The RFP process for this facility has been concluded for more than two years. As I understand it, construction of the plant is well underway. In my view, this highlights the weakness of the OPA's argument that disclosure of the scores and evaluation summary could somehow inject instability into the procurement process and the concluded contract here (see Orders MO-1781 and MO-1789).

[169] In Order PO-2987, I also rejected the OPA's submissions around the relevance of the appellant's identity and any affiliations between various groups that were expressing concern with the procurement process for the facility in question:

> The fact that the appellant was, and likely remains, opposed to the project does not itself amount to harm, and I agree with the appellant's representations on the subject. In my view, participation in dissent or active disagreement with government decision-making in a democratic society should not be equated with harm *per se*, particularly as that term is contemplated by sections 18(1)(c) and (d) of the *Act*.

[170] These comments are equally relevant in the present appeal, where similar submissions have been made seeking to link dissent with economic harm under section 18. As in that appeal, I find that the evidence provided to establish such a connection does not cross the threshold of speculation.

[171] Accordingly, having considered the numerical scores and values associated with each of the rated criteria at issue in records 2 to 6, I find that the OPA has failed to provide the detailed and convincing evidence required to demonstrate that disclosure of

this particular information could reasonably be expected to prejudice its economic interests or competitive position, as contemplated by section 18(1)(c). Similarly, I find that the OPA has failed to establish that disclosure of this information could reasonably be expected to be injurious to the Government of Ontario's financial interests or its ability to manage the economy, as contemplated by section 18(1)(d).

[172] Finally, regarding the OPA's claim that the names and business addresses of the RFP evaluation team are exempt under section 18(1)(c) or section 18(1)(d), I reiterate that no representations were offered in support of this position. By reference to the OPA's position on the law enforcement exemption, it may be suggested that disclosure of this information would result in individuals not being willing to participate in future bid evaluation teams, thereby causing some form of economic harm to the OPA. However, the OPA has not provided sufficient (or any) evidence to make such a finding, nor is it possible for me – on an independent analysis of the facts and circumstances – to infer a reasonable expectation of such harm.[67] Since I do not accept that disclosing the names or business addresses of the RFP evaluation team could reasonably be expected to lead to the harms contemplated by sections 18(1)(c) or (d), I find that this information is not exempt.

[173] In conclusion, as the OPA has not tendered the requisite detailed and convincing evidence to show that disclosure of the responsive information in any of these records could reasonably be expected to result in the harms contemplated by sections 18(1)(c) or 18(1)(d), I find that none of the records qualify for exemption on this basis.

[174] As I have found that none of the exemptions claimed apply to the records, it is not necessary for me to consider the OPA's exercise of discretion under sections 14 or 18; nor is it necessary for me to review the possible application of the public interest override in section 23 of the *Act.* Accordingly, I will order the OPA to disclose the responsive information to the appellant.

ORDER:

1. I order the OPA to disclose the responsive portions of the records that do not quality for exemption to the appellant by **January 28, 2013**, but not before **January 23, 2013.**

   For certainty, this provision requires the OPA to disclose (including their headings):

   - columns 1, 4 and 5 of record 1; and
   - columns 1, 2, 16, 17, 18 and 19 of records 2 to 6.

[67] See Order PO-2758, in which former Senior Adjudicator John Higgins referred to Order PO-1745 to explain an adjudicator's entitlement to independently inquire into whether the record by itself, and in a given set of facts and circumstances, ought to be exempt.

2. 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 provision 1.

Original signed by: December 19, 2012
Daphne Loukidelis
Adjudicator