Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3011

Appeal PA10-218

Infrastructure Ontario

November 22, 2011

**Summary:** The appellant submitted a request for access to a copy of the Alternative Financing and Procurement agreement between the Province of Ontario and a named company awarded for the redevelopment and operation of Ontario Service Centres. The institution's decision to withhold portions of the agreement was upheld pursuant to the mandatory third party exemption in section 17(1). Section 17 and section 18 (economic and other interests) were found not to apply to the remainder of the agreement.

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

**Orders and Investigation Reports Considered:** PO-2435, PO-2453, PO-2569

## OVERVIEW:

[1] This order disposes of the issues raised as a result of a request made to Infrastructure Ontario under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> A copy of the Alternative Financing and Procurement contract between the Province of Ontario and [a named company] awarded for the redevelopment and operation of Ontario Service Centres as announced on April 6, 2010.

[2] Infrastructure Ontario responded to the requester, advising that, pursuant to section 22 of the *Act*, the above agreement was published on Infrastructure Ontario's website. A link to the on-line agreement was provided.

[3] That decision was then appealed to this office on the basis that the whole agreement is not publicly available. Specifically, the appellant indicated that a large part of the agreement posted on the website had been redacted.

[4] At the outset of this appeal, Infrastructure Ontario issued a revised decision. In that decision, Infrastructure Ontario advised that access to the redacted portions of the agreement were denied pursuant to the exemptions at sections 17 (third party information) and 18 (valuable government information; economic and other interests) of the *Act.*

[5] During the course of mediation, the mediator contacted the company named in the request (the affected party) in order to determine if they would consent to the release of any additional information. This consent was not obtained. However, during mediation, Infrastructure Ontario advised that they are no longer relying on section 17 of the *Act.* As a result, only the affected party relies on section 17.

[6] With respect to the section 18 of the *Act,* Infrastructure Ontario advised that they are relying on subsections 18(1)(a), 18(1)(c), 18(1)(d), and 18(1)(e) of the *Act* in denying access to the records.

[7] The appellant agreed to review the Table of Contents of the agreement in order to identify the parts of the agreement that he was specifically seeking to obtain. Following this review, the appellant narrowed the scope of the appeal to six schedules appended to the agreement. Specifically, the appellant advised that he is seeing access to Schedules 13, 14, 16, 29, 30 and 31 in their entirety.

[8] The matter then moved to the adjudication stage of the process. I sought, and received representations from Infrastructure Ontario, the appellant and the affected party. Representations were shared in accordance with the IPC's Code of Procedure's *Practice Direction Number 7*. In their representations, Infrastructure Ontario withdrew its claim under section 18(1)(e).

[9] In this order, I conclude that sections 17(1)(a) and (c) apply to exempt portions of the record from disclosure, and that sections 18(1)(a), (c) and (d) do not apply to the remaining portions of the record, which must therefore be disclosed.

## RECORDS:

[10] At issue in this appeal are all or parts of Schedules 13, 14, 16, 29, 30 and 31 of the Alternative Financing and Procurement contract.

## ISSUES:

Issue A: Does the third party information exemption at section 17(1) apply to the records?

Issue B: Do the valuable government information/economic and other interests exemptions at sections 18(1)(a), (c), and (d) apply to the records?

## DISCUSSION:

### BACKGROUND

[11] In 2006, the Ontario Government created Infrastructure Ontario, which is a Crown agency responsible for delivering public infrastructure improvements to Ontario. Infrastructure Ontario uses a model called Alternative Financing and Procurement (AFP) in which the public sector establishes the purpose and scope of a project, while the construction work is financed and carried out by the private sector.

[12] There are 23 service centres located on Highways 400 and 401 owned by the province as represented by the Ministry of Transportation (MTO). In late 2007, Infrastructure Ontario and MTO started a procurement process to select a single operator to redevelop all 23 service centre sites. The redeveloped sites would offer standard services and amenities to the public. After a two year procurement process, the affected party was selected as the successful proponent to upgrade the highway service centres.

[13] The highway service centre project utilizes a design-build-finance-maintain AFP model, in which the private sector bids for the project as defined in a project agreement under a guaranteed fixed price. This model covers a concessionary period that includes both the construction period and the operations period. The successful proponent receives monthly service payments for the term of the service period, commencing after the facility has been built.

[14] The model also involves the creation of a special purpose vehicle (e.g., Project Co.) that exists solely for the purpose of financing and delivering the project. A consortium of developers, contractors, facility operators and/or financiers establishes Project Co., which contracts with MTO to design, build, finance and maintain the facilities for the concessionary period. Usually, Project Co. borrows the bulk of the

funds required to build the facilities and some or all of the consortium members directly invest the residual requirement in the form of equity or ownership interest.

## A: DOES THE THIRD PARTY INFORMATION EXEMPTION AT SECTION 17(1) APPLY TO THE RECORDS?

[15] In their representations, the third party claims that section 17(1) applies to the records at issue in this appeal with the exception of the following information:

- Schedule 13: sections 6.4(c), 6.5(b) and (c);
- Schedule 14: references to [a category] in sections 1(b), 1(g), 1(p), 1(bb) and 3(a);
- Schedule 15: sections 1(q) and 1(aa);
- Schedule 29: sections 3.4, 3.13, 4.2(4) and appendix 1 [name of individual]

[16] Therefore, the above information is no longer at issue with respect to section 17(1), but will be considered under Infrastructure Ontario's section 18 exemption claim, below.

[17] The affected party claims that sections 17(1)(a) and (c) apply. These sections state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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

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

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

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

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

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

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

[20] Parties who rely on the exemption provided by section 17(1) of the *Act* share with the institution the onus of proving that this exemption applied to the record or parts of the record.[3] In the circumstances of this appeal, Infrastructure Ontario has withdrawn its reliance on section 17. Consequently, the onus is on the affected party to prove that the section 17(1) exemption applies to the records at issue.

[21] Infrastructure Ontario provided a description of the records, as follows:

- Schedule 13 sets out the capital and concessionary and rent payments between the affected party and the Province pertaining to the project;

- Schedule 14 sets out the pricing of various products serviced at the highway service centre locations;

- Schedule 16 sets out any compensation payments to the parties based on certain termination events that may occur;

- Schedule 29 sets out the various payments to be made between the parties with respect to the project;

- Schedule 30 is the closing financial model submitted by the affected party during the bid process and which Infrastructure Ontario's evaluation of pricing during the procurement process is based on; and

[2] Orders PO-1805, PO-2018, PO-2184, MO-1706.
[3] Order P-203.

- Schedule 31 sets out the payment details regarding any refinancing that may occur with respect to the project.

## Part 1: type of information

[22] The affected party submits that the information in the schedules at issue is commercial and/or financial information of or about the affected party. The definition of commercial and financial information as listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *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.[6]

[23] The affected party provided detailed descriptions of the information at issue and how that information constitutes financial and/or commercial information. In particular, the affected party states that the information describes the use and distribution of money and forms part of its underlying business model. In addition, the affected party provided detailed descriptions of all of the information at issue, which I am not able to elaborate on, for confidentiality reasons.

[24] I have reviewed the records and agree with the affected party that they contain "commercial" and "financial information", as defined above. The records set out the particulars of capital and concession payments, rent, pricing, compensation on termination, strategic infrastructure investment, the closing financial model and refinancing. These records clearly relate to money and refer to specific data, as well as to the buying and selling of services.

[25] Therefore, I find that the records at issue contain "commercial" and "financial information", and that the affected party has satisfied part 1 of the section 17(1) test.

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[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.

## Part 2: supplied in confidence

### *Supplied*

[26] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[7]

[27] 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.[8]

[28] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[9]

[29] 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 supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. In addition, the onus is on the party resisting disclosure to show immutability.[10]

[30] The affected party submits that all of the information at issue was either directly supplied by the affected party to Infrastructure Ontario or that components of the affected party's underlying business model, such as pricing, rental amounts, gain/sale price, pricing assumptions, margins on sales, capital costs of construction, construction time frame and targets, expected sales revenue, equity level, internal right of return and lending arrangements, can be inferred from the information at issue. The information the affected party states was directly supplied is as follows:

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[7] Order MO-1706.

[8] Orders PO-2020, PO-2043.

[9] This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[10] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above); *Canadian Medical Protective Association v. Loukidelis*, (2008) CanLII 45005 (ON S.C.D.C.).

- Schedule 13 – section 1.1(d), which is the rate of return;
  Appendix A, which are assumptions on sales and the business model;
  Appendix C, which is a chart illustrating its methodology in calculating the percentage of rent;

- Schedule 29 – section 1.5, which is the construction loan amount;
  sections 1.7 and 3.7(5), which are the affected party's financing costs;
  section 1.16, which is the affected party's initial equity investment;

- Schedule 30 – the closing financial model in its entirety;

- Schedule 31 – section 1.1(i), which is the affected party's right of return, reflecting the pricing and costing assumptions it made when negotiating the agreement; and
  Appendix A, which is the affected party's lending arrangements with third parties.

[31] The affected party also argues that the information that was not directly supplied, if disclosed, would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was supplied by the affected party, that is, about information not expressly contained in the contract. The affected party provided further information on this issue in the confidential portions of their representations, which will not be reproduced in this order.

[32] The appellant did not make representations on the issue of whether the information was "supplied" to Infrastructure Ontario.

[33] As previously stated, Infrastructure Ontario submits that Schedule 30, the Closing Financial Model, was submitted by the affected party during the bid process. Infrastructure Ontario based its evaluation of pricing during the procurement process pricing on this schedule.

[34] In Order PO-2435, I addressed the issue of whether information provided by one party but incorporated into a contract was "supplied". In that order, the Ministry acknowledged that the records at issue in that appeal were contracts, but explained why it believed they still qualify as "supplied", stating:

> Although the Record ... consists of contacts, the per diem information in the Appendices of each of these contracts was not a negotiated item.... Proposals submitted by potential vendors in response to government RFPs are not negotiated; a vendor's per diem rates in particular, as contained in

> their proposals, cannot be a negotiated item. The Ministry either accepts or rejects the proposal in its entirety.

[35] I rejected that approach to part two of the test, and stated:

> As in Order MO-1706, just because [the terms of a contract] may substantially reflect the terms of the RFP, it does not necessarily follow that they were "supplied" by the third parties within the meaning of section 17(1).
>
> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by [the Ministry], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into [an agreement] with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by [the Ministry] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of [the Ministry] process cannot then be relied upon by the Ministry … to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of [these agreements], I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

[36] I have carefully examined the agreement at issue. In my view, the majority of the agreement, including the information contained in the schedules, is the end product of a negotiation process, and sets out mutually agreed upon terms. The parties chose to incorporate these terms into the agreement entered into between them. The agreement also clearly refers to all of the schedules as being incorporated into and forming part of the agreement. In doing so, the records cannot be considered to have

been "supplied" by the affected party. They constitute the agreed, negotiated terms of the agreement.

[37] However, I have also carefully reviewed the agreement to determine whether any portions of the schedules were "supplied" as claimed by the affected party. On my careful review of the schedules, I find that some of the information contained in them was "supplied" in that the information was not the result of negotiations between the affected party and Infrastructure Ontario. In particular, I find that the following portions of the schedules were "supplied" by the affected party to Infrastructure Ontario, as they disclose fixed, underlying costs, agreements struck between the affected party and other third parties and/or were not negotiated (and therefore meet the "immutability" exception outlined above):

- Schedule 29 - severed portions of the following sections: section 1.5 (construction loan), section 1.7 and 3.75 (affected party's financing costs) and 1.16 (initial equity investment);

- Schedule 30 – the closing financial model; and

- Schedule 31 – Appendix A (lending agreements with third parties)

[38] Consequently, only those portions of the records that meet the exceptions above have been "supplied" by the affected party to Infrastructure Ontario. I will now determine whether they were supplied "in confidence".

[39] The remaining information at issue has not met the requirement under the section 17(1) test that it was "supplied" by the affected party to Infrastructure Ontario. It is, therefore, not exempt under section 17(1). However, as Infrastructure Ontario has claimed the exemption at section 18, I will re-visit this information in my section 18 analysis.

### *In confidence*

[40] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[11]

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

[11] Order PO-2020.

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;

- not otherwise disclosed or available from sources to which the public has access; and

- prepared for a purpose that would not entail disclosure.[12]

[42] The affected party argues that they had a "reasonable, objective and explicit" expectation of confidentiality at the time they supplied information to Infrastructure Ontario. During the RFQ and RFP process, the affected party supplied parts of their business model information to Infrastructure Ontario on the basis that it was confidential and was to be kept confidential. The affected party states that Infrastructure Ontario and the Province acknowledged and agreed to this expectation on more than one occasion.

[43] In addition, the affected party submits that they entered into an early works agreement with Infrastructure Ontario in anticipation of entering into the project agreement. The early works agreement provided that the affected party's internal management processes and procedures are proprietary and confidential information, and are not subject to transfer from the affected party to the Province or to public disclosure by the Province. The project agreement itself states that the Province will not disclose portions of the agreements, which would be exempt from disclosure under section 17(1) of the *Act*.

[44] The appellant submits that the affected party did not have an expectation of confidentiality based on reasonable and objective grounds, as some financial information pertaining to the contract was disclosed to the public by the Province, for example, the cost of the project, and the respective contributions of the third party and the Province to the cost. The appellant also argues that, given Infrastructure Ontario's stated principles of transparency and openness with contractual agreements based on "clear, comprehensive guidelines and full public disclosure," the affected party should not have had an expectation of confidentiality.

[45] In reply, the affected party reiterates that there was a reasonable, objective and explicit expectation of confidentiality, based on the affected party's knowledge at each stage of the process that Infrastructure Ontario would disclose information contained in the records, unless it would be exempt from disclosure under section 17(1). This

[12] Orders PO-2043, PO-2371, PO-2497.

knowledge was gained through the early works agreement, the project agreement, and Infrastructure Ontario's disclosure practices, published on their website. The affected party argues that, given its position that this information is exempt under section 17(1), there was an expectation of confidentiality.

[46] I note that the RFP for this project, provided by Infrastructure Ontario, and also found on Infrastructure Ontario's website, advises proponents that the RFP documents and part or parts of any proposal may be required to be disclosed pursuant to the *Act*.

[47] In Order PO-2453, Adjudicator Catherine Corban considered the application of section 17(1) to a request for a quotation submitted to the Ministry of Natural Resources for air services in and out of a provincial park. Adjudicator Corban referred to several past orders of this office that have found that the inclusion of a notice provision in the record that identifies the *Act* applying to the information is important evidence in determining the "in confidence" component of part 2 of the test. When a notice provision is present, the onus has been found to rest on the individual bidders to identify the parts of their quotation that contain information they wish to remain in confidence [Orders M-845 and MO-1861].

[48] Adjudicator Steven Faughnan, in Order PO-2371, in dealing with attachments to a contract between the Ontario Science Centre and a third party for exhibit development and design, had this to say about the determination of confidentiality based on the existence and wording of the notice provision in that contract which specifically referred to the application of the *Act*:

> The contractual provision itself recognizes that disclosure of the services set out in the attachments to the contract is a possibility, and that confidentiality is by no means assured. Section 21.1 of the contract allows the Science Centre, not the affected party, to control the dissemination of information it asserts it wishes to protect. Thus the Science Centre, not the affected party, is in control of the confidentiality of the services and confidential information, subject to the terms of the *Act* (which can, of course, require disclosure).

[49] Adjudicator Faughnan went on to state that neither the Science Centre nor the affected party had offered evidence sufficient for him to find that the undisclosed information had been supplied in confidence.

[50] As previously stated, the RFP itself states that RFP documents may be required to be disclosed under the *Act*. The final project agreement states that the Province will not disclose portions of the agreement that would be exempt under section 17(1) of the *Act*.

[51] Having reviewed the factors above, I find that they weigh in favour of a finding of there being a reasonable basis for the expectation of confidentiality for the limited amount of information that I have found to have been supplied by the affected party to Infrastructure Ontario. I reach this conclusion based on the submissions provided by the affected party, the sensitive, financial nature of the information, and the fact that this information was generated by the affected party separate from any negotiations with Infrastructure Ontario. Accordingly, I find that this information was "supplied in confidence" for the purposes of part 2 of the test under section 17(1).

### Part 3: harms

[52] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[13]

[53] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[14]

[54] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[15]

[55] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[16]

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

[56] The affected party provided combined representations on sections 17(1)(a) and (c), and I shall proceed on that basis.

[57] The affected party submits that the project with Infrastructure Ontario features many new and unique attributes that it has developed, and that disclosure of this information would lead to a direct negative impact on its ability to compete on other projects, both within and outside Ontario, as competitors would use the affected party's established business knowledge, expertise and experience to its detriment.

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

In particular, competitors would use the affected party's established financing structures, pricing and other assumptions, rental arrangements, strategies and negotiating outcomes, resulting in undue gain by teaching the competitor how to best and most efficiently develop its own bids. This would result in unfair procurement practices and the affected party would be at a high risk of losing future site opportunities.

[58] In addition, competitors would have insight into the affected party's pricing model and would undercut the affected party's pricing to the consumer, causing undue harm to the affected party.

[59] The affected party also submits that if a competitor were to unfairly win a future site opportunity and subsequently deliver poor service, the affected party would suffer a reputational and economic risk, as a traveler's poor experience at a competitor's service centre would reflect poorly on the affected party and have a negative impact on its revenue generating ability.

[60] The affected party also provided further examples of the harm it would suffer. However, I will not be reproducing those arguments, as they are confidential.

[61] The appellant submits that vague arguments, such as the inference that the release of records would allow competitors to undercut the third party's pricing or that competitors who secure contracts for highway services and provide poor quality of service would undercut the third party's reputation do not constitute detailed or convincing arguments.

[62] I am sufficiently persuaded by the appellant's arguments that disclosure of the information that I have found was supplied in confidence could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party, resulting in undue loss to the affected party and gain to other competitors. The appellant's representatives, including the confidential portions, contain sufficiently detailed evidence of harm. I note that the finding of harm relates only to those limited sections of the record that I have found to have been supplied by the affected party to Infrastructure Ontario.

[63] Consequently, I find that section 17(1)(a) and (c) applies to:

- Schedule 29 - severed portions of the following sections: section 1.5 (construction loan), section 1.7 and 3.75 (affected party's financing costs) and 1.16 (initial equity investment);

- Schedule 30 - the closing financial model; and

- Schedule 31 - Appendix A (lending agreements)

[64] These portions of the record are therefore exempt from disclosure.

[65] I will now consider whether sections 18(1)(a), (c), and (d) apply to the remaining portions of the record that are at issue.

## B: DO THE VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS EXEMPTIONS AT SECTIONS 18(1)(a), (c), and (d) APPLY TO THE RECORDS?

[66] Infrastructure Ontario claims sections 18(1)(a), (c), and (d) in denying access to the records at issue. The affected party did not make representations on section 18.

[67] Sections 18(1)(a), (c) and (d) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> . . .
>
> (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;

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

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

[69] For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[17]

[70] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[18]

[71] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[19]

[72] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[20]

### Section 18(1)(a): information that belongs to government

[73] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,

2. belongs to the Government of Ontario or an institution, and

3. has monetary value or potential monetary value.

#### *Part 1: type of information*

[74] Infrastructure Ontario submits that the records contain commercial and financial information. Commercial and financial information, as listed in section 18(1)(a), have been discussed in prior orders:

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

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

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[21]
>
> *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.[22] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[23]

[75] With respect to Infrastructure Ontario's position that the record contains financial information, it states that under the terms of the agreement, the affected party will pay all costs related to the operation, maintenance and lifecycle repair and renewal of the highway service centres for 50 years, and will share a portion of the revenue generated with the province. The cost to design and construct the highway service centres is approximately 300 million dollars. The affected party will contribute 100 million dollars and the province will contribute the other 200 million dollars. Under the agreement, the province expects its share of the investment to be fully recovered over the duration of the project agreement. All of the records at issue contain particular information relating to payment of money and its use, including between the parties to the agreement.

[76] Infrastructure Ontario also takes the position that the record contains commercial information in that it includes terms setting out certain payments to be made by the Province to the affected party for the provision of services offered by the affected party.

[77] The appellant submits that Infrastructure Ontario has not demonstrated that the records contain commercial information.

[78] I have reviewed the records and agree with Infrastructure Ontario that they contain "commercial" and "financial" information, as defined above. As discussed in my section 17(1) analysis, the records set out the particulars of capital and concession payment, rent and gainshare, competitive pricing, compensation on termination, strategic infrastructure investment, closing financial model, and refinancing. These records clearly relate to money and refer to specific data, as well as to the buying and selling of services.

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[21] Order PO-2010.
[22] Order PO-2010.
[23] Order P-1621.

### *Part 2: belongs to*

[79] The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[80] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,[24] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.[25]

[81] Infrastructure Ontario submits that the record belongs to them and is its property, for the following reasons:

- the record was created as a result of the application of considerable skill and effort, i.e., by preparing the template request for proposal documentation that is used for its AFP procurement process, which is copyright protected;

- the project agreement and schedules are part of Infrastructure Ontario's copyright protected templates;

- there is confidential commercial and financial information in the schedules as a result of the affected party submitting its pricing information in its bid under the procurement process. For example, Schedule 30, which is the affected party's financial model, was accepted by Infrastructure Ontario and formed the basis of all pricing within the agreement;

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[24] Order P-636.

[25] Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.

- the affected party's proposal submission became the property of Infrastructure Ontario once accepted, and was formalized by the project agreement.

[82] The appellant did not make representations on whether the records belong to Infrastructure Ontario.

[83] In keeping with my findings in my section 17(1) analysis, I find that the information contained in the agreement does not "belong" exclusively to Infrastructure Ontario, but was the product of negotiation(s) with the affected party. I do not accept that the schedules, once incorporated into the project agreement, became the property of Infrastructure Ontario. The project agreement and its schedules comprise the contract between the affected party and Infrastructure Ontario, setting out each party's rights and responsibilities. I also note that the RFP document, which Infrastructure Ontario submits is copyright protected, is not at issue in this appeal.

[84] The project agreement was the result of negotiations between Infrastructure Ontario and the affected party. Therefore, the schedules that comprise the records at issue are not proprietary information of Infrastructure Ontario and do not satisfy the second part of the test under the discretionary exemption in section 18(1)(a).

[85] Given that all of the parts of the test under section 18(1)(a) must be met, I find that this exemption has no application to the records in this appeal.

**Section 18(1)(c): prejudice to economic interests and section 18(1)(d): injury to financial interests**

Infrastructure Ontario provided combined representations on sections 18(1)(c) and (d), and I shall proceed on that basis.

[86] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[26]

[87] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the

[26] Orders P-1190 and MO-2233.

information could reasonably be expected to prejudice the institution's economic interests or competitive position.[27]

[88] With respect to section 18(1)(d), given that one of the harms sought to be avoided is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[28]

[89] Infrastructure Ontario submits that approximately sixty major projects have been assigned to it by the province to manage. Infrastructure Ontario further submits that disclosure of the information at issue would jeopardize their financial interests and ability to negotiate the best deal with other bidders on similar projects, and compromise the effectiveness of any future AFP procurement process by Infrastructure Ontario. This, in turn, would affect the economic interests and competitive position of Infrastructure Ontario and the province in any future procurement process.

[90] In particular, Infrastructure Ontario argues that part of the project agreement relates to concessionary pricing. Should it be determined, by the release of the information, that Infrastructure Ontario had negotiated a concessionary price that was comparably lower than other similar assigned projects, other bidders would expect the province to negotiate the same or lower price benchmark in the future. As a result, this would hamper Infrastructure Ontario's ability to negotiate pricing on other projects, weaken its bargaining position and ultimately would "debilitate" the province's ability to manage its economy, resulting in additional costs to tax payers.

[91] Infrastructure Ontario cites Adjudicator Catherine Corban's decision in Order PO-2569 and describes the fact situation in that order as being similar to this appeal. In that Order, Adjudicator Corban found that disclosure of the information at issue would undermine the province's ability to negotiate competitive financial contribution packages with respect to business ventures and that knowledge of the province's bottom line could prejudice the economic interests of the Ministry.

[92] Infrastructure Ontario also submits that its ability to negotiate on other projects would be compromised as disclosure would indicate the terms, specifically pricing terms, that Infrastructure Ontario are prepared to accept on such projects, possibly leading to additional costs incurred by the Province.

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[27] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

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

[93] The indirect consequence is that other bidders will not be forthcoming in revealing confidential commercial and financial information to Infrastructure Ontario in their proposals for fear of public disclosure of such information.

[94] The injury to the province (and taxpayers) is that certain projects may not be completed or there could be delays in completing the projects if similar information was no longer supplied by bidders.

[95] Infrastructure Ontario provided a letter written by the Executive Vice President (VP) of Infrastructure Ontario division, who states:

> The integrity of Infrastructure Ontario's AFP process is fundamentally based on the fact that none of the bidders have access to another bidder's proposal. If such information were to be released publicly, the confidence of the bidding community would be undermined and could allow key competitors to gain a detailed understanding of pricing strategy that bidders rely on to remain confidential.

[96] The VP then goes on to describe the injury and harm that, in Infrastructure Ontario's view, would result to the province:

- Infrastructure Ontario's ability to negotiate the best deal for Ontarians with other bidders on similar projects would be undermined for the reasons set out by MTO and that negotiating the "best deal" is paramount and should not be based on other respective projects bid pricing submissions; and

- Bidders may submit bids but withhold pricing information for the reasons set out by MTO. Without pricing information, it would be impossible for Infrastructure Ontario to evaluate proposals and the province would not be able to construct projects for the best possible price, resulting in delays and substantial increases in costs.

[97] The appellant submits that Infrastructure Ontario's *"Building a Better Tomorrow*" framework document indicates that "stakeholders involved in delivering public infrastructure initiatives must be accountable" and that "the development of public infrastructure initiatives must be fair, transparent and efficient," with contracts "based on clear, comprehensive guidelines and full public disclosure."

[98] The appellant states:

> ...[T]here must be an expectation of openness and transparency by third parties that when they enter into contracts for public sector infrastructure projects that, while there may be some confidentiality of commercial and

> financial information, basic financial arrangements will be made available to the public.

[99] The appellant is of the view that, by failing to make public basic details about the financial nature of the public-private partnership, including respective investments and revenues by the parties to the project agreement, Infrastructure Ontario is harming the interests of Ontario taxpayers by "hindering accountability of the use of tax dollars, and violating its stated principles of transparency, efficiency and fairness."

[100] In reply, Infrastructure Ontario reasserted its position stated in its original representations and also indicated that pursuant to the *"Building a Better Tomorrow"* framework, all project agreements are disclosed and published on Infrastructure Ontario's website subject to certain commercial and financial information being redacted in accordance with Infrastructure Ontario's guidelines on disclosure practices. Infrastructure Ontario submits that, while they have made fulsome disclosure of the project agreement and its schedules on the website, there are portions of the schedules that contain confidential commercial and financial information.

[101] Infrastructure Ontario's position is that other private sector businesses would be disinclined to participate in joint projects with it if they were required to share what they consider to be proprietary information. I do not agree. In my view, it is not reasonable to suggest that participation by private sector partners in projects involving government bodies is less likely should information such as that at issue be made publicly available through access to information requests. Consistent with this view, I note that I have already found portions of the record to have qualified for exemption from disclosure pursuant to section 17, which is the appropriate mechanism to protect the legitimate interests of third parties.

[102] Infrastructure Ontario has submitted that Adjudicator Corban's Order PO-2569 is similar to this appeal. In the appeal that resulted in Order PO-2569, all the records at issue related to the Province's proposal issued in response to an aircraft manufacturer's RFP for a jurisdiction to host a final assembly plant necessary to construct aircraft. In other words, in that appeal the Province was competing with other jurisdictions to entice a business to set up a manufacturing facility in Ontario. The facts of this appeal are quite different. The record in this appeal reflects the final contract between Infrastructure Ontario and the successful proponent who responded to Infrastructure Ontario's RFP. The competitor is the affected party, not Infrastructure Ontario.

[103] With respect to the flow of payments between Infrastructure Ontario and the affected party, I adopt the reasoning of Senior Adjudicator John Higgins in Order PO-2758, in which he stated:

> ... McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly

> wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality. . .

[104] Finally, the VP of Infrastructure Ontario takes the position that Infrastructure Ontario's process is based on the fact that none of the bidders have access to another bidder's proposal. However, in this case, the appellant's request was submitted after the bidding process was completed and the responsive record is the final agreement between the affected party and Infrastructure Ontario.

[105] In conclusion, I find that Infrastructure Ontario has not provided the kind of detailed and convincing evidence required to demonstrate that disclosure of the information for which it has claimed the section 18(1)(c) and (d) exemptions could reasonably be expected to prejudice the economic interests or the competitive position of Infrastructure Ontario, and 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 the Province. Accordingly, I find that sections 18(1)(c) and (d) do not apply to the information for which it has been claimed.

[106] As I am not upholding Infrastructure Ontario's exemption claim under sections 18(1)(a), (c) and (d), it is not necessary to consider Infrastructure Ontario's exercise of discretion. In conclusion, Infrastructure Ontario must disclose the portions of the records at issue that are not exempt under section 17.

## ORDER:

1. I uphold Infrastructure Ontario's decision to withhold the severed portions of sections 1.5, 1.16, 1.7 and 3.75 of Schedule 29, Schedule 30 in its entirety, and Appendix A of Schedule 31.

2. I order Infrastructure Ontario to disclose the remaining portions of the records at issue by **December 30, 2011** but not before **December 22, 2011**.

Original Signed by: November 22, 2011
Brian Beamish
Assistant Commissioner