COURT FILE NO.: 193/02 and 224/02
DATE: January 20, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

DUNNET, FERRIER and EPSTEIN JJ.

B E T W E E N:	)	
Court File No. 193/02	)	
MINISTRY OF TRANSPORTATION	)	*Sara Blake*
	)	for the Ministry of Transportation
Applicant	)	
- and -	)	
LAUREL CROPLEY, Adjudicator, JOHN DOE, Requester and CONSULTING ENGINEERS OF ONTARIO, Affected Party	)	*William S. Challis* for Laurel Cropley, Adjudicator
Respondents	)	
A N D B E T W E E N:	)	
Court File No. 224/02	)	
CONSULTING ENGINEERS OF ONTARIO	)	*Andrew J. Heal*
	)	for the Consulting Engineers of Ontario
Applicant	)	
- and -	)	
LAUREL CROPLEY, Adjudicator, JOHN DOE, Requester, and MINISTRY OF TRANSPORTATION	)	
	)	*Heard:* September 24 and 25, 2003
Respondents	)	

DUNNET J.:

[1] This is an application for judicial review of Order PO-1993 made by the respondent Laurel Cropley, Adjudicator (the Commissioner) under the *Freedom of Information and Protection of*

Privacy Act, R.S.O. 1990, c. F.31 (the Act). The Commissioner found that components of the scores awarded by staff of the Ministry of Transportation (the Ministry) to consulting engineering firms bidding on certain highway construction projects were not exempt under the Act. The Ministry and the Consulting Engineers of Ontario (the CEO) seek to set aside this determination.

BACKGROUND

[2] The Ministry is responsible for the construction and maintenance of public highways in Ontario. Since 1996, the Ministry has retained consulting engineering firms to design highways and carry out the construction administration services of highways built by construction firms. This is referred to as total project management or TPM. The request for access concerns records relating to proposals made by consulting engineering firms for TPM contracts.

[3] The Ministry acquires consulting services by means of competitive bidding. Each component of the project is evaluated by a project manager and Ministry staff. The evaluators are certified engineering technologists or professional engineers. They record their evaluation of each component of each proposal as a score.

[4] These scores are then rationalized through discussions among the evaluators to an average evaluated score for each component. The scores are added to arrive at an overall evaluation score for each proponent. This results in a comparative score by each evaluator whose scores are then averaged for each proponent. This case concerns disclosure of the component comparative evaluation scores given in respect of the projects.

[5] The price proposed by each proponent is submitted in a separate envelope. After the technical and management evaluations are completed, the price envelopes are opened. The evaluative score is compared to the proponent's price to determine a price/score ratio for that proposal. The firm with the lowest price/score/ratio wins the contract.

[6] In the projects at issue, the evaluation of past performance was included in the score for technical and management qualifications. Since 2001, this evaluation is separately recorded as a corporate performance rating and the three scores are weighted - the price at 20%, the score for technical and management qualifications at 30% and the corporate performance rating at 50%. The request for access concerns contracts that were awarded before this change.

THE REQUEST FOR ACCESS

[7] On September 25, 2000, the Ministry received a request for disclosure of "all RFP [Request for Proposal] summary charts, construction scores" relating to six highway construction projects involving portions of Highway 401 in Ontario. The Ministry notified the consultants who had submitted proposals, as well as the CEO, an organization that represents the industry.

[8] Before issuing its decision on access to the requested records, the Ministry gave notice to the affected parties. Six of the nine consultants who had submitted proposals in response to the RFPs objected to the disclosure of the information pertaining to their companies in the records. The CEO

also submitted representations to the Ministry objecting to the disclosure on the basis that the information had been supplied to the Ministry in confidence; the technical scores are proprietary and trade secrets; and disclosure would prejudice their competitive position in the industry and would result in undue loss.

[9] The Ministry exercised its discretion to deny access to the requested information and the requester appealed to the Commissioner. At the mediation stage, the requester narrowed his request to a portion of the records showing only the project supervisor scores. The requester no longer sought the identities of any party.

[10] At the adjudication stage, the Commissioner sent a notice of inquiry to the Ministry, the affected parties, and the CEO, inviting submissions on the issues raised. The Ministry and four affected parties submitted representations.

[11] Prior to reviewing the individual issues in the appeal, the Commissioner noted the concerns of the CEO in relation to the narrowed scope of the request and stated that she had not restricted her consideration of the issues to only the information requested by the appellant, but took into account the broader implications of the disclosure of any information from the records sought.

THE EXEMPTIONS IN ISSUE

[12] The relevant exemptions provide as follows:

> 18.(1) 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;
>
> 13.(1) 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.
>
> 17.(1) 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;

THE APPLICANTS' SUBMISSIONS

Section 18 - Economic Interests of the Institution

[13] In its submissions to the Commissioner, the Ministry asserted that:

(i) although the TPM process had changed in 2001 after the completion of the projects referred to in the RFP, the impact of disclosure of the records should be measured with respect to the new system;

(ii) disclosure would damage the integrity of the consulting bidding system;

(iii) if the scores of the other consultants were to be known, a consultant would be in a position to adjust its bid price to maximize its price while still being awarded the contract;

(iv) consultants might choose not to compete for Ministry contracts if they knew that the scores would be released;

(v) consultants who believe that their reputation has been damaged through disclosure of the information in the records might take legal action against the Ministry, which would impact negatively on its financial interests.

[14] The Commissioner rejected the Ministry's submission that the disclosure of records generated under the old system should be measured with respect to the new system. She observed that the Ministry had gone to great lengths to explain how the specific construction of the new weighted system had created a system where full disclosure could lead to manipulation of the bidding process. She was not convinced that the same concerns arose in the former system "such that this leap can or should be made".

[15] The Commissioner determined that, regardless of any similarities in concepts, approach or process, she was not persuaded by the evidence that the anticipated harms could reasonably be expected to occur from disclosure of the information at issue under either system.

[16] The Ministry submitted that information regarding two of the variables was not generally known in the consultant industry and was in fact internal knowledge within the Ministry.

[17] She found that the Ministry had not established a reasonable expectation of harm under section 18(1)(c) and/or (d) because, according to the Ministry's own argument, the prospect of harm depended on knowledge of other information outside the scope of the request, which was known only to the Ministry.

[18] The Ministry attempted to demonstrate through examples how a party using the information in the records could manipulate the scores to gain an unfair advantage over other competitors. The Commissioner assumed, based on the Ministry's submissions, that there are similar expectations with respect to all of the projects. Thus, she examined the scoring on the records at issue to determine whether it supported the Ministry's argument that a competitor would be able to take the information and determine the scores that the other bidding companies could expect to obtain for any future project.

[19] In her reasons, the Commissioner stated:

> 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 that could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and/or (d).

[20] The Commissioner found that the Ministry's arguments concerning engineering consultants declining to bid on its jobs or suing the Ministry were entirely speculative and did not constitute detailed and convincing evidence to establish a reasonable expectation of probable harm. In addition, given the interest and involvement of the consulting engineering community in the development of an evaluation process generally, it was unlikely that disclosure of the scores could reasonably be expected to result in a disinterest in competing for government contracts.

[21] The Ministry's position is that the Commissioner gave no deference to the knowledge and expertise of the Minister's delegate in the interpretation of section 18 in the context of the records at issue. Instead, she applied her own interpretation to the facts, as she misunderstood them.

[22] In her reasons, she concluded first that even if the scores were disclosed, there remained undisclosed information that a proponent would need in order to be able to use the scores to manipulate its price. Second, she did not accept that the scores recorded the judgment of the evaluators for the purpose of making a recommendation to senior staff in the Ministry on which proposal to accept for a project. Third, she rejected the Ministry's position that the recent change in 2001 should not affect the analysis.

[23] The Ministry argues that the Commissioner gave section 18 an unreasonable interpretation by requiring evidence supporting the assertion of a reasonable expectation of probable harm. It is submitted that the section applies where there is a reasonable expectation that disclosure could cause prejudice and injury. To apply this statutory test requires a prediction as to future behavior. The proper test for the Commissioner to apply, therefore, was to review the assumptions underlying the Minister's prediction and if they were reasonable, to uphold the prediction.

Section 13(1) - Advice or Recommendations

[24] The Ministry submitted to the Commissioner that with respect to section 13(1) of the Act, the information in the records may look like factual information, but each score represents in numerical form the judgment of the scorer with respect to one aspect of a consultant's RFP submission. Further, the individual scores and the totals convey to senior staff the scorer's recommendations as to which consultant the contract should be awarded.

[25] In addressing the proposals submitted at the RFP stage, the Commissioner stated:

> 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.

[26] The Commissioner concluded that even if a broader definition were adopted for "advice" and "recommendations", she would not find the project supervisor scores exempt under section 13(1), because they were primarily of a factual nature and did not, in and of themselves, advise or recommend anything, nor could they be seen as predictive of the advice or recommendations that would ultimately be given.

[27] The Ministry submits the Commissioner's restrictive interpretation fails to give proper consideration to the purposes of section 13. In any event, the scores represent the evaluator's recommendations and advice as to which proposal should be accepted, subject to the price also being acceptable. Moreover, the scores are not listed in section 13(2) of the Act as exceptions to section 13(1) and should, therefore, be exempt.

[28] It is conceded by the Ministry that the standard of review of the Commissioner's decision is reasonableness, provided the Commissioner applied the correct standard of review to the decision of the Ministry's delegate. However, in interpreting the words "advice or recommendations", to require that "the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient during the deliberative process", the Commissioner narrowed the exemption and her interpretation is unreasonable.

Section 17 - Third Party Information

[29] The Ministry did not provide submissions to the Commissioner nor to this court concerning the application of section 17(1) (a), (b) or (c). However, four of the affected parties (to the Commissioner) and the CEO (to the Commissioner and to this court) made representations that focused on their expectations of confidentiality.

[30] The Commissioner dealt with whether the parties resisting disclosure had discharged the requisite burden of proof by presenting detailed and convincing evidence that described a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17 would occur.

[31] Specifically, she determined whether the three-part test for exemption set out in *(Ontario) Workers' Compensation Board v. Ontario (Information and Privacy Assistant Commissioner)*

(1998), 164 D.L.R. (4th) 129 (Ont. C.A.) *(Workers' Compensation Board)* at 141 had been satisfied, namely:

> (1) Does the record reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> (2) Was the information supplied to the institution in confidence, either implicitly or explicitly; and
>
> (3) Does the prospect of disclosure of the record give rise to a reasonable expectation that one of the harms specified in section 17(1)(a), (b) or (c) will occur?

[32] The Commissioner found that the records qualified as commercial information. However, the scoring information in the records was not supplied to the Ministry by the consultants who tendered the proposals. Therefore, the second part of the test had not been established.

[33] Although it was not necessary to her conclusion under section 17(1), the Commissioner considered the submissions on confidentiality and stated that the Ministry was not in a position to "guarantee" confidentiality and any promise to keep the bidding process confidential must be subject to the requirements of the Act.

[34] The Commissioner found that none of the exemptions applied and ordered disclosure of the records at issue, namely, the de-identified project supervisor scores.

STANDARD OF REVIEW

[35] The Ministry takes the position that four different standards of review apply in this case. First, the Commissioner's interpretation of the scope of her authority to decide issues under appeal pursuant to section 54 of the Act must be correct, because this provision goes to jurisdiction. Second, the standard of review with respect to the Commissioner's findings of fact is reasonableness.

[36] Third, the Commissioner's decision overruling the Minister's interpretation of section 18 of the Act and its application to the records must be correct. Fourth, the Commissioner's decision with respect to section 13 must be reasonable, provided she applied the correct standard of review of the head's decision. The "head" of the Ministry is the Minister or his or her delegate.

[37] Section 54 provides:

> 54.(1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

> (2) Where the Commissioner upholds a decision of the head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

[38] The Ministry asserts that the words in section 54(1) are best understood by reference to section 53, which states that "[w]here a head refuses access to a record or part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head". It is submitted that this provision imposes on the Minister a persuasive, not an evidentiary burden.

[39] The assertion is that if the record fits within the exemption, the Commissioner has no authority to review the head's exercise of discretion whether to disclose the record.

[40] The Ministry submits that with respect to the scope of the appeal, only one part of the decision may be appealed. Section 13, however, contains a two-step process. First, the head decides whether the record fits within the exemption. If it does, the head exercises a discretion whether or not to disclose. Section 17 contains only the first step. If the record fits within the exemption, the Act prohibits disclosure. Section 18 appears to conflate the two-step process by including the discretionary element of whether to disclose within the question of whether the record fits within the exemption.

[41] In addition, the Ministry argues that sections 53 and 54 provide that only the first step is capable of appeal. If the record fits within the exemption, the Minister's exercise of discretion pursuant to section 13 or section 18 as to whether or not to disclose the record may not be appealed.

[42] It is the position of the Ministry that the head has a special expertise in the business of the Ministry and in the interpretation of the Act in the context of the Ministry's business. Therefore, if the head can demonstrate that the interpretation of the exemptions in the context of the records at issue was reasonable, section 54 requires that the Commissioner uphold the head's decision.

[43] The Ministry submits that here the Commissioner applied a standard of correctness and failed to give deference to the decision of the Minister's delegate.

[44] With respect, the case law does not provide support for the Ministry's position. The Ontario Court of Appeal has applied the standard of reasonableness to the Commissioner's determinations involving various exemptions under the Act, including advice to government and economic interests of Ontario [sections 13 and 18: *Ontario (Minister of Finance) v. Higgins (1999)*, 118 O.A.C. 108, leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 134 *(Higgins)*]; law enforcement and threats to health and safety [sections 14 and 20: *Ontario (Information and Privacy Commissioner) v. Ontario (Minister of Labour)* (1999), 46 O.R. (3d) 395]; third party trade secrets and valuable commercial information [section 17: *Workers' Compensation Board*]; and personal information and individual privacy [sections 2 and 21: *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300].

[45] This court has applied the reasonableness standard of review to the Commissioner's determinations under sections 13 and 18, as well as section 10 of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, which is equivalent to the exemption at section 17 of the Act. See *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, (25 March 1994) [unreported]; *Hamilton (City) v. Ontario (Information and Privacy Commissioner)*, (9 February 1995) [unreported]; *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*, (21 December 1995) [unreported], leave to appeal denied [1996] O.J. No. 1838; *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552; and, *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 3522 (14 August 2003).

[46] This application was heard immediately after the consolidated applications in *Ministry of Northern Development and Mines v. Tom Mitchinson, Assistant Commissioner*, [2004] O.J. No. 163, (19 January 2004), (Ont. Div. Ct.). Since the standard of review in relation to section 13 was analyzed extensively there, it is not necessary to repeat it here.

[47] Suffice it to say that the courts have applied the pragmatic and functional analysis in determining that the reasonableness standard applies to the Commissioner's determinations. The courts have accorded the Commissioner considerable deference in interpreting the general wording of his home statute, given his greater expertise in balancing the need for access and the right to protection of privacy.

[48] The Court of Appeal has held that correctness is the applicable standard for jurisdiction-limiting questions. However, reasonableness remains the standard for all other questions within the jurisdiction of the Commissioner, including the interpretation and application of these exemptions.

[49] The Act is intended to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public; exemptions from the right of access should be limited and specific; and decisions on the disclosure of government information should be reviewed independently of government (s. 1(a) of the Act).

[50] In *Workers' Compensation Board*, the Court of Appeal stated at 138-140, that the Commissioner is required to administer the Act and to provide an independent review of government decisions on access to information in determining whether any of the statutory exemptions apply. Further, the legislature intended that fact-finding and the weighing of the contents of the submissions be dealt with by the Commissioner.

[51] It follows that the Act requires a hearing *de novo* of the head's decision. Sections 50 to 54 provide that the Commissioner may conduct a full inquiry, including the power to compel witnesses and to require production of documents when reviewing the head's decision. The Commissioner, therefore, is broadly empowered to dispose of the issues on appeal on terms that the Commissioner considers appropriate. There is nothing in section 54(2) that precludes the Commissioner from reviewing the exercise of discretion of the head.

[52] The Ministry submits that for sections 17 and 18 to apply, it is sufficient for the Ministry to be of the opinion that disclosure "could reasonably be expected to" result in harm. It is argued that these are not matters of evidence and proof but of prediction as to future behavior based on experience.

[53] In *Workers' Compensation Board* at 141-143, the Court of Appeal held that the Commissioner may require detailed and convincing evidence of a reasonable expectation of harm under section 17 of the Act. These words describe the quality and cogency of evidence required to satisfy the onus of establishing a reasonable expectation of harm. Accordingly, speculation as to possible harm is not sufficient to meet the burden of proof.

[54] Contrary to the submissions of the Ministry, there is no authority for the argument that an institution possesses greater expertise in the interpretation and application of the Act than the Commissioner.

[55] In *Walmsley v. Ontario (Attorney General)*, (1997) 34 O.R. (3d) 611 at 618, the Court of Appeal held that once records are found to be in the control of the institution, the applicability of the many legislated exemptions would clearly call on the particular expertise of the Commissioner.

[56] Moreover, as this court found in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at 782-783, the Commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of information in the hands of hundreds of heads of government agencies. The Commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts.

[57] The Commissioner submits that the reasonable expectation test and the economic interests at issue under section 18 are conceptually similar to the analysis under section 17(1) as set out in *Workers' Compensation Board* and should attract the reasonableness standard of review. I agree.

[58] In *Higgins*, the Court of Appeal has applied the reasonableness standard when reviewing the Commissioner's interpretation of the public interest override at section 23 of the Act and its application to a number of exemptions, including section 18. (Section 23 requires the Commissioner to determine whether the public interest in disclosure of a record clearly outweighs the purpose of the exemption.) As submitted by counsel for the Commissioner, it is illogical that the Commissioner should be afforded deference with respect to the public interest override analysis, but not with respect to the interpretation and application of an exemption subject to the override.

[59] The only exemption where the Commissioner has been held to a standard of correctness is solicitor-client privilege at section 19 of the Act, where the court held in *Ontario (Attorney General) v. Big Canoe* (2002), 220 D.L.R. (4th) 467 (Ont. C.A.) at 470 that the relative expertise of the court on the issue of solicitor-client privilege is overwhelming.

[60] The Ministry asserts that the deference accorded the Commissioner's factual determinations should be attenuated because the evidence before the Commissioner was in written form and she failed to give reasons for rejecting uncontradicted evidence.

[61] In *Workers' Compensation Board* at 138-140, the Court of Appeal took into account the Commissioner's practice of receiving evidence in the form of written submissions without affidavits or sworn evidence in arriving at the reasonableness simpliciter standard of review. The court held that this still results in considerable deference being given to the tribunal's decision. Further, the uncontradicted evidence did not have to be accepted. The Commissioner was still required to find facts and weigh the contents of the written submissions in order to decide whether or not the exemptions applied.

[62] Here the Commissioner undertook her own independent analysis of the Ministry's unsworn submissions and the information contained in the records. She made findings of fact and explained in her reasons in detail that the facts did not support a reasonable expectation of harm.

ANALYSIS

Section 18

[63] In *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246 at 253-255, the Federal Court of Appeal held that the phrase "could reasonably be expected to" should be interpreted as imposing a requirement of an expectation of probable rather than possible harm. The case involved the interpretation of a provision exempting disclosure of the requested information in circumstances where disclosure could reasonably be expected to result in material financial loss or interfere with contractual negotiations.

[64] The court there examined the words "could reasonably be expected to" in their total context in the light of the purpose of the federal statute as well as the principle that government information should be available to the public and exceptions to the public's right of access should be limited and specific.

[65] In the present case, the Commissioner concedes that actual proof of harm is not required. There is a requirement, however, that a reasonable expectation of harm be established on the evidence.

[66] Referring to the test under the federal statute in *Canada (Information Commissioner) v. Canada (Prime Minister) (T.D.)*, [1993] 1 C.F. 427 at 480-481, Rothstein J. held that the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters in issue. There is a requirement of evidence linking the harm described and the disclosure of specific pages of the record and an explanation of why, in all the circumstances, the disclosure of the contents of the record would cause such harm.

[67] *Worker's Compensation Board* supports the Commissioner's interpretation. There the Ontario Court of Appeal dealt with section 17 of the Act where the wording is similar. Speaking for the court, Labrosse J.A. held at para. 26:

> ... 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.

[68] In *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300, the Ontario Court of Appeal dealt with the "detailed and convincing" test with reference to section 2(1) of the Act and stated:

> [5] We note that the impugned formulation of the test has been used to express the onus to bring a case within one of the exemptions in the Act (see ss. 12-23), and that in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.) it was held that these words 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."
>
> [6] Notwithstanding this latter point, having regard to the substantive test of what is "personal information", referred to in paragraph 2 above, we think that reference to an evidentiary standard of "detailed and convincing evidence" is too demanding to be realistically appropriate. What is required to satisfy or persuade the Commissioner, on the balance of probabilities, will depend on the circumstances of a case and the issues arising in it.
>
> [7] Having regard for the record before the Commissioner, we do not think that in the present case the formula used in the Divisional Court's reasons resulted in any material error. There was a distinct paucity of evidence before the Commissioner on which she could be satisfied or persuaded that the substantive test had been met. Accepting that the proper standard of review on application for judicial review is that of reasonableness, we are satisfied that her

> decision that the information in question was not personal information could not be said to be unreasonable.

[69] The Commissioner's analysis of the evidence demonstrates that there were evidentiary gaps with respect to the existence of a reasonable expectation of harm. The Commissioner found to be speculative the Ministry's arguments concerning engineering consultants declining to bid on government contracts or taking legal action against the Ministry.

[70] The Ministry claimed that the scores could be combined with other confidential information known only to the Ministry in order to permit a party to manipulate the tendering process. She concluded that the need to combine internal Ministry information with the information at issue was fatal to the Ministry's argument.

[71] Having conducted an independent review of the records and the Ministry's submissions, she was not convinced that disclosure would permit the detailed analysis and interpretation suggested by the Ministry that could reasonably be expected to result in the harms contemplated by section 18(1)(c) or (d).

[72] The Ministry's assertions did not support the conclusion that corporations would be identified. Also, there was no reasonable explanation supplied by the Ministry to assist the Commissioner in understanding how disclosure of the records in issue under the old system would have an impact on information in the records created under the new weighted system.

[73] Accepting that the substantive test with respect to section 18 may be too high, there was a paucity of evidence before the Commissioner to meet the required burden of persuasion in any event.

Section 13

[74] The Ministry raises the same arguments made in Ministry of Northern Development and Mines referred to above. In upholding the interpretation of section 13(1) as reasonable, this court found:

> [67] The Commissioner's interpretation of the meaning of section 13(1) followed a long line of previous orders, which held that the terms "advice" and "recommendations" have similar meanings. The Commissioner observed that ordinary dictionary meanings use the words "advice" and "recommendation" to define each other. Further, the legislative history set out in the Williams Commission Report (*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) uses the words "advice" and "recommendations" interchangeably.
>
> [68] The Commissioner also referred to the policy rationale in the Williams Commission Report for including the exemption and the

> fact that the exemption was not designed to protect analytical discussion of factual material or the assessment of various options relating to a specific factual situation that does not offer specific advice or recommendations.
>
> [69] In view of these findings, there is no need to apply the presumption against tautology. Alternatively, there are ample indicators of legislative meaning to suggest that the presumption is rebutted and the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose, and is reasonable.

[75] In the present case, the Commissioner found that the project supervisor scores were primarily of a factual or background nature. She did not accept the Ministry's argument that the scores represented the judgment of the scorer for the purpose of making a recommendation to senior staff. She found that the evaluators, in applying the pre-set criteria to the information contained in the RFPs, are essentially providing the factual basis upon which any advice or recommendation would be developed.

[76] As argued by counsel for the Commissioner, to the extent that the factual information is to be translated, it involves an element of judgment; however, it is not advice, because it represents an objective assessment of factual information.

[77] The reasoning of the Commissioner is consistent with the fundamental purpose of an access to information regime, which is to ensure that the public has the information it requires to permit it to assess the factual and analytical basis upon which decisions affecting the public interest have been or are to be made, to participate in that process, and to hold government accountable.

Section 17

[78] Information contained in a record not actually submitted to the Ministry will be considered to have been "supplied" if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied. Further, information generated by the Ministry which does not reveal information actually supplied by a third party is not considered to have been "supplied", even though it may be derived from information that was supplied by the party.

[79] The CEO asserts that the Commissioner misunderstood that the evaluation process involved elements of expertise and judgment and wrongly concluded that the evaluation of proposed methods offered by the consultants in the proposals was a mechanical assessment. Further, the evaluators only expressed their judgment in numeric form for comparative purposes.

[80] Moreover, if the individual component scores were available to the public, it would frustrate the confidential basis upon which the information was submitted and would provide an unfair competitive advantage to those obtaining the information.

[81] The CEO was unable to point to any information actually supplied in confidence by affected parties in their proposals that would be revealed by disclosure of the scores assigned by Ministry officials or in respect of which accurate inferences could be drawn.

[82] Having found that none of the exemptions applied, the Commissioner ordered disclosure of the records at issue, namely, the de-identified project supervisor scores.

THE POSTSCRIPT

[83] The Ministry is critical of the Postscript in the Commissioner's reasons and states that her failure to mention sections 13 and 18 indicates her personal disagreement with the enactment of these exemptions by the legislature.

[84] In the Postscript, the Commissioner notes that the Ministry explained the basis for its decision to implement the TPM process, including the duty to treat all bidders fairly, and submitted that a decision to release the information sought would damage the integrity of the consulting bidding system.

[85] She observes:

> 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. ...

[86] 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.

[87] In my view, the Postscript adds context to the determination of the Commissioner. Her comments are balanced and supported by the principles enunciated by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at paras. 61-63, that the overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. Further, rights to state-held information are designed to improve the workings of government and to make it more effective, responsive, and accountable.

CONCLUSION

[88] The Commissioner's decision is detailed, reasoned, logical and stands up to a somewhat probing examination. For these reasons, her interpretation and application of the exemptions in issue cannot be said to be unreasonable. Accordingly, the applications are dismissed. As agreed among the parties, there will be no order as to costs.

DUNNET J.
I agree: FERRIER J.
I agree: EPSTEIN J.

RELEASED: January 20, 2004

COURT FILE NO.: 193/02 and 224/02
DATE: January 20, 2004

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

DUNNET, FERRIER and EPSTEIN JJ.

B E T W E E N:

MINISTRY OF TRANSPORTATION

Applicant

- and -

LAUREL CROPLEY, Adjudicator, JOHN DOE, Requester and CONSULTING ENGINEERS OF ONTARIO, Affected Party

Respondents

A N D B E T W E E N:

CONSULTING ENGINEERS OF ONTARIO

Applicant

- and -

LAUREL CROPLEY, Adjudicator, JOHN DOE, Requester, and MINISTRY OF TRANSPORTATION

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REASONS FOR JUDGMENT

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