Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4183

Appeal PA19-00506

Infrastructure Ontario

August 31, 2021

Summary: Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the winning proposal relating to a Request for Proposal (RFP) for scheduling consulting services for reconstruction of a government complex in Toronto. IO granted partial access to responsive records, but withheld some information from two responsive records on the basis of the mandatory exemption in section 17(1) of the *Act* (third party information). In this order, the adjudicator finds that the information at issue is not exempt under section 17(1) and orders IO to disclose it to the appellant.

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

Orders Considered: Orders MO-1609, MO-3058-F and PO-2043.

OVERVIEW:

[1] This order deals with a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a winning proposal for scheduling consulting services. The proposal was submitted in response to Infrastructure Ontario's (IO) Request for Proposals (RFP) for the reconstruction of Macdonald Block (the project) in Toronto. IO received the following request for access to information relating to the winning bid:

> RFP No. 18-146 Scheduling for Consulting Services for Macdonald Block Reconstruction Project

> I am requesting one complete copy of the winning submission(s) along with a copy of the letter of intent and/or award, and copies of score cards, minutes of meetings, audio, evaluation notes and interview notes, from all submissions received pertaining to the decision of this award.

[2] IO searched for and located 19 responsive records. In accordance with section 28 of the *Act*, before issuing a decision, IO notified a third party whose interests might be affected by disclosure and gave it the opportunity to make representations. The third party submitted representations to IO objecting to disclosure of some of the responsive records on the basis that they are exempt under sections 19 (solicitor-client privilege) and 20 (danger to safety or health) of the *Act*.[1]

[3] After it received the third party's submissions, IO issued a decision granting full access to two of the responsive records, and partial access to 17 records. IO denied access to portions of the responsive records on the basis that they are exempt pursuant to the mandatory exemptions in sections 17 (third party information) and 21 (personal privacy), and the discretionary exemption in section 13 (advice to government) of the *Act*. In its decision, IO also requested payment of a final fee in the amount of $60.20, pursuant to section 57(1) of the *Act*. The requester paid the fee and IO disclosed responsive records in accordance with its decision.

[4] The requester, now the appellant, then appealed IO's decision to grant partial access to the Office of the Information and Privacy Commissioner of Ontario (IPC). The parties participated in mediation to explore the possibility of resolution. During mediation, the appellant narrowed her request to specific pages in two of the responsive records, identified as Records 18 and 19 in IO's index of records, which are identified as a technical submission in response to the RFP, and a price form. IO, however, took the position that the information in Records 18 and 19 to which the appellant seeks access is exempt under section 17(1).

[5] When a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process on the sole issue of whether the information at issue is exempt under section 17(1). An adjudicator began the inquiry by inviting the appellant, IO and the third party to submit representations in response to a Notice of Inquiry, in which the facts and issues under appeal were summarized. Both IO and the third party submitted representations. The appellant did not submit representations during the inquiry, although she was given the opportunity to do so. The representations received by the IPC were shared among the parties in accordance with IPC's *Practice Direction 7* on the sharing of representations. The appeal file was then transferred to me to complete the inquiry.

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[1] The third party wrote in its response to IO that disclosure would "contravene provisions 19(1), 20(1)(a) and 20(1)(c) of the *Act"* and enclosed a document with its representations to IO highlighting the records that it said should not be disclosed.

[6] For the reasons that follow, I find that that the information at issue is not exempt under section 17(1) of the *Act* and order IO to disclose it to the appellant.

RECORDS:

[7] The records at issue are Records 18 and 19 in IO's index of records. The information at issue is found in the records as follows:[2]

- Record 18 – a 37-page RFP Technical Submission. At issue is a schedule review report contained on pages 13 and 14.
- Record 19 – a six-page Price Form. At issue is a fee breakdown and hourly rates contained on pages 3-6, inclusive.

DISCUSSION:

Does the mandatory exemption at section 17(1) apply to the records?

Background provided in IO's and the third party's representations

[8] According to IO, the Macdonald Block Complex (the complex), is the administrative hub of Ontario government operations and is undergoing significant construction as part of a renovation and reconstruction project. The project is being delivered through IO's design, build, finance and maintain (DBFM) Public-Private Partnership (P3) model, which transfers certain risks associated with the project's design, construction, maintenance and financing to the private sector. IO says that, although the complex will continue to be publicly owned, as part of the P3 model certain risks are transferred to the private sector because it has the expertise and experience to handle them best.

[9] As part of the overall project, IO solicited responses to an RFP for scheduling consulting services. The third party submitted its proposal, which IO accepted as the winning bid. The proposal included a sample Schedule Review Report, and a Price Form for scheduling consulting services – Records 18 and 19, respectively. As noted above, access to withheld portions of those records is at issue in this appeal. IO and the third party claim that the records are exempt from disclosure under section 17(1) of the *Act*. IO submits, however, that it has already disclosed a significant portion of the

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[2] At the conclusion of mediation, the appellant also sought access to information withheld from pages 34-37 of Record 18. During the inquiry, however, access to pages 34-37 was removed from the scope of the appeal after the appellant informed the IPC that, "After re-looking at the documentation provided to me by IO, I am solely looking for pages 13-14 of record 18. I remove my request for pages 34-37 in Appendix 4 of Record 18."

responsive records to the appellant.

The section 17(1) exemption

[10] Section 17(1) states, in part, that:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
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> > (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….[3]

[11] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[3] Section 17(1)(d), which is not relevant and therefore not addressed in this order, is intended to protect "information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute."

[4] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal denied, Doc. M32858 (C.A.) (*Boeing Co.*).

[5] 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.

Part 1: type of information

[13] The types of information listed in section 17(1) have been discussed in prior IPC orders. Relevant to this appeal are the following:

> *Trade secret*, which means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[6]
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> *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.[7] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[9]

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[6] Order PO-2010.
[7] Order PO-2010.
[8] Order P-1621.
[9] Order PO-2010.

Representations

The third party's representations[10]

[14] The third party submits that it is a leading professional services provider in the real estate, infrastructure and natural resources sectors. It says that the information at issue contains trade secrets and business practices. The third party also says that the records contain commercial information that pertains to its provision of scheduling services, including pricing for its "Scheduling services in Toronto and specifically to Infrastructure Ontario as a client."

IO's representations

[15] IO says that the information contained in the portions of the records at issue relates directly to the proposed terms of a commercial relationship between IO and the third party.

[16] IO submits that Record 18 describes the third party's methodologies, and contains proprietary data and processes that IO says are essential to the provision of the third party's services to IO and its clients. IO says that pages 13 and 14 of Record 18 set out a proposed schedule review process designed to ensure that construction requirements are met in a timely way, and that this information is unique to each respondent in an RFP process and is commercially valuable.

[17] With respect to Record 19, IO submits that the information on pages 3-4 that is at issue relates directly to the proposed financial relationship between IO and the third party. IO says that this includes information on pricing, cost breakdown of the project during various phases of construction, the rates for additional services, and the individual hourly rate of identified project team members. IO says that this qualifies as "financial information" for the purposes of the *Act* because it refers to the third party's different pricing practices. IO says this information is supplied to it by respondents to an RPF to indicate the value of the proposed project and to allow for "a just evaluation and understanding of how respondents arrived at their price."

[18] IO says that it disclosed the total fixed fee for the project, and as much of the records as could reasonably be severed in accordance with section 10(2) of the *Act*, but argues that the cost breakdown by phase is exempt.

Analysis and findings

[19] I find that the records contain commercial and financial information as contemplated by section 17(1). Based on my review of the records at issue, I agree that

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[10] The third party also states in its representations in response to a Notice of Inquiry that it has adopted the position described in its response to IO's section 28 notice. I therefore considered both.

they contain commercial information relating to the relationship between IO and the third party and the services to be provided by the third party as part of the project, and that this information relates to the proposed terms of a commercial relationship between them. I also find that the records contain financial information consisting of information about fees associated with the project.

[20] Although the third party submits that the records also contain trade secrets, the third party has not explained in its representations what those trade secrets are or provided other evidence to support its assertion. In any event, because I have found that the records contain commercial and financial information, it is not necessary for me to determine whether they also contain "trade secrets" as the third party submits, because the first part of the three-part test in section 17(1) is met.

Part 2: supplied in confidence

[21] Part two of the three-part test itself has two parts: the third party must have "supplied" the information to the institution, and must have done so "in confidence," either implicitly or explicitly.

[22] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[11]

[23] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[12]

[24] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" for the purpose of section 17(1). Past IPC orders have, in general, treated the provisions of a contract as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[13]

[25] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information that the affected party supplied to the institution.[14] The "immutability"

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[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] This approach was approved by the Divisional Court in *Boeing Co.*, supra note 1, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (*Miller Transit*).
[14] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

exception applies to information that is immutable or not susceptible to change or negotiation.[15] Examples are financial statements, underlying fixed costs and product samples or designs.[16]

[26] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[17]

[27] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and,
- prepared for a purpose that would not entail disclosure.[18]

Representations

The third party's representations

[28] The third party submits that its proposal was submitted to IO in confidence. The third party says that its response to the RFP contains a confidentiality provision that expressly states that the proposal's contents are not to be made available, copied or otherwise quoted or referred to without its express written permission and that "we accept no liability of whatsoever nature for any use by any other party."[19]

IO's representations

[29] IO says that it procures all goods and services in accordance with an IO

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[15] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134.
[16] *Miller Transit*, *supra* note 14 at para. 34.
[17] Order PO-2020.
[18] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, cited above.
[19] The third party also objects in its representations to the disclosure of its clients' names, however, I note that those are not at issue in this appeal.

procurement policy that complies with an Ontario Public Service directive. IO says that its procurement evaluation process requires vendors to submit proposals for specific scopes of work for goods or services and that, because the records at issue were provided to IO at its request by the third party, they were "supplied" within the meaning of section 17(1).

[30] IO argues that the third party (as the successful bidder) supplied IO with "immutable information," which IO says includes fixed costs or labour costs that IO says were neither changed nor subject to negotiation. IO says that the records at issue were submitted to IO, evaluated pursuant to the evaluation criteria outlined in the RFP, and accepted as the successful bid. IO says that its evaluation of the third party's proposals did not involve any negotiation, discussion or compromise with the third party and that IO's simple acceptance of the third party's RFP submissions "precluded any negotiation." Because it made no revisions to the proposal, IO maintains that the records at issue were "supplied" to it by the third party.

[31] IO also says that the withheld portions of the records represent contractual terms proposed solely by the third party, and therefore were supplied to IO by the third party. IO submits that, even though the tender bid may have been wholly incorporated into a contract, because IO made no revisions to the third party's proposal, the bid meets the "immutability" exception and should be considered to have been supplied to IO.

[32] IO further submits that the third party's response to the RFP was supplied to IO in confidence as part of the procurement process. IO says that there was a reasonable expectation from the totality of the surrounding circumstances, as well as specific evidence, which indicated the parties' intentions for the information to be treated as confidential.

[33] IO says that the RFP itself contains express provisions notifying respondents that all proposals are received in confidence "subject to disclosure requirements" under the *Act*. IO submits that these confidentiality provisions that gave rise to "an explicit and reasonable expectation of confidentiality on the part of the affected third party in the information they provided to IO throughout the RFQ and RFP processes, information that would ultimately be incorporated directly into both records at issue."

[34] IO also says that it has consistently maintained the confidentiality of procurement documents and treated such submissions as confidential, so that the third party had an implied expectation of confidentiality.

[35] The third party did not address this part of the test in its representations.

Analysis and findings

[36] I find that the third party's RFP proposal was "supplied" to IO within the meaning of section 17(1). At the outset, I note that the records at issue before me are part of the proposal submitted to IO in response to the RFP, and not the contract between IO

and the third party that followed. Although IO argues that IO accepted the proposal without negotiation or changes, IO has not provided the IPC with a copy of the contract. Accordingly, in making my finding, I have considered that the records at issue are not the contract that resulted from the winning bid, but are part of the bid itself, as submitted by the third party before the contract was awarded.

[37] My conclusion in this regard is consistent with prior IPC orders that have considered the application of section 17(1) (or its municipal equivalent) to RPF proposals.[20] In discussing a winning proposal in Order MO-1706, the adjudicator stated that:

> …it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution…

[38] In Order MO-3058-F, the senior adjudicator also found that a winning proposal was supplied to the institution. She wrote:

> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. **But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract.** In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue. [Emphasis added]

[39] As noted above, IPC orders have found that where a winning proposal governed the commercial relationship between an institution and a proponent, and there was no separate written agreement, the terms of the winning proposal were mutually generated and not "supplied" for the purpose of part two of the test in section 17(1).[21] I distinguish the circumstances before me from those where a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the

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[20] See also, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.
[21] See, for example, Order MO-2093.

parties, and no separate contract between the parties is created. In the circumstances before me, the parties have not provided the IPC with a copy of the contract, and neither IO nor the third party submits that their relationship is governed by the winning proposal because no separate contract was created. It may well be that the terms of the proposal were incorporated into a contract between IO and the third party, as was the case in Order MO-3058-F. However, the appellant seeks access to portions of the winning proposal, and, as I have already noted, those are the records at issue.

[40] I am therefore satisfied that the information in the winning proposal was supplied to IO within the meaning of section 17(1).

[41] I am also satisfied that it was supplied to IO with a reasonably held expectation of confidentiality. As IO has noted, the RFP contains a confidentiality provision which states that it is subject to the *Act*. Given that the *Act* explicitly protects the confidential informational assets of third parties, this reference does not negate the expectation of confidentiality regarding the proponent's RFP proposals. It is an expression of IO's intent to maintain the confidentiality of the proposals it receives, and it is reasonable for the third party to rely on it.

[42] For these reasons, I find that the information at issue was supplied in confidence by the third party and meets the second part of the test for exemption under section 17(1).

Part 3: harms

[43] The final part of the test for exemption under section 17(1) requires a finding that disclosure of the information at issue "could reasonably be expected to" lead to one of the harms set out in that section.

[44] The party resisting disclosure must establish a risk of harm from disclosure of the records that is well beyond the merely possible or speculative, but it need not prove that disclosure will in fact result in such harm.[22]

[45] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[23] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be

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[22] *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616; *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), [2014] 1 S.C.R. 674; *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.

[23] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.

proven simply by repeating the description of harms in the *Act*.[24]

[46] In this case, both IO and the third party submit that disclosure of the information at issue will prejudice the third party's competitive position (section 17(1)(a)) and could reasonably be expected to result in similar information no longer being supplied (section 17(1)(b)). IO also submits that disclosure could reasonably be expected to result in undue loss to the third party or gain to the third party's competitors (section 17(1)(c)).

Representations

The third party's representations

[47] The third party submits that the market for scheduling services in Toronto is dynamic and competitive. It submits that any public disclosure of its pricing can be expected to prejudice its commercial position and potentially confer a material financial gain on a competitor. It says that the "result of such diminished competition may be a less competitive market supplying Scheduling services" to IO in Toronto. The third party also argues that disclosure of the information at issue "could be injurious" to it.

IO's representations

Section 17(1)(a): prejudice to competitive position

[48] IO submits that disclosure of the "requested records" could reasonably be expected to significantly prejudice the competitive position of the third party or interfere significantly with its contractual negotiations. IO submits that "there is a risk of harm greater than that of speculation to the [third party's] economic interests."

[49] IO says that a factor that indicates significant prejudice to the third party is the competitive nature of the construction industry. IO submits that the third party is a renowned multinational professional services company in the infrastructure sector, and has developed numerous techniques specific to its own operations that are not known to its competitors. IO submits that the "release of the records at issue would significantly prejudice" the third party's competitive position, negotiations and commercial interests, given the competitive industry climate. IO says that clients select the third party over its competitors partly because of its creative methodologies and unique abilities. If the third party's processes and techniques are copied by competitors, IO says that the result will be a loss of revenue and that disclosure would "potentially confer a material financial gain on a competitor(s) in the market who could exploit this information to their benefit."

[50] IO also submits that, since not much time has passed since December 2018 when the proposals were made, "many of the records" continue to be relevant and that

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[24] Order PO-2435.

disclosure could reasonably be expected to impact any possible future negotiations.

[51] IO says that disclosure of the detailed breakdown of the financial information (in Record 18) would provide insight into the third party's established financing structures and pricing costs, which could harm the third party's competitive position and allow competitors to appropriate the third party's strategic approaches and to take advantage of any competitive opportunities, otherwise not known, that the records reflect. IO submits that this information, in the hands of the third party's competitors or in the public domain, could impair the third party's competitive advantage.

[52] IO submits that in prior orders, the IPC held that information in a price detail form would allow a competitor to determine the method and strategy an affected party used to price its services and allow competitors to use or adapt the methodology in future bids (Order MO-1773), or that disclosure of financial documents would give rise to a reasonable expectation of harm (Order P-314).

Section 17(1)(b): similar information no longer supplied

[53] IO argues that disclosure of the information at issue could reasonably be expected to result in similar information no longer being supplied to IO or similar institutions. IO says that if the information "supplied in the proposals" is disclosed, it is "reasonable to expect that consultants will become hesitant to submit proposals to IO fearing that the proposals would be made available to the public." IO says that it is in the public interest to encourage participation in its RFP processes and to ensure that such processes are conducted in an equitable manner. IO says that, although the third party objected to disclosure of a "huge portion" of its information, IO disclosed as much information as reasonably possible in the spirit of transparency.[25]

[54] IO "contends that it is in the public interest to keep key details of proposals responding to RFPs confidential" in order to ensure that they be continually supplied to IO and other institutions. IO says that the RFP process is designed to ensure that government gets the best value for its dollar and that discontinuance of the submission of proposals (due to concerns about disclosure under the *Act*) would result in the inability of IO to attract high quality and competitive proposals in the future.

[55] IO relies on the comments in the Williams Commission Report, as cited in Order PO-2043, in support of its position that it is "reasonable and responsible to keep the [third party's] proposals confidential." IO also submits that in a similar fact scenario in Order MO-1609, the IPC held that technical and financial submissions made in response to an RFP are exempt from disclosure under section 17(1)(b).

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[25] As described in the "Overview" of this decision, IO located 19 responsive records, granted full access to two, and partial access to 17.

Section 17(1)(c): undue loss or gain

[56] IO says that disclosure would result in both undue loss and undue gain. IO says that the third party would experience undue loss in that its competitors would be able to see their submission and use the information about skills, technique and form of response as a basis for their own future submissions, while the appellant would experience undue gain by "obtaining the ability to use the proposals to its advantage in preparing future proposals [sic]."[26]

[57] IO says that if pricing information were to be made available to the third party's competitors, it is reasonably likely that they would make use of this information and attempt to undercut the third party in future competitions and the third party's "methods, service commitment and other valuable commercial information would be open to imitation by competitors."

Analysis and findings

[58] Based on my review of the withheld information and the parties' representations, I find that part 3 of the test for exemption under section 17(1) is not met. I am not persuaded by the materials before me that the information at issue is as prone to exploitation as the third party and IO assert.

[59] As I have noted above, in order for me to find that the exemption at section 17(1) applies, the parties resisting disclosure – in this case, IO and the third party – must establish that the specified harms could reasonably be expected to occur in the event of disclosure. To do so, they must provide sufficient evidence about the potential for harm.

[60] The Supreme Court of Canada, in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[27] addressed the meaning of the phrase "could reasonably be expected to" in two other exemptions under the *Act*,[28] and found that it requires a reasonable expectation of probable harm.[29] The Court wrote that "the reasonable expectation of probable harm formulation…should be used whenever the 'could reasonably be expected to' language is used in access to information statutes."

[61] In order to meet that standard, the Court explained that:

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[26] I note that the appellant is an individual. None of the parties have explained the appellant's relationship, if any, to the third party or IO in their representations.
[27] 2014 SCC 31 (CanLII).
[28] The law enforcement exemptions in sections 14(1)(e) and (14(1)(l) of the *Act*.
[29] See paragraphs 53-54.

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."

[62] This is the standard of proof that I will apply in this appeal.

Section 17(1)(a) and (c): prejudice to competitive position and undue loss or gain

[63] As noted above, IO and the third party submit that the information at issue is exempt under section 17(1)(a) because disclosure could reasonably be expected to prejudice significantly the third party's competitive position. IO also submits that the information at issue is exempt under section 17(1)(c) because disclosure could reasonably be expected to result in undue loss to the third party, and undue gain to its competitors and to the appellant.

[64] Pages 13 and 14 of Record 18 (the proposal) contain an overview of the third party's proposed approach to the provision of its scheduling consulting services if awarded the contract. Pages 3-6 of Record 19 (the price form), contain the total fixed fee of the bid, a breakdown of the fee components by project phase, a blended hourly rate for additional services, and the hourly rates of three team members proposed to deliver services.

[65] Although both IO and the third party argue that the market for scheduling consulting services is highly competitive, they have not provided specific evidence on which I could find that harm to the third party's competitive advantage could reasonably be expected to result from disclosure of the information at issue. Neither IO nor the third party has provided an adequate explanation of what techniques, processes or methodologies are contained in the information at issue that are unique or proprietary to the third party, that are not known to the third party's competitors, and that could therefore be exploited. I note that some of the information at issue in Record 18 is contained in portions of Record 19 that have already been disclosed, and is broken down by project phase.

[66] IO has also already disclosed the total fixed fee for the third party's services, but not the breakdown by phase or the hourly rates.

[67] The third party and IO both submit that disclosure of the information at issue "could potentially confer a material financial gain" on the third party's competitors. However, neither has adequately explained how future negotiations could be impacted or how, specifically, harm to the third party's competitive advantage could reasonably

be expected to result from disclosure of the specific information at issue.

[68] Finally, neither IO nor the third party have provided sufficient evidence for me to determine that disclosure of fees by phase, the blended hourly rate for additional services, or team member hourly rates could reasonably be expected to prejudice significantly the third party's competitive position, or how it would allow an informed party to calculate the value of the proposal, when IO has already disclosed the total fixed fee.

[69] While IO and the third party argue that the third party could suffer these harms if the information at issue is disclosed, I note that their representations, although they repeat the harms in sections 17(1)(a) and (c), do not provide sufficiently detailed evidence to establish the connection between disclosure and the harms, which is required to meet part 3 of the test. Instead, I find that their representations amount to speculation of possible harms, and I am not persuaded that the harms in sections 17(1)(a) and (c) are inferable from the information at issue.

Section 17(1)(b): similar information no longer supplied

[70] Under section 17(1)(b), IO argues that disclosure would create a disincentive for entities considering contracting with government to offer their best price or terms.

[71] Relying on the findings of the Williams Commission Report, as cited in Order PO-2043, IO argues that it is in the public interest to keep key details of RFP proposals confidential in order to ensure that they be continually supplied to IO and other institutions.

[72] As noted in Order PO-2043, when commenting on the purpose of section 17(1), the Williams Commission Report stated that:

> …The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets, through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

[73] IO submits that the information at issue contains information about the third party's proprietary processes, approaches and techniques. However, neither IO nor the third party has provided specific representations in this regard. As I have already noted, neither has adequately explained what portions of the information at issue are proprietary or unique to the third party, or that would, for example, be the result of substantial capital investment by the third party. Similarly, neither IO nor the third party

have provided me with sufficient evidence to conclude that disclosure of the information at issue could reasonably be expected to result in similar information no longer being supplied to IO by the third party or other proponents in response to future RFPs.

[74] I also find that the circumstances before me are distinguishable from those in Order MO-1609, relied on by IO. I find that the level of detail, and specifically technical detail, in the records before the adjudicator in Order MO-1609 is lacking in the information at issue before me.

[75] As with section 17(1)(a) and (c), above, I find that IO's and the third party's representations do not provide sufficiently detailed evidence to establish how disclosure of the information at issue could reasonably be expected to result in the harm described in section 17(1)(b). I am also not satisfied that the harm in section 17(1)(b) is inferable from the information at issue.

Conclusion

[76] In conclusion, I find that the third party and IO's representations do not provide sufficiently detailed evidence to establish the connection between disclosure of the information at issue and the harms contemplated in section 17(1) of the *Act*. I find that the third party's and IO's representations amount to speculation of possible harms, and I am not persuaded that the harms in section 17(1) are inferable from the information itself.

[77] Accordingly, I find that a reasonable expectation of harm resulting from disclosure of the portions of the records at issue has not been established. I find that the third part of the three-part test in section 17(1) has not been met and, as all three parts of the test for exemption under section 17(1) must be met, the portions of Records 18 and 19 at issue are therefore not exempt from disclosure under section 17(1).

ORDER:

1. I order Infrastructure Ontario to disclose the records in full to the appellant by **October 5, 2021**, but not before **September 30, 2021**.

2. In order to verify compliance with this order, I reserve the right to require Infrastructure Ontario to provide me with copies of the records that are disclosed to the appellant.

Original Signed by: August 31, 2021

Jessica Kowalski
Adjudicator