Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1993

Appeal PA-000378-1

Ministry of Transportation

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a seven (7) part request to the Ministry of Transportation (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to: "all Request for Proposal (RFP) Summary Charts, Construction Scores for the following work projects:

1. G.W.P. 273-96-00
   Highway 401 from Wesleyville Road to Highway 2, Eastern Region

2. W.P. 10-93-00
   Highway 401 from 2.6 km east of Nagle Road easterly to 1.4 km west of Shelter Valley Road, Eastern Region

3. W.P. 521-91-00
   Highway 401 from Joyceville Road to Highway 32, Eastern Region

4. W.P. 7-93-00
   Highway 401 from 0.8 km west of Little Lake Road westerly to 1.4 km west of Shelter Valley Road, Eastern Region

5. W.P. 11-93-00 (Part 'A')
   Highway 401 from 2.4 km west of Burnham Street easterly to 2.6 km east of Nagle Road, Eastern Region

6. W.P. 271-96-00-01-02-03 and W.P. 424-98-01
   Highway 401 from 0.4 km west of Durham, Northumberland Boundary Road, easterly 5.6 km, Eastern Region."

Before issuing its decision on access to the requested records, the Ministry notified nine consultants (the affected parties) who had submitted proposals in response to the RFPs pursuant to section 28(1) of the *Act*, since their interests might be affected by disclosure of the records at issue. In addition, the Ministry notified an association that represents the interests of most companies in the consulting engineering industry (the intervenor) to seek its views on the application of section 17 to the type of information requested. In doing so, the Ministry noted that this organization has, in the past, expressed concerns regarding the disclosure of this type of information.

Six of the nine affected parties responded to the Ministry and objected to the disclosure of the information pertaining to their companies in the records. The intervenor also submitted representations to the Ministry objecting to the disclosure of this type of information.

The Ministry then denied access to the Summary Chart Construction Scores for the work projects identified in the request under sections 13(1) (advice or recommendations), 17(1)(a)(b) and (c) (third party information), and 18(1)(c) and (d) (economic and other interests) of the *Act*.

The appellant appealed the Ministry's decision.

During the course of mediation the Ministry confirmed that responsive records were identified only with respect to items 1, 2, 4, and 5 of the appellant's request. The Ministry indicated that records do not exist for "W.P. 271-96-00-01-02-03 and W.P. 424-98-01 Highway 401 from 0.4 km west of Durham, Northumberland Boundary Road, easterly 5.6 km, Eastern Region" or "W.P. 521-91-00 Highway 401 from Joyceville Road to Highway 32, Eastern Region" (Items 3 and 6 of the request).

Also during mediation, the appellant narrowed his request to access to a portion of the requested records, namely, the Project Supervisor scores. He indicated further that he was no longer seeking the identities of any party. The Project Supervisor score is found under that heading in Records 1 and 2, identified as RFP Summary Charts. It was confirmed with the Ministry that the "Project Supervisor" score is found on the Total Projects Management (the TPM) Scoring Sheets under the "Management Plan" heading at subheading "Contract Admin" (Records 3 and 4). The remaining portions of these records, including the names of the companies for which each score is given and the names (initials) of the Ministry staff who conducted the evaluations, are no longer at issue.

Finally, the appellant believes that records exist for items 3 and 6 of his request.

The mediator assigned to this file sent out her Report of Mediator to the appellant and the Ministry. The Ministry responded to the Report, indicating that it accurately reflects the facts and issues in the appeal as they stood at the time the Report was prepared. However, the Ministry raised two matters that arose subsequent to the issuance of the Report:

- the Ministry indicated that it withdraws its reliance on the mandatory exemption in section 17(1) of the *Act*; and
- the Ministry conducted one further search for responsive records, and located a record responsive to item 3 of the appellant's request. The Ministry attached a copy of this record to the letter and stated that it continues to rely on the exemptions in sections 13(1) and 18(1)(c) and (d) for this record, as well as those previously located.

Further mediation could not be effected and this appeal was moved on to inquiry. I decided to seek representations from the Ministry, initially. In addition, despite the withdrawal of its section 17(1) claim, I provided the affected parties with an opportunity to address this issue given the mandatory nature of the exemption. I sent the Notice of Inquiry to eight of the affected parties originally identified by the Ministry. One affected party had advised the mediator during mediation that it did not wish to participate further in the appeal. On that basis, I did not notify this party.

Pursuant to section 13 of the Information and Privacy Commissioner (the IPC) "Code of Procedure", 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. In view of the role of the intervenor in representing the interests of companies operating in this particular sector and its previously stated position regarding the types of information at issue in this appeal, I decided to seek its representations on the section 17(1) issue as well.

The Ministry submitted representations in response, as did the intervenor and three of the affected parties who were notified. In addition, the affected party who had indicated during mediation that it did not wish to participate submitted representations in direct response to the issues raised in the Notice of Inquiry, although this document was not sent to it. Based on its representations, however, I am satisfied that it has made itself aware of the issues in this appeal and has had an opportunity to fully present its position on them. Two affected parties contacted this office to advise that they would not be submitting representations, and the remaining three did not respond to the Notice.

All of the parties who responded objected to disclosure of the information at issue. In all cases, the affected parties referred to and adopted the representations submitted by the intervenor. Two of the affected parties submitted additional representations.

After reviewing these submissions, I decided that it was not necessary to hear from the appellant on the substantive issues in the appeal. The Ministry's representations included affidavits sworn by two of its employees relating to the steps taken to search for and locate responsive records. I sent a Notice of Inquiry to the appellant along with copies of these affidavits and asked that he provide representations on the reasonableness of search issue only.

The appellant submitted representations in response, which I then sent to the Ministry in order to provide it with an opportunity to reply on this issue. The Ministry submitted further affidavits in response.

RECORDS:

The records at issue are described as follows:

- Record 1 - RFP Summary Chart, Construction Office Scores, WP 273-96-00 (1 page). The information at issue is located at line 3 of this record;

- Record 2 - RFP Summary Chart, Construction Office Scores, WP 10-93-00 (1 page). The information at issue is located at line 5 of this record;

- Record 3 - TPM Scoring Sheets, WP-11-93-00 (6 pages). The information at issue is located under the heading "management Plan" at subheading "Contract Admin";

- Record 4 - TPM Scoring Sheets, WP-7-93-00 (6 pages). The information at issue is located under the heading "management Plan" at subheading "Contract Admin"; and

- Record 5 - RFP Summary Chart, Construction Office Scores, W.P. 521-91-00 (1 page). The information at issue is located at line 3 of this record.

Preliminary comments regarding the scope of this appeal

The Ministry and affected parties, including the intervenor, express concerns about disclosure of the records in their totality. As the Intervenor notes in its representations:

> [W]e understand that the appellant is no longer requesting the identification of the companies involved, but this does not alter our opposition to the request. Given the nature of the marketplace, it is clear that the requested information, in combination with information previously released by [the Ministry], would definitely identify the companies and their detailed scoring on the projects in question.

Accordingly, I have not restricted my consideration of the issues to only that information requested by the appellant, but rather, have taken into account the broader implications of the disclosure of **any** information from the records.

DISCUSSION:

REASONABLENESS OF SEARCH:

Where a requester provides sufficient detail about the records which he is seeking and the Ministry indicates that further records do not exist, it is my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

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

In responding to this issue, the Ministry provided affidavits sworn by the head of Engineering Claims in the Eastern Region Construction office and the head of Construction Administration in the Eastern Region Construction office. Both affiants explain their roles at the Ministry and their knowledge and familiarity with the types of records requested, the filing systems within their offices and records storage protocols.

The head of Construction Administration indicates that he supervised the search for and collection of the requested records. He states:

> It is the practise of the Ministry's Eastern Region Construction Office to maintain two filing systems in regards to the consultant evaluation process, one electronic and the other paper.
>
> As a result of the Ministry's storage protocol, I contacted [the head of Engineering Claims] and the former Chairperson of the Consultant Evaluation Committee, about the electronic files for the Documents, because his duties as the former Chairperson of the Consultant Evaluation Team required him to keep and maintain the electronic files on his laptop…
>
> With respect to the paper files of the Documents, I instructed [the Senior Construction Administration Technician] for the Ministry, and one of the members of the Consultant Evaluation Team, who has knowledge of the Ministry's storage protocol, to undertake a search of the paper files pertaining to the construction scores for the six projects requested.
>
> [The Senior Construction Administration Technician] specifically searched the consultant acquisition files, the construction contract files and the work project files located at the Eastern Regional Head Office in Kingston.
>
> [A construction Contract Control Officer] working out of the Ministry's Port Hope field office, [searched] the Port Hope office, because the six construction projects listed in the Request are administrated by the Ministry's Port Hope office.
>
> As well,… a Project Manager in the Planning and Design Office … in Eastern Region [searched] the files in the Planning and Design Office because some of the requested Documents involved contracts that were evaluated by this office.

The head of Construction Administration indicates that further similar searches were conducted during the mediation stage of the appeal for records responsive to items three and six of the request. He explained that originally some documents relating to these two projects had been located but "these documents did not show the Project Supervisor's score because this particular score had not been requested." He also asked various staff to review their personal files for responsive records. As a result of this search a Contract Control Officer located his personal summary sheet for the project identified as item three and this record was forwarded to the Freedom of Information and Privacy office.

He confirms that no other records were located as a result of the additional searches.

He notes that the retention schedules for construction files that were applicable between 1997 and 2000 did not include the evaluation documentation since this process was recently implemented in 1996, and the retention schedules were not amended until 1998. He indicates, however, that it is possible that the record that would be responsive to item three of the request has been destroyed as a result of various office furniture upgrades and office relocations at the

Regional and Port Hope Construction Offices between 1997 and 2000. He also states that it has been the practice of the Construction Office that the "originator office" of the files would be responsible for their retention and as Construction was not the originator of the RFPs stated in the request, it did not keep or maintain the score sheets.

Finally, the head of Construction Administration states that a search was not conducted at the Ministry's off-site records storage area (for archived records) due to the fact that the construction contracts were only completed in 2000/2001 and 2001/2002 and the documents would have been kept with the construction files in the Regional and field offices.

In his affidavit, the head of Engineering Claims explains why and how the electronic files are maintained. He states that he would have placed any documents relating to the request on his laptop computer's hard drive. He states that his laptop computer was stolen during a break-in at the Ministry's Regional office on or about May 19, 2000. He attached a certified true copy of the police incident report relating to the break and enter.

The head of Engineering claims states that he did not make back-up copies of the electronic files and to date, the laptop computer has not been found.

He confirms that various staff conducted further searches for responsive records in contract files, work project files and their personal work files at either the Eastern Region office in Kingston or at the Field Operations Centre in Port Hope. He concludes:

> It was the practice of the Construction Office to forward the total score for the Construction Administration Portion and the Contract Administrator's score to the Project Manager in the Engineering Office for TPM Design and Construction Administration Consultant Assignments. Once the assignment was awarded and completed, the scoring summaries in Construction as one part of the TPM total evaluation process were typically destroyed.

These two affidavits were provided to the appellant. In response to them, he poses a number of questions relating to the appropriate offices to be searched, and in particular, whether the "originating office" was searched. He notes that records relating to items three and six should have been retained pursuant to the 1998 retention schedule since they were completed after this date (it appears he is not satisfied with the existence of only one record pertaining to item three in the personal files of a Ministry employee). He also believes that there should be a back-up disk as well as hardcopy of the records. In this regard, he indicates his belief that the hard drive in the Ministry's computer network would also contain the files responsive to his request. He queries whether this hard drive was searched. Finally, he believes that the archived files should have been searched as these projects were completed in either the fall of 2000 or the summer of 2001.

The Ministry submitted further affidavits in response to the appellant's questions.

In his affidavit, the head of Engineering Claims reiterates that any responsive records on his laptop would have been created by him, that no-one else would have made back-ups without his knowledge and that he did not back-up these documents on the laptop computer itself, on the Ministry's computer network, on floppy disk or on any other computer or computer system.

In responding to the issues raised by the appellant, the head of Construction Administration states that, in this case, the originating office is the Kingston office. He reiterates that a search for responsive paper records was conducted in both the Kingston and Port Hope offices. He notes that this was done because of the relocation of staff between the two offices and the possibility that certain records may have followed them during their moves.

He also disputes the completion dates suggested by the appellant, noting that although the "substantial completion dates" were July 24, 2000 and July 24, 2001, respectively, the construction warranty period for each project extended for another year. He states:

> Based upon the aforementioned substantial completion dates of these projects, it is not the practice of the Ministry to place Responsive Documents into the archived files as suggested by the Requester, because the projects are still current.

Based on the affidavits provided by Ministry staff, I am satisfied that a full and complete search for responsive records was conducted. Moreover, the Ministry has provided a reasonable explanation for the possible destruction of the missing records (albeit outside of its records retention schedule). Accordingly, I find that the Ministry's search for responsive records was reasonable in the circumstances.

ECONOMIC AND OTHER INTERESTS

Sections 18(1)(c) and (d) provide:

> 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;

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice the economic interests of an institution or the position of an institution in the competitive marketplace (Order P-441) .

To establish a valid exemption claim under section 18(1)(d), the Ministry must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario (Orders P-219, P-641 and P-1114).

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Applying this reasoning, in order to establish the requirements of the section 18(1)(c) or (d) exemption claims, the Ministry must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections resulting from disclosure of the records.

In responding to the issues in the appeal, the Ministry has provided extensive background information relating to the government procurement policy generally and the process it has developed for the awarding of contracts. In essence, the Ministry notes that, as per Management Board of Cabinet Directive, competitive bidding for the acquisition of consulting contracts is essential in order to obtain the best value for the funds to be expended.

The Ministry states that it has recently, through a lengthy development process involving industry consultations, arrived at a new "two-stage system of award" in the tendering for the services of a consultant. This system is part of an acquisition process referred to as "Total Project Management" (TPM) which was first introduced several years ago as part of the Ministry's outsourcing initiative, although it only came into effect on January 1, 2001. The Ministry indicates that pursuant to the TPM:

> the Ministry hires a consulting engineering firm to design a highway and then to carry on with the administration and supervision of a construction firm who actually builds the highway. In some cases, the Ministry hires the consultant to solely carry out the administration and supervision of the construction firms work on the highway construction project.

The Ministry explains the difference between the system prior to January 1, 2001 and as it currently stands:

> As per the system that was in place until December 31, 2000, bidders submitted their Technical and Management Proposal to the Ministry in confidence. The Total Competitive Cost for each Proposal was divided by the Total Score for the Technical and Management Proposal to give the Price/Score Ratio for that Proposal. The best proposal was deemed the one with the lowest Price/Score Ratio.
>
> Effective January 1, 2001, a Corporate Performance Rating (CPR), which measures the past performance of a firm on prior Ministry projects, was introduced into the evaluation process. The Total Competitive Cost, the score of the Technical and Management Proposal and CPR of a firm are weighed at 20, 30 and 50 percent respectively under this new evaluation system. The weighted score for each of these components is added. The firm with the highest total score wins the assignment.

The Ministry notes that, although the records at issue were created prior to this new system coming into place:

> Many of the fundamental concepts, the approach and steps are the same … and the impacts of the access to Records should be measured with respect to the new system.

The Ministry explains that debriefing sessions are held after the contract is awarded and that it does provide the specific scores to each consultant, presumably so that each proponent can determine for itself where it was weakest. The Ministry continues that the consultants are, therefore, quite knowledgeable about the details of their specific scores and how the scores are used by the Ministry to evaluate proposals.

The Ministry argues that disclosure of the requested information "would damage the integrity of the consulting bidding system". The Ministry concludes:

> The result would be unfairness to all bidders who do not possess this information and would have serious economic impacts on the Ministry in terms of prices sought and in the number and quality of the bids received for each and every contract. The alternative to the disclosure of the scores is to not evaluate the consultants on the basis of their past performance or ability, so that no documents are created. However, such an option is not in keeping with the need of the Ministry to obtain the best work at the lowest possible price, employing a fair and equitable process.

Initially, I have some difficulty accepting the Ministry's position that the "harms" resulting from disclosure of the records at issue, created prior to the implementation of the new system, should

be assessed based on the same criteria as the new system. This argument suggests that regardless of the "system", the Ministry will suffer economic harm if the records are disclosed. Yet it has gone to great lengths to explain how the specific construction of the new "weighted" system has created a situation where full disclosure of the records could reasonably be expected to place proponents in a position to anticipate and thus manipulate the tendering process at a significant cost to the Ministry. I am not convinced that the same concerns (as described in the Ministry's representations) arise in the former system such that this leap can or should be made.

Regardless of any similarities in concepts, approach or process, I am not persuaded that the anticipated harms could reasonably be expected to occur from disclosure of the information at issue (or the entire record for that matter) under either system, as discussed below.

The Ministry indicates that the consultant selection system uses three variables in a mathematical formula. These variables consist of the technical score, weighted at 30%, the consultant past performance score (CPR), weighted at 50% and the price, weighted at 20%. The Ministry notes that the consultant industry that bids on Ministry projects is relatively small and that most consultants know whom they are competing against.

It should be noted that the Ministry's web site contains a reasonably detailed description of the new system and explains essentially how each variable is calculated. The Ministry states further:

> [T]he consultants can rely upon the debriefing session to fully understand the details of the evaluation system save for the lack of information of the scores of other consultants. If the scores of the other consultants were to be known, the consultant would be in a position to adjust its bid price to maximize its price while still being awarded the contract.
>
> … If the request were granted, the precedent value of such a decision would allow numerous other persons to obtain this information. The use of this information would exploit the evaluation system of the Ministry to the sole benefit of the consultants and the public detriment. Consultants with high technical and past performance scores would be able to price their work higher without the concern for the open market, because they would know how to price their work without fear of the open market competition.

The Ministry provides a number of examples of the manner in which the information can be used, resulting in harm to its economic interests. The Ministry requested in its representations that these portions not be shared with the appellant because to reveal the means by which an outside party could cause harm to the Ministry would result in the very harm it is seeking to prevent.

In my view, the submissions of the Ministry regarding the sharing of its representations undermine its argument that disclosure would damage the integrity of the bidding system. In this regard, the Ministry indicates that certain information relating to two of the variables "is not a generally known fact in the consultant industry" and is "in fact … internal knowledge of the

Ministry". The Ministry appears to suggest that knowledge of the scores, combined with internal "confidential" Ministry information (which is not at issue in this appeal), could be used by a party to manipulate the tendering process generally.

However, the information in the records comprises only one part of the overall assessment. By the Ministry's own admission, a party would require additional information that, at present, is not known within the industry but is closely held by the Ministry, in order to be able to manipulate the evaluation process in such a way as to affect the Ministry's economic or financial interests. In my view, the need to combine this additional "internal" Ministry information with the information at issue is fatal to this argument relating to harm.

Accordingly, I find that the Ministry has failed to meet its onus in providing detailed and convincing evidence sufficient to establish that disclosure of the records at issue (or the entire record for that matter) could reasonably be expected to result in either of the harms in sections 18(1)(c) and/or (d) on the basis of this argument.

On the other hand, the Ministry may be suggesting that revealing the scores would permit a party to determine what the Ministry already knows. Because the Ministry has requested that this information not be made public, I am somewhat restricted from providing details of its argument. Suffice it to say that the Ministry, through its examples, has attempted to demonstrate how a party using the information in the records could manipulate the scores in such a way as to gain an unfair advantage over other competitors.

Essentially, the Ministry submits that knowledge of the scores of its competitors would permit a consultant to gauge their strengths and weaknesses with respect to all of the evaluation criteria and thus adjust its bids for future tenders accordingly. The end result of this ability to "exploit" the evaluation system, as suggested by the Ministry, could be an undercutting or inflation of the bid prices with the attendant problems either situation creates. Ultimately, according to the Ministry, this could reasonably be expected to impact negatively on its financial interests.

This argument suggests that there is a consistency in the scoring for each company across projects, and that a competitor would be able to take this information and, through its own calculations, determine the scores that the other bidding companies could expect to obtain for any future project.

The scores on the records at issue relate to similar types of projects, thus I would expect that the evaluation criteria are somewhat comparable; although it may be that there are variations. However, based on the Ministry's submissions, I must assume that there are similar expectations with respect to all of the projects. I, therefore, examined the scoring on the records at issue to determine whether it supported the Ministry's argument.

In cases where certain companies submitted bids on more than one project, I observed variations in the scores for each company across the different projects. I also noted that it appears that in some cases the same evaluator (as identified only by initials or first name) assigned different scores to the same company with respect to different projects. Based on the variations within the

records, including the scores, the companies bidding for the different projects and the composition of the evaluation team, I am not convinced that disclosure of the records at issue or the record overall would permit the kind of in-depth analysis and interpretation suggested by the Ministry in a way that could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and/or (d).

The Ministry also suggests that the scores it gives a particular consultant may adversely affect its reputation in the marketplace. The Ministry claims that if consultants know the scores will be released, they may choose not to compete for Ministry contracts. The Ministry submits that this could result in the loss of valuable consulting resources which could reasonably be expected to prejudice its economic interests or be injurious to its financial interests. The Ministry states further that a consultant who believes its reputation has been damaged through disclosure of the information in the records may decide to take legal action against the Ministry, which would similarly impact negatively on its economic or financial interests.

In my view, the Ministry's final two arguments are entirely speculative. Moreover, given the interest and involvement of the consulting engineering community in the development of an evaluation process generally, it is unlikely, in my view, that the disclosure of the scores could reasonably be expected to result in a disinterest on the part of this industry in competing for government contracts.

Based on the above discussion, I find that the Ministry has not provided detailed and convincing evidence to establish a reasonable expectation of probable harm pursuant to either section 18(1)(c) and/or (d) and the records at issue are not exempt on this basis.

ADVICE OR RECOMMENDATIONS

Section 13(1) of the *Act* states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Previous orders of the Commissioner have established that advice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94, P-118, P-883 and PO-1894). Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the *Act* (Orders P-1054, P-1619 and MO-1264).

The interpretation of section 13(1) first introduced in Orders 94 and P-118 was applied in Order P-883, upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (December 21, 1995), Toronto Doc. 220/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order P-883, former Adjudicator Anita Fineberg stated:

> I have reviewed Record 6 and find that it contains an update to the Secretary of the Cabinet on the beer dispute, but does not relate to a suggested course of action which will be accepted or rejected by the Secretary. I find, therefore, that Record 6 is not exempt under section 13(1) of the *Act*.

In its endorsement, the Divisional Court commented on Adjudicator Fineberg's interpretation of the exemptions in that order:

> …we are satisfied that the applicant has failed on either standard of review [i.e. patent unreasonableness or a high standard of deference] **and there is no reason to interfere with the interpretation given by the Inquiry Officer nor the results reached in connection with the records relating to the sections outlined above.** [emphasis added]

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Building on his earlier discussion in Order 94, former Commissioner Linden noted in Order P-118:

> The general purpose of the section 13 exemption has been discussed in Order 94 (Appeal Number 890137) released on September 22, 1989. At page 5, I stated that:
>
> > ...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the *Act* stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the *Act*. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.
>
> …
>
> In my view, "advice", for the purposes of subsection 13(1) of the *Act*, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

> My interpretation of "advice" would appear to be consistent with the way in which the word has been defined by the Quebec Commission d'accès à l'information (the "Commission") when interpreting a similar provision in its legislation entitled, *An Act respecting Access to documents held by public bodies and the protection of personal information*, R.S.Q. Chapter A-2.1. According to an analysis by Dussault and Borgeat in *Administrative Law, A Treatise*, 2nd Edition, Vol. 3, Carswell, 1989 at page 347 the Commission defined "advice" in its decision in the case of *J. v. Commission scolaire Jacques-Cartier* (1985) 1 C.A.I. 82 as follows:
>
> > ... advice is "an opinion expressed during debate", the action of debating being the fact of "studying in view of a decision to be made". Advice is thus not an opinion "that a person is made aware of to keep him informed", but rather " to invite that person to do or not to do a certain thing". Considering therefore, that advice implies a decision-making process in progress, the Commission concluded "advice is counsel or a suggestion as to a line of conduct to adopt during the process. Logically, it takes place after research and examination into the facts, i.e. study, has taken place"[Tr.].

The purpose and scope of the section 13(1) exemption as interpreted by this office was implicitly endorsed by the Court of Appeal in the judicial review of Order P-1398 (*Ministry of Finance v. John Higgins, Inquiry Officer and John Doe, Requester* [1999] O.J. No. 484, 118 O.A.C. 108 (C.A.), reversing [1998] O.J. No. 5015 (Div. Ct.), leave to appeal refused [1999] S.C.C.A. No. 134 (S.C.C.).

The Ministry submits:

> The information set out in the records at issue may look like factual information at first glance, but from the foregoing description of the system it will be apparent that such is not the case. Each “score” represents in numerical form the judgment of a scorer with respect to one aspect of a consultant’s RFP submission. The scorer assesses the materials submitted for their technical merit and responsiveness to the needs of the Ministry and makes a judgment as to the strength and weaknesses of the consultant for the purpose of recommending to senior staff of the ministry how that consultant’s submission should be viewed in terms of awarding a contract. The scorer’s judgment is expressed in a numerical score with respect to each aspect of the consultant’s submission rather than in words. The individual scores and the totals convey to senior staff the scorer’s recommendations as to which consultant the contract should be awarded.
>
> With the changes in the role of the Ministry through TPM the importance of the consultant is greatly magnified. Responsibility for design and construction and supervision is transferred from Ministry staff to the consultant and its resources. The size of the contracts involved in this process, and the level of dependence

> upon the consultant to produce a quality functional provincial highway infrastructure makes the process of advising the Minister on the awarding of such contracts extremely important. These score sheets are the medium for the provision of such advice by public servants on the staff of the Ministry.

Further on this point, the Ministry describes how the records are used as part of the Consultant Evaluation Process, including a description of the composition of the evaluation team and its role:

> Ministry staff as part of the consultant evaluation process assigns the technical component scores…the process still emphasizes the evaluation of the technical component score, the past performance score and the price tendered by the consultant. Ministry staff assess these variables in order to select the appropriate consultant…
>
> … Ministry staff … evaluate and assign scores for each consultant. The difference relates to the composition of the evaluation team …
>
> …
>
> The evaluation team [for a TPM – Construction Contract Administration Contract] consists of a Chairperson and three technical staff from the Construction Office, all of whom are Ministry employees. The technical staff are either Contract Control Officers or Senior Construction Administration Technicians with the requisite knowledge and construction experience to carry out the required assessment of a consultant submission.
>
> Once the submissions have been evaluated at the EOI stage, the chairperson reviews these scores and makes recommendations to the Manager of Construction on the short listing … At the RFP stage a more comprehensive predetermined scoring system is used to assess the technical component of a consultant's proposal. Up until December 31, 2000, the Chairperson used these technical scores to calculate the price/score ratio. Currently, the approach implemented January 1, 2001 applies to calculate the price/score/CPR in weighted scores. The Chairperson then provides the successful consultant with a conditional award pending approval by the appropriate delegated authority, based on the value of the assignment…
>
> …the evaluation team [for a TPM – Detailed Design and Construction Contract Administration] consists of the Ministry's Project Manager from the Planning and Design office and several Ministry staff with expertise in the various functions of engineering and construction required for the work..
>
> For the construction administration portion of the evaluation, the team consists of a Chairperson and three technical staff from the Construction Office appointed by

> the Manager of Construction. All are Ministry employees. At both the EOI stage and RFP stage, the three-member team assesses the submissions based on a pre-established scoring system. Each member of the team scores the firms individually and then they meet together and discuss differences in order to ensure that any one member of the team has not missed any items requiring evaluation. If concerns or potential problems arise the Chairperson is asked to make a ruling. Once the scoring is complete a summary chart is submitted to the Chairperson with the average score of the team members. The scores are reviewed by the Chairperson, and submitted to the Project Manager in Planning and Design, who leads the total evaluation team. The score for the Contract Administration portion is incorporated with the design scores to come up with the total evaluated scores.

The Ministry also describes how the three variables (price/score/CPR) used in the consultant selection process are calculated and how they interact to enable the Ministry to arrive at the final score.

Corporate Performance Rating (CPR)

Under the new system, which was put into effect on January 1, 2001, past performance is weighted at 50% of the overall score. The CPR is a three-year weighted average computed from the ratings of the performance appraisals issued, calculated every three months. According to the Ministry's web site, the CPR is calculated using the following equation:

> CPR = 3(Avg. Yr. 1) + 2(Avg. Yr. 2) + 1 (Avg. Yr. 3) divided by 6
>
> Avg Yr. 1 = Average of all appraisals with the most recent 12 months
> Avg Yr. 2 = Average of all appraisals in 12 months prior to Year 1
> Avg Yr. 3 = Average of all appraisals in 12 months prior to Year 2

CPR's are rated between 1 and 5, with 5 being outstanding and 1 being poor, not acceptable.

The Ministry's web site indicates further that appraisals will be completed once the assignment has been completed. According to the web site:

> Appraisals for all types of capital project consultant assignments are included to calculate a consultant's CPR (e.g. Preliminary Design, Detailed Design, Construction Administration, Total Project Management, Functional Assignments for single engineering disciplines, RFP, RFQ, etc.). At this time, the post-construction appraisals of design assignments are not used in CPR calculation.

Technical component

The Ministry indicates that the "consultant technical submissions are scored to a scale typically ranging from 600 – 1800 points maximum. The evaluation requirements and the scale are pre-determined." This method of calculation is similar in both the pre and post January systems.

The Technical scores of the proposal are weighted at 30% of the overall score under the new system.

Proposals submitted at the RFP stage

In both systems, the consultant firms submit their proposals under a two-envelop process. The first envelop containing the technical (and management proposal) is opened and the scores are calculated. After January 2, 2001, if a consultant meets the minimum technical requirements, the second envelop containing the price (weighted at 20%) is opened and the qualified submissions are weighted using the three variables. The consultant with the highest overall score wins the assignment. Under the old system, once a consultant meets the minimum technical requirements, the price envelop is opened and the Price/Score Ratio is calculated. The firm with the lowest Price/Score Ratio wins the assignment.

With respect to the awarding of the contract, the Ministry states:

> Once the scores have been completed, senior management within the Ministry's Region where the project is located use the scores to select the consultant, who is then recommended for award.

It appears that the awarding of a contract (in either system) is based on a non-discretionary application of an established formula or pre-set criteria. If, as the Ministry suggests, after totaling up the scores, there is no further assessment of the information contained therein, no balancing or options or opinion to put forward, I am somewhat at a loss to understand the nature of the advice being given. In other words, rather than the selection panel putting the consultant forward to the Chairperson (or any other senior management for that matter) with a recommendation that this party be awarded the contract, it appears that the process is designed such that, once the mechanics of the assessment are completed, based on the application of established criteria, there is no discretionary decision to be made; there is no advice to be accepted or rejected during the deliberative process.

Even if there is an element of discretionary decision-making, that is, an ability of the recipient to accept or reject the awarding of the contract to a particular consultant, in my view, the development of the advice or recommendations would only occur once the completed scores for the technical component are given to the Chairperson (or Manager) and the remaining calculations are made based on the overall compilation of all of the variables.

I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed. Broadly viewed, the Ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue.

As I noted above, the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations **within the deliberative process**. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.

Support for this approach to the interpretation of section 13(1) can be found in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) at p. 292:

> A second point concerns the status of **material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations.** Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind [16]
>
> .
>
> Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. **The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.** [emphases added]

According to the Ministry, its evaluators are "Ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the consultants' proposals". In conducting their review of the proposals submitted to the Ministry pursuant to RFP's, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made. Moreover, in this case, the entire exercise may be even further removed from the deliberative process through its very design.

Even if a broader definition were adopted for "advice" and "recommendations", to include, for example, all expressions of opinion on policy-related matters, I would not find the Project Supervisor scores exempt because they are, as I noted above, primarily of a factual or background nature. In and of themselves, they do not "advise" or "recommend" anything, nor can they be seen as predictive of the advice or recommendations that would ultimately be given. It would not be accurate to view them as advice or recommendations in the sense required by section 13(1). On this basis, I find that section 13(1) does not apply to the records at issue or the records in their entirety.

THIRD PARTY INFORMATION:

Section 17(1) of the *Act* reads, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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;

In order for a record to qualify for exemption under sections 17(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

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

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

To discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and

circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. In its decision upholding Order P-373, the Court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "*detailed and convincing*" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal for Ontario in *Ontario (Workers' Compensation Board)* cited above.

The Ministry did not provide representations on the application of section 17(1) of the *Act*, stating that it leaves it to the affected parties and the intervenor to make their case. Accordingly, the burden of proof rests with the affected parties and the intervenor, and it is up to these parties to provide evidence and representations sufficient to establish the requirements of the section 17(1) exemption claim.

Requirement One – Type of Information

The intervenor submits that "the requested information is derived from detailed technical proposals and the scoring of those proposals is clearly commercial information that represents a key activity in the process for buying and selling engineering services.

The submissions made by the other affected parties tend to echo the intervenor's position in this regard.

The term "commercial information" in section 17(1) has been defined in previous orders of this office to mean information that relates solely to the buying, selling or exchange of merchandise or services (Order P-493). The records at issue consist of the evaluation scores assigned to each company that submitted a proposal in response to Requests for Proposals (RFP's) issued by the Ministry. The evaluations were conducted by Ministry staff. Many previous orders have found that records prepared by a company in response to an RFP contain commercial information (see, for example, Order PO-1957). Previous orders have also concluded that evaluation notes and/or scores made by institution staff which pertain to proposals and interviews/presentations relate to the process of selecting bidders to provide services to the institution (Orders PO-1957, PO-1816 and PO-1818, for example).

Consistent with this line of orders, I find that the records, which contain the scores assigned by each evaluator for each company that submitted a proposal, relates to the process designed by the Ministry for selecting the consultant to provide the required services, and as such, qualifies as commercial information.

Requirement Two – Supplied in Confidence

In order to satisfy the second requirement, the affected parties and the intervenor must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence. Information contained in a record not actually submitted to an institution will nonetheless be considered to have been "supplied" for the purposes of section 17(1) if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-179, P-203, PO-1802 and PO-1816).

The intervenor acknowledges that the records contain the scoring by the Ministry of a number of proposals submitted by several of its member companies in response to RFP's but submits that:

> Given the nature of the marketplace, it is clear that the requested information, in combination with information previously released by [the Ministry], would definitely identify the companies and their detailed scoring on the projects in question. This would significantly interfere with the confidentiality of the tendering process …
>
> Engineering proposals represent a comprehensive presentation of the capabilities of a professional firm to undertake an engineering assignment. Within the practice of professional engineering, proposals are submitted with a definite understanding that they are provided for the sole use of the client and that they will be treated as confidential information …

> Similarly, the details of the scoring of that confidential information should also remain confidential. The scoring process is an intrinsic element of the overall proposal and selection process. To make that information available to other clients or to competitors violates the relationship between an engineer and client and would disclose information that our industry treats as being confidential. In this case, in fact the requested information even exceeds the level of detail that is reported back to each of the proponents after the assignment is awarded.

One affected party states:

> We feel that all of the information supplied to MTO during the proposal process is confidential and should only be available to MTO's proposal evaluation team. This was our understanding when submitting these proposals. MTO's Request for Proposal documents typically include the following statement:
>
> > All requirements, designs, documentation, plans and information viewed or obtained by the proponent in connection with this RFP are the property of the Ministry and must be treated as confidential and not used for any other purpose other than replying to this RFP and the fulfillment of any resulting Agreement.

This affected party focuses primarily on the contents of its actual proposal, but concludes that:

> We are particularly concerned that our competitors will find out what our overall performance rating is with MTO, how our key staff are rated, how we staff our jobs, and the rates we charge for the various individuals in the proposal.

Another affected party states:

> MTO staff and CEO members expended very extensive effort in developing a "Consultant Performance and Selection System" (CPSS) over the past two years. The fundamental principles observed in the development of this process were to ensure that the taxpayer of Ontario is well served through a competitive consultant selection process, while at the same time encouraging a fair selection process recognizing the professional nature of the services provided by consulting engineers to MTO. A foundation of this process is the confidentiality of certain components including particularly and individual firm's Corporate Performance Rating (CPR) and the "intellectual property" included in the technical component of the proposals submitted to MTO. Some of this data, particularly a consultant's individual Corporate Performance Rating, is considered to be very highly confidential both by CEO members and MTO.

In its representations relating to the application of section 18 of the *Act*, the Ministry describes the evaluation process:

> In this situation, the evaluation team consists of the Ministry's Project Manager from the Planning and Design office and several Ministry staff with expertise in the various functions of engineering and construction required for the work.
>
> For the construction administration portion of the evaluation, the team consists of a Chairperson and three technical staff from the Construction Office appointed by the Manager of Construction. All are Ministry employees. At both the EOI [expression of interest] stage and the RFP stage, the three-member team assesses the submissions based on a pre-established scoring system. Each member of the team scores the firms individually and then they meet together and discuss differences in order to ensure that any one member of the team has not missed any items requiring evaluation. If concerns or potential problems arise the Chairperson is asked to make a ruling. Once the scoring is complete a summary chart is submitted to the Chairperson with average score of the team members. The scores are reviewed by the Chairperson, and submitted to the Project Manager in Planning and Design, who leads the total evaluation team. The score for the Contract Administration portion is incorporated with the design scores to come up with the total evaluated scores.

Unlike the situation described in many previous orders of this office, which have considered "notes" taken by evaluators during the interview/presentation portion of the RFP process or references to details of proposals in evaluation documents to reflect the information actually provided by the bidders at that stage (for example, Orders PO-1816, PO-1818 and PO-1957), the information at issue in this appeal is simply the score assigned to one particular aspect of each proposal by Ministry staff. The record as a whole similarly comprises the scores assigned by Ministry staff relating to other aspects of each proposal.

In Order MO-1237, Senior Adjudicator David Goodis considered whether the scores assigned to a number of contractors as part of a pre-qualification process were supplied in confidence under section 10(1) (the municipal equivalent to section 17(1)). He stated:

> In order to meet the second part of the test, it must be established that the information in the records was actually supplied to the Board, or its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Board [Orders P-203, P-388, P-393].
>
> In Order P-373, Assistant Commissioner Mitchinson stated:
>
> > Records 1, 2, and 3 list the names and addresses of the employers with the fifty highest surcharges in 1991, together with the amount of surcharge for each employer. Records 4 and 5 list only the names and addresses of the employers with the highest penalties in 1990 under the relevant program.

> In my view, the surcharge amounts were not "supplied" to the Board by the affected persons; rather, they were calculated by the Board. While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves.

In my view, the reasoning in Order P-373 applies to the scores assigned to the contractors with respect to each of the criteria. In each case, disclosure of these scores would not reveal the specific information actually supplied to the architect (as agent for the Board). Rather, the architect calculated or derived the scores based on the information that was actually supplied, or in some cases the architect arrived at the scores based on a subjective evaluation of the information actually supplied. Further, the number of submissions received and the name of the engineering firm clearly does not constitute information supplied to the Board, or to the architect as agent for the Board.

Speaking to this issue generally, Adjudicator Sherry Liang stated in Order MO-1462:

> The requirement that it be shown that the information was "supplied" to the institution reflects, once again, the purpose in section 10(1) of protecting the informational assets *of the third party*. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of this *Act*:
>
> > . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that **the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself**. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. **It is the original source of the information that is the critical consideration**: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp. 312-315) [emphasis added by Adjudicator Liang].

Adjudicator Liang concluded that the information in the evaluation form used by the County's evaluators in assessing the bids for the contract and the scores given by evaluators to the companies bidding for the contract were not "supplied" by a third party within the meaning of section 10(1).

The scoring information in the records at issue was clearly not supplied by the consultants who tendered the proposals. Neither would its disclosure reveal the information provided by them or permit the drawing of accurate inferences with respect to it. Consistent with previous orders of this office and the intention of the Legislature in enacting this provision, I find that the information at issue in this appeal was not supplied to the Ministry and the second part of the section 17(1) test has not been established. On this basis, I find that the exemption in section 17(1) does not apply in the circumstances.

Before concluding, however, the comments made by the intervenor relating to the affected parties' expectations of confidentiality in the RFP process merit some discussion. The intervenor states:

> In the second half of 2000, [the intervenor] held extensive discussions with [the Ministry] to develop and agree on a revised consultant performance and selection system (CPSS) for consulting engineering firms. This system was implemented in January, 2001. Throughout those discussions, [the intervenor] on behalf of the industry, maintained that scoring or ratings of engineering firms by [the Ministry] must be treated as confidential information between a client and a professional engineering firm and must not be disclosed to other clients, competitors or the general public. That position was accepted by [the Ministry] and was a key element of our agreement.

These comments are consistent with a letter written by the intervenor to the Assistant Deputy Minister, Operations Division, at the time the Ministry first notified the parties of the request. In that letter, the intervenor stated:

> As you know, over the past year, we have worked extensively with your ministry to develop a revised engineering consultant selection system …
>
> Our understanding, throughout discussions on the selection and appraisal systems, was that selection scoring data and the Corporate Performance Ratings of individual firms within the appraisal system would not be available to third parties. The scoring of proposals is a review of confidential information by the ministry and represents the ministry's view of the strengths and weaknesses of the firms…

The affected parties who submitted representations also appear to hold this view.

In Order MO-1476, Assistant Commissioner Tom Mitchinson discussed confidentiality expectations on the part of a company doing business with the institution in that case:

> The appellant maintains that the survey results were supplied to the City with an explicit expectation of confidentiality, as evidenced by the confidentiality clause included in the subscription agreement. The City acknowledges that the subscription agreement with the appellant contains an explicit statement of confidentiality, but points out that this is not determinative of whether or not information of this nature is accessible under the *Act*. The City states that at the time the agreement was entered into with the appellant "the appellant was informed that notwithstanding any confidentiality clause, the City was bound by provincial statutes, including the provisions of the *Act*." In the City's view, because the limitations of the confidentiality clause were discussed with the appellant, "the appellant could not have reasonably held an expectation of confidentiality that would override any provisions of the *Act* regarding access, notwithstanding the confidentiality clause."
>
> I agree with the City that the provisions of the *Act* apply in the context of requests for access to records created under the terms of its contract with the appellant, notwithstanding the existence of a confidentiality clause. However, in my view, it does not necessarily follow that the appellant did not supply the information provided under the terms of the contract in confidence. Based on the representations provided by the parties, it is clear that the confidential nature of the arrangements between them was not only explicitly addressed in the terms of the contract, but also discussed in some detail at the time the contract was executed. The City's caution to the appellant regarding the extent to which the clause would apply in the context of an access request under the *Act* is an important one that is prudently addressed in contracts of this nature. However, the confidentiality clause is explicit, and evidences a clear intention on the part of the parties that the information would be provided in confidence and treated in that manner by the City. I am satisfied that the appellant's business protocols support its position that information from its surveys is treated confidentially within its organization, and that the survey results were prepared for a purpose that would not involve general disclosure to the public.

Each case must be determined on its own and the reasonableness of an affected party's expectations of confidentiality will depend on the circumstances as they exist at the time the records are supplied to the institution. For example, in Order M- 845 (upheld on judicial review in *Ottawa Home Health Care Inc. v. Ontario (Information and Privacy Commissioner)* (January 26, 1998) Ottawa Doc. 1209/96 (Ont. Div. Ct.)), I concluded that the affected parties in that case did not have a reasonably held expectation of confidentiality with respect to the contents of their proposals because the City had a well-understood and formalized policy and practice of disclosing this information, subject to specific requests for confidentiality at the time the proposals were submitted.

Further, section 67(1) of the *Act* provides that this *Act* prevails over a confidentiality provision in any other *Act* unless other specified in subsection (2) (which is not relevant in the circumstances

of this appeal). Clearly, with only a few exceptions (in subsection (2)), the legislature intended that issues relating to "confidentiality" with respect to records that fall within the scope of the *Act* are to be assessed and determined within that context.

The intervenor's comments suggest that it has been led to believe that the Ministry has, in effect, provided a "guarantee" that records relating to the tendering process will be maintained in confidence. This is not a guarantee that the Ministry can give. At best, the Ministry may be able to assure potential bidders that it will recognize the confidential nature of this process, subject of course, to the requirements of the *Act*.

ORDER:

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

2. I do not uphold the Ministry's decision to withhold the requested records from disclosure.

3. I order the Ministry to disclose the records at issue to the appellant by providing him with copies of this information by April 8, 2002 but not earlier than April 2, 2002.

4. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3, **only** upon request.

Original Signed By: February 28, 2002
Laurel Cropley
Adjudicator

POSTSCRIPT:

On a final note, the Ministry explains the basis for its decision to implement the TPM process:

> In 1981, the Supreme Court of Canada rendered a decision in the Ron Engineering case that the integrity of the bidding system must be protected where under the law of contract it is possible to do so, and the Court developed the notion of Contract A (tendering) and Contract B (performance).

> As an extension of the integrity of the bidding system, the Courts recognize that an owner, such as the Ministry, has a duty to treat all bidders fairly and equally in terms of the evaluation process and award…
>
> Based upon the above legal principles, the Ministry has developed procedural guidelines for the evaluation of consultants' submissions that incorporate a variety of performance measures, including past performance.
>
> …
>
> …for the reasons [discussed in this order] a decision to release the information sought would damage the integrity of the consulting bidding system.

It appears that the Ministry has interpreted this principle in such a way that it has developed a system of "fairness" and elevated it over its obligations to the public to be accountable for the use of public funds, in essence, suggesting that the integrity of the process itself satisfies any public accountability. The Williams Commission Report discussed the rationale for the adoption of a freedom of information scheme in Ontario, which includes public accountability, informed public participation, fairness in decision-making and protection of privacy. With respect to "accountability", the Williams Commission Report stated at page 77:

> Increased access to information about the operations of government would increase the ability of members of the public to hold their elected representatives accountable for the manner in which they discharge their responsibilities. In addition, the accountability of the executive branch of government to the legislature would be enhanced if members of the legislature were granted greater access to information about government.

In my view, the ability of the public to scrutinize the bases upon which government contracts are awarded is an important aspect of public accountability. Subject to the proprietary interests of third parties, the approaches taken by government, the criteria against which tender documents are assessed and the degree to which proponents satisfy those criteria are all integral to the ability of the public to assess the operations of government and to hold it accountable for the use of public funds.