

ACCESS TO INFORMATION AND BIDDING AND TENDERING¹

1. Introduction

In an effort to make government more accountable, since January 1, 1988, in Ontario, if anyone had any interest, they could apply to the Ontario Government to request that the government disclose government records, such as the government's contracts with third parties. In Ontario the legislation that permits a person to make such a request is the *Freedom of Information and Protection of Privacy Act*.² The provincial legislation generally applies to all provincial ministries and most provincial agencies, boards and commissions.

With respect to municipal governments in Ontario, the *Municipal Freedom of Information and Protection of Privacy Act*³ came into effect on January 1, 1991. It generally applies to local government organizations, including municipalities, school boards, transit commissions and other local boards.

At the federal level, the legislation is the *Access to Information Act*.⁴ In addition, almost all the provinces have similar legislation providing access to government records and rights to privacy in respect of personal information. Given the several jurisdictions which have access to information legislation, this paper in outlining the legislative framework will focus on the Ontario legislation.

¹ John Margie, Partner, Glaholt LLP.

² R.S.O. 1990, c. F.31, as amended. Use of the word "Act" throughout this paper are in reference to the *Freedom of Information and Protection of Privacy Act*, unless otherwise noted.

³ R.S.O. 1990, c. M.56.

⁴ R.S.C. 1985, c. A-1.

In Ontario, the Williams Commission Report⁵ set out four primary reasons for adopting freedom of information legislation: public accountability; informed public participation; fairness in the decision making process; and protection of privacy. With respect to accountability, the Williams Commission Report stated as follows:

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

Before reviewing the legislative framework and some of the cases, it is important to be aware of the overarching principle related to freedom of information legislation. The Williams Commission Report stated that “the underlying premise of a freedom of information law is one of public accessibility of government documents. The critical balance between the public interest in access and the government need for confidentiality is achieved by means of statutory exemptions from the general rule of public access”.⁶

In applying the Federal freedom of information legislation, the Supreme Court of Canada reiterated the statement by the Williams Commission when it commented in *Dagg v. Canada (Minister of Finance)*⁷ that “access is the general rule” and that exceptions to the right to access should be limited and specific.

⁵ Williams Commission Report, *Public Government for Private People*, The Report of the Commission on Freedom of Information and Individual Privacy, 1980.

⁶ Williams Commission Report, p. 277.

⁷ [1997] 2 S.C.R. 403.

Courts have also stated that public access should not be frustrated by the courts except in the clearest of circumstances and it is a heavy burden of persuasion that rests upon the party resisting disclosure⁸.

2. The Legislative Framework

The courts' use of the overarching principle set out above is a direct result of the stated purposes of the legislation, which purposes are embodied in the legislation itself. Section 1 of the *Freedom of Information and Protection of Privacy Act* sets out the two broad purposes of the Ontario *Act*. The first is:

“to provide a right of access to information under the control of the institutions in accordance with principles that

- a) information should be available to the public;
- b) necessary exemptions from the right of access should be limited and specific; and,
- c) decisions on the disclosure of government information should be reviewed independently of government”.

The second purpose of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information, and if necessary, the ability to correct it. Personal information is defined, generally, as information related to an individual's race, ethnic origin, religion, sex, age, education, criminal or employment history, address, blood type and views or opinions of

⁸ See for example *Maislin Industries Limited v. Minister of Industry Trade and Commerce*, [1984] 1 F.C. 939 (T.D.) and *Rubin v. Canada (Mortgage and Housing Corp.)*, [1989] 1 F.C. 265 (C.A.).

another individual about the individual. It is worth noting that excluded from this definition is commercial information.

The first purpose of the *Act* suggests that access to information is a “right”. As the *Act* operates on the presumption that all information held by institutions is to be disclosed, it therefore creates a “right” of disclosure to entrench the presumption. The “right” to access information is reinforced by the language in the *Act* that requires a part of a record to be disclosed in the event that a portion of the record is found to fall within an exemption.

a) **The “Right” to Access Information**

Section 10 of the *Act*, which creates the “right”, provides as follows:

10(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

- (a) the record or part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

The “right” to request access to records is given to every person. This includes individuals and organizations such as companies and partnerships. The “right” to access records is made more apparent by the fact that the Ontario legislation does not require the person requesting the information to indicate why the person seeks the information and the purpose for which the person making the request will use the information once obtained.⁹

⁹ However, see s.5.1(b), Regulation 460, R.R.O. 1990, which provides that “A head of an institution that receives a request for access to a record or personal information shall conclude

A person is entitled to access information held by institutions. "Institution" is broadly defined in the *Act* as the Assembly (the provincial parliament), a ministry of the Government of Ontario and any agency, board, commission, corporation or other body designated as an institution in the regulations. In addition to the specifically named institutions, the Assembly and government ministries, the agencies, boards, commissions, corporations and other bodies to which the *Act* applies are set out in the Schedule to Regulation 460. For example, the *Act* applies to the Building Code Commission, the Building Materials Evaluation Commission, the Ontario Housing Corporation, Ontario Power Generation Inc., the Ontario Realty Corporation and the Ontario SuperBuild Corporation.

A person is entitled to have access to a record. A "record" is also broadly defined as "any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes:

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and,
- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the installation."

that the request is frivolous or vexatious if ... (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access."

The definition of “record” is not exhaustive and the central feature is that it is a record of information, irrespective of the medium used to capture or convey the information.

The *Act* also requires the institutions to publish annually an indexed compilation containing a list of the general classes or types of records prepared by or in the custody or control of each institution.¹⁰ The Ontario Government has established the Directory of Records in order to comply with the *Act*. The Directory of Records describes the Ontario Government ministries and agencies to which the *Act* applies, the types of records maintained by these institutions and the telephone number and address of each institution’s Freedom of Information and Protection of Privacy Coordinator.

For example, one of the ministries listed in the Directory of Records is “transportation”. Transportation is subdivided into 8 offices such as the “operations division”. The responsibilities of the operations division include “building and maintaining the provincial highway system and remote airports”. At the operations division level, the general classes or types of records maintained by that office include contracts, tenders, construction tenders, work orders, plans, schedules and reports.

The operations division is further divided into the construction and operations branch, the program management branch and the regional and district offices. The construction and operations branch is further divided into four offices, two of which are the claims office and the construction office. The claims office does not list any records it holds. The construction office is further divided into “contracts” for which no records are described, “qualification” for which no

¹⁰ Section 32, *Freedom of Information and Protection of Privacy Act*.

records are described and “estimating” where the only general class or type of record listed is “Project Value System”.

b) The Exemptions

As set out above, the *Act* creates a presumption in favour of disclosure of the record. However, the presumption in favour of disclosure is subject to exemptions. The exemptions are found in sections 12 to 22 and 67.¹¹ Section 67 provides that certain confidentiality provisions in other legislation will prevail over the *Act*.

A number of the exemptions in sections 12 to 22 are subject to three types of general exceptions. The first type is that if a number of years have passed, the record may be released. The second type of exception is the party from whom the record is sought consents to disclosure of the record. The third type of general exception, the public interest, is found in section 23¹² which provides that an exemption from disclosure of a record does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purposes of the exemption.

The fourteen exemptions in sections 12 to 22 can be divided into two types, discretionary and mandatory exemptions. The first type of specified exemptions gives the government a discretion as to whether the government will rely on the specific exemption and refuse to disclose the information. For example, the

¹¹ See also section 65 which expressly sets out that the *Act* does not apply to certain records, for example, the notes of a judge or master if the notes are prepared for that person’s personal use in connection with the proceeding (s. 65(3)).

¹² Section 23 applies to the exemptions in sections 13, 15, 17, 18, 20, 21 and 21.1, *Freedom of Information and Protection of Privacy Act*.

government may refuse to disclose a record that contains questions that are to be used in an examination or test for an educational purpose.¹³

The second type of exemption is mandatory and the government has no discretion. For example, section 17 provides as follows:

(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; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

c) **The Procedural Scheme**

The procedure for obtaining information, or attempting to prevent the disclosure of information is as follows:

¹³ Section 18(1) (h), *Freedom of Information and Protection of Privacy Act*.

- a) the person seeking access to a record shall make a request in writing (note that there is a specific form to be used) to the institution that the person believes has custody or control of the record. The request is to provide sufficient detail to allow an experienced employee of the institution to identify the record and at the time the request is made, the person is to pay the prescribed fee - s. 24(1);
- b) if the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so that it complies with s. 24(1) - s. 24(2);
- c) Although the time within which the information is to be provided to the person who made the request may be extended¹⁴, generally the institution must, within 30 days of receiving the request, give written notice to the person who made the request as to whether or not access to the record or a part of the record will be given, and if access is to be given, give access to the person to the records and where necessary cause the record to be produced (s. 26);
- d) However, before access is granted, if the institution has reason to believe that the record requested might contain information referred to in subsection 17(1) that affects the interest of a third party (s. 28(1)), the institution shall give written notice to the third party advising them that:
 - i) the institution intends to release a record that may affect their interests;
 - ii) provide a description of the contents of the record that relate to that third party; and,

¹⁴ See for example section 27 which permits the institution to extend beyond 30 days the response of the institution where, for example, the request is for a large number of documents or a search through a large number of records must be made to locate the record requested.

- iii) state that the third party may within 20 days after the notice is given make representations to the institution as to why the record should not be disclosed s. 28(2);
- e) The representations of the third party as to why the record should not be disclosed shall be made in writing unless the head of the institution permits them to be made orally s. 28(6);
- f) Within 30 days after the head gives notice under s. 28(1), but not before the earlier of the day a response is received to the notice or 21 days after the notice is given, the head shall decide whether or not to disclose the information and give written notice of that decision to the third party and the person who made the request - s. 28(7);¹⁵
- g) Where the head decides to disclose the information, the head shall state in the notice that the person to whom the information relates may appeal that decision to the Commissioner within 30 days after the notice is given and that access will be given to the person who made the request, unless an appeal of the decision is made within 30 days of the notice being given - s. 28(8);
- h) Where the head gives notice of a refusal to give access to the record, two situations apply. If there is no such record, the notice shall state that and the person who made the request may appeal to the Commissioner the question of whether such a record exists. If there is such a record, the refusal notice shall state the specific provisions of the *Act* under which access is refused, the reason the provision applies, the name and position of the person responsible for making the decision and that the person who made the request may appeal the decision of the head for review to the Commissioner - s. 29(1);

¹⁵ Where a head of an institution fails to give notice under s. 26 or subsection 28(7) concerning a record, the head of the institution is deemed to have given notice of refusal to give access to the record - s. 29(4).

- i) Once the appeal is made, the Commissioner may appoint a mediator to investigate the circumstances of the appeal and try to effect a settlement - s. 51;
- j) Where there is no settlement achieved by the mediator, or no mediator is appointed, the Commissioner will conduct an inquiry (the Commissioner conducts what is essentially a hearing) and may summons and examine persons under oath and may hear representations from the person who requested access to the record, the head of the institution involved and any third party affected - s. 52 (1), (8) and (13);
- k) After all the evidence for the inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal. The order may contain terms and conditions that the Commissioner considers appropriate and the Commissioner is to give written notice of the order to the appellant and any party that received notice of the appeal - s.54(4);
- l) an appeal from the order of the Commissioner is made to the Divisional Court.

3. The Cases

The *Freedom of Information and Protection and Privacy Act* has received much attention since the decision of the Divisional Court in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*¹⁶ . This decision is reviewed below, however, requests for tender documents have been made for quite some time. In some cases, the records are found to be exempt and in others, only some or portions of the records are exempt.

¹⁶ [2004] O.J. No. 224, affirming [2002] O.I.P.C. No. 29 (Ontario Information and Privacy Commissioner L. Cropley, February 28, 2002).

Although it appears that the case of *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* has caused the construction industry to take notice of the *Freedom of Information and Protection of Privacy Act*, when you consider the information sought in this specific request, it may be apparent that there are other decisions of the Privacy Commissioners in Ontario and in other jurisdictions that may have a more detrimental effect on the construction industry.

Ontario (Ministry of Transportation)

A request was made under the *Act* for access to “all request for proposal (RFP) summary charts, construction scores for seven projects”. Before issuing its decision, the MTO notified the nine consultants who had submitted proposals in response to the RFP. Six of the nine effected parties responded to the Ministry and objected to the disclosure of information pertaining to their companies. An intervener also submitted a representation objecting to the disclosure. The Ministry then denied access to the summary charts and construction scores for the seven projects identified in the request under sections 13(1) (advice or recommendations), 17(1) (a) (b) and (c) (third party information), and 18(1) (c) and (d) (economic and other interests) of the *Act*. The person making the request appealed the Ministry’s decision.

A mediation was ordered. During the course of the mediation, the Ministry confirmed that records were identified for only five of the seven projects requested. Also during the mediation, the person making the request narrowed its request to access to a portion of the requested records, specifically the Project Supervisor Scores. The person no longer sought the identities of any party. The Project Supervisor Score is found in the record identified as RFP Summary Charts. The Project Supervisor Score is found on the Total Projects Management

(TPM) Scoring Sheets. The remaining portions of the records, including the names of the companies for which each score is given and the initials of the Ministry's staff who conducted the evaluations were no longer at issue. In addition, after the mediation and the mediator delivering her Report of Mediator, the Ministry withdrew its reliance on the mandatory exemption in section 17(1). Although the Ministry withdrew its objection on this basis, the interested parties and the intervener expressed their concerns about disclosure of the records on this basis.

Much of the decision of the Privacy Commissioner deals with the two exemptions raised by the Ministry, economic and other interests under section 18(1)(c) and (d), and advice or recommendations, section 13(1) of the *Act*. The section 18(1)(c) exemption is a discretionary exemption and provides that the institution may refuse to disclose the information where disclosure of information could reasonably be expected to prejudice the economic interests of an institution or the position of an institution in the competitive marketplace.

The exemption under section 18(1)(d) requires the Ministry to demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario, or the ability of the Government of Ontario to manage the economy of Ontario.

In interpreting these sub-sections, where the phrase "could reasonably be expected to" is used when dealing with a wide variety of anticipated harms. In order to establish the particular harm in question, the party with the burden of proof must provide detailed and convincing evidence to establish a reasonable expectation of probable harm. Therefore, the Ministry was required to provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm, as described in the exemptions relied upon.

The Ministry argued that its “competitive bidding for the acquisition of consulting contracts is essential in order to obtain the best value for the funds to be expended”. The Ministry also argued that disclosure of the requested information “would damage the integrity of the consulting bidding system”. The Ministry feared that full disclosure of the records could reasonably be expected to place proponents in a position to anticipate, and therefore manipulate the tendering process at a significant cost to the Ministry. The Ministry’s argument concluded as follows:

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

The Ministry argued that knowledge of the scores would permit a consultant to gauge their strengths and weaknesses with respect to all the evaluation criteria and therefore adjust future bids accordingly. The Ministry argued that the end result could be under cutting or inflation of bid prices with the problems that either of those situations would create. Therefore, the Ministry argued that releasing the scores could reasonably be expected to impact negatively on its financial interests.

The Ministry also argued that if the consultants know the scores will be released, they may choose not to compete for Ministry contracts. The Ministry therefore

submitted that this could result in the loss of valuable consulting resources and thereby prejudice its economic interests which will be injurious to the financial interests of the province.

The Privacy Commissioner was not persuaded that the anticipated harms could reasonably be expected to occur from disclosure of the information at issue. The Commissioner found that the Ministry failed to meet its onus in providing detailed and convincing evidence sufficient to establish that the disclosure of records at issue could reasonably be expected to result in either of the harms in sections 18(1)(c) or (d) and therefore held that the records are not exempt on this basis.

The Ministry also relied upon section 13(1) exemption, another discretionary exemption. For the purposes of this exemption, the record must contain more than mere information, and that to qualify as “advice” or “recommendations”, the information in the records must relate to a suggested course of action, which will be ultimately be accepted or rejected by its recipient during the decision making process. In addition, information that would permit the drawing of accurate inferences as to the nature of the actual advice, and recommendation would also qualify for the exemption under this section.

The Ministry argued that information may appear to be factual information, however, each “score” represents in numerical form the judgment of the scorer with respect to one aspect of the RFP submission. The Commissioner reviewed the basis upon which these scores are used and the RFP process and concluded that awarding of the contract is based on a non-discretionary application of established formula or pre-set criteria. The Commissioner concluded that the process appears to be designed in a such a fashion that once the mechanics of the assessment are completed, based on the application of established criteria, there

is no discretionary decision to be made, and there is no advice to be accepted or rejected during the deliberative process.

The Commissioner noted that the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations within the deliberative process. The purpose of this exemption is to ensure that employees do not feel constrained in expressing their issues, nor feel constrained by outside pressures in exploring all issues and approaches in the context of making a recommendation or providing advice in the government's decision making and policy making process. The Commissioner held that the Project Supervisor Scores are not exempt under section 13(1), as they do not provide advice or a recommendation to the government.

The Commissioner then turned to the section 17(1), the third party information mandatory exemption under the *Act*.

In order for a record to qualify for the mandatory exemption under section 17(1), each part of the three part test must be satisfied:

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

In order to discharge the burden of proof under the three part test, the parties resisting disclosure, in this case, the interested parties and the intervener, must generally present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more the harms described in sections 17(1) would occur if the information was disclosed.

The term “commercial information” has been interpreted by other Commissioners to mean information that relates solely to the buying, selling or exchange or merchandise or services. The Management Board Secretariat manual in respect of the *Act* indicates that commercial information is distinct from financial information. The manual defines financial information as “referring to specific data and is information that relates to finance or money matters”. Technical information, distinct from scientific information, is defined in the manual as information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples include architecture, engineering or electronics and usually involve information prepared by a professional in the field and describe “the construction, operation or maintenance of a structure, process, equipment or thing”.

The intervener in this case argued that the requested information is derived from detailed technical proposals, and the scoring of those proposals is therefore clearly commercial information that represents a key activity in the process for buying and selling engineering services. The Commissioner concluded that the records which contain the scores for each company relates to the process designed by the Ministry for selecting the consultant to provide the required services, and as such, qualifies as “commercial information.”

The Commissioner then turned to the next requirement, that the commercial information be supplied in confidence, either explicitly or implicitly. The Commissioner also noted that information contained in a record, although not actually submitted to an institution will nonetheless be considered to have been “supplied” for the purpose of section 17(1) if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

The intervener argued that the requested information, in combination with information previously released by the Ministry would identify the companies and their detailed scoring on the projects in question and therefore would significantly interfere with the confidentiality of the tendering process. The intervener also argued that proposals, within the practice of professional engineering, are submitted with a definite understanding that they are provided for the sole use of the client, and that they will be treated as confidential information. The other interested parties argued essentially, that they understood the information supplied to the MTO during the proposal process to be confidential, and therefore should only be available to the MTO proposal evaluation team.

The Commissioner noted that the information at issue is simply the score assigned to one particular aspect of each proposal by the Ministry’s staff. The Commissioner noted that the second part of the test requires that the information be obtained from a person. The Commissioner held that the information in the records at issue was not supplied by the consultants who tendered proposals. The Commissioner held that consistent with previous orders and the intention of the legislature in enacting the provision, the information at issue was not supplied to the Ministry. The second part of the section 17(1) test had therefore not been established and the exemption did not apply.

The decision of the Commissioner is not particularly shocking. The Commissioner's postscript, however, may be the most interesting part of the decision. The Commissioner quoted the Ministry's explanation for its decision to implement the Total Project Management system:

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

"As an extension of the integrity of the bidding system, the Courts recognize that an owner, such as the Ministry, has a duty to treat all bidders fairly and equally in terms of the evaluation process and award ...

Based on the above legal principles, the Ministry has developed procedural guidelines for the evaluation of consultants' submissions that incorporate a variety of performance measures, including past performance.

... for the reasons [discussed in this order] a decision to release the information sought would damage the integrity of the consulting bidding system."

The Commissioner commented about this argument as follows:

"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.”

After quoting from the Williams Commission Report on accountability, as set out in this paper above, the Commissioner then concluded as follows:

“In my view, ability of the public to scrutinize the basis upon which government contracts are awarded is an important aspect to 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.”

Ontario (Ministry of Transportation), The Appeal

The matter proceeded to appeal before the Divisional Court. The Divisional Court upheld the Order of the Commissioner.

The Court reviewed the arguments related to the three exemptions relied on before the Commissioner. With respect to the section 18 exemption, the Court reviewed whether the Commissioner had applied the correct test. The Court stated that the phrase “could reasonably be expected to” should be interpreted as imposing a requirement of an expectation of probable rather than possible harm. Although actual proof of harm is not required, there is a requirement that a reasonable expectation of harm be established on the evidence. The evidence must demonstrate a probability of harm from disclosure, not 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 the 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. The evidence must be detailed and convincing.

The Divisional Court concluded that the Commissioner's analysis of the evidence demonstrates that there were evidentiary gaps with respect to the reasonable expectation of harm.

With respect to the section 13 exemption, the Divisional Court found the Commissioner's analysis to be correct. The Court also agreed with the Commissioner's assessment of the section 17(1) exemption and in particular that the intervener was not able to point to any information actually supplied in confidence by the affected parties in their proposals that would be revealed by disclosure of the scores assigned by Ministry officials.

The decision of the Divisional Court is also not particularly significant. The significance of the reasons relate to the comments made by the Divisional Court in arriving at its conclusions and the comments of the Commissioner in the postscript.

With respect to the section 18 exemption, the Divisional Court concluded that:

The court there [referring to a Federal case] 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.

With respect to the section 13 exemption; the Divisional Court concluded as follows:

"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."

The comments made by the Divisional Court with respect to the sections 18 and 13 exemptions set the stage for the Court to make the following statement in regard to the Commissioner's postscript:

"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 para's. 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."

*Atlantic Highways Corp. (Re)*¹⁷

The Atlantic Highways Corporation and Atlantic Highways Management Corporation (collectively AHC) are subsidiaries or associated with Canadian Highways International Corporation (CHIC), whose primary business is the construction of highways in Canada and other parts of the world.

A request was made by Atlantic Canada Transportation Group Inc. to the Nova Scotia Department of Transportation and Public Works to disclose the records related to an arrangement, the principal document of which was the Omnibus Agreement, between the Province of Nova Scotia and AHC to build Highway 104, the first public-private toll highway in Canada.

The Ministry responded that the request had been granted in part. The Ministry was prepared to release only the agreements signed with Atlantic Highways Corporation Inc., in particular, the Omnibus Agreement, the Annual Maintenance Agreement, and an Interim Work Agreement regarding clearing. The Ministry also advised that release of these records would be suspended pending notification to AHC of release of the documents.

In the meantime, three others, The Daily News, The Halifax Chronicle Herald and one individual, also requested access to the records. The Ministry was of the view that the records fell within the equivalent to the Ontario s. 17(1) exemption and therefore requested the consent of AHC. AHC refused its consent. The Ministry then reaffirmed its decision to release the records and advised those making the request and AHC of that decision. AHC exercised its right to have the Ministry's decision to disclose the records reviewed by a Review Officer.

¹⁷ [1997] N.S.J. No. 238.

The only document in contention before the Review Officer was the Omnibus Agreement, which the Review Officer ordered be disclosed. AHC appealed that the decision to the Court. Only the two newspapers responded to the appeal.

The Court started its analysis by reviewing the purposes of the Nova Scotia legislation. Generally, the purposes of the Nova Scotia legislation are similar to those found in the Ontario *Act*, however, in Nova Scotia, they go further by indicating that the purpose of the Nova Scotia legislation is to provide disclosure of all government records, with limited and specific exemptions, in order to:

- i) facilitate informed public participation in policy formation;
- ii) ensure fairness in government decision-making; and,
- iii) permit the airing and reconciliation of divergent views.

The Court also compared the current legislation with its predecessor and noted that the predecessor had a different emphasis in that it acknowledged the right of access only to specifically enumerated records. The current legislation was viewed by the Court as clear legislative intent for even broader public disclosure of information relating to the legislative, executive and judicial branches of government.

The AHC had two principal arguments. The first related to the manner in which section 21(1), the equivalent of section 17(1) in the Ontario *Act* was to be interpreted, namely were all elements of that section to be satisfied. The Court held that all listed requirements were to be satisfied.

The second argument related to the application of section 21(1). AHC argued that the Omnibus Agreement was a trade secret or commercial information. It argued that the agreement as a whole was developed through research, efforts

and costs of AHC in devising a program or proposal for developing a public-private partnership to construct, maintain and operate a toll highway.

The newspapers argued that the Omnibus Agreement was not proprietary to AHC because it is the product of negotiation with the Province. The Province had submitted evidence that it played a significant role in the creation of the Omnibus Agreement and it was willing to release the record to the public. The Ministry also argued that its Request for Proposals outlined the minimum requirements in such areas as development, design, construction, bonding, financing, operations and maintenance. The Court held that many areas of the Omnibus Agreement were significantly influenced by the requirements of the Province as evidenced in its RFP, or the Agreement was created or modified in the negotiation process with the Province. Therefore AHC's claim to a proprietary interest in the record was now clouded and the document ordered to be released.

The Court went on to consider the other elements in the event it was wrong in concluding that the Agreement is not commercial information. The Court considered whether the information was supplied explicitly or implicitly in confidence. AHC had made some effort to keep certain information confidential by negotiating a clause in the Omnibus Agreement that recognized that some of the information in the Agreements is seen by AHC as proprietary or confidential and to the extent possible, the Province will consult with AHC prior to its disclosure. The clause however also recognized that the Agreement is subject to the Province's freedom of information legislation.

The Court found that the process, the negotiations with the Province and the Province's input of minimum requirements in its RFP, had clouded the proprietary interest in any such confidential information. The Court held that

AHC has not discharged its burden regarding the confidentiality aspect of the exemption. It is worth noting that the Court also stated that if the process did not result in a contract, AHC would likely have been able to keep such information confidential by relying on the exemption.

The Court then went on to consider whether there would be harm to AHC as a result of the disclosure. AHC argued that releasing the Omnibus Agreement would harm its competitive position and interfere with its negotiating position with the New Brunswick government in respect of a similar toll highway in that province. The release of the Agreement would therefore result in undue loss to AHC in the New Brunswick negotiations.

The Court reviewed the test of this arm of the exemption. It stated that it requires that it be shown that the information “reasonably” be expected to “harm significantly” or “interfere significantly” and “result in undue loss”. The Court concluded that this arm of the exemption requires a logically and rationally based threshold of speculative proof of harm or damages of some substance. Although the Court was satisfied that the release of the information may be expected to cause harm to AHC, the Court was not satisfied to the extent required by the exemption that there is a sufficient prospect of the degree of harm contemplated by the exemption. The harm was not significant.

The concluding remarks by the Court highlights the issues in these cases:

“The Review Officer in his written reasons for his recommendation concluded that a private company cannot expect to keep private the information contained in an agreement signed with government, particularly when public funds are involved. I confess to some difficulty with this broad statement as there may be rare

circumstances where it could be in the public interest to do so. For example if such a contract also involved other protected information of the Act such as certain personal information. However, the general statement is valid in most circumstances as it reflects the right of citizens to be informed of the use of public funds. The obvious danger is the use of the protection of “commercial information” as a shield to keep from the public the information necessary to properly assess government acts. Here, of course, the government authority was willing to release the information, and the party contracting with government seeks to shield it from public view. The broad terms of the debate by counsel is whether AHC’s interest in protecting information in the Omnibus Agreement from its competitors so exceeds the public right to know the details of this transaction that the information should be restricted under the Act.

...This Act is an important part of the ongoing process of improving the democratic process in this Province. The past decisions of this jurisdiction and other jurisdictions have supported the basic purpose of this legislation, to provide protection to certain specified information that deserve privacy, and then to ensure that the public has the information necessary to make an informed assessment of the performance of its government institutions.”

These comments suggest that if you enter into a contract with the government, there is a very high degree of probability that the contract will be disclosed.

*Brookfield LePage Johnson Controls*¹⁸

Brookfield (BLJC) provides professional facility management services to property owners and tenants across Canada. The Canadian Government requested proposals for the management of its properties in eastern Quebec and also issued twelve other RFPs relating to management of its properties in other parts of Canada. BLJC submitted proposals in respect of each RFP and was the successful bidder on all thirteen procurements.

The government received a request for disclosure of all documents regarding the procurement of two of the thirteen portfolios. The request was subsequently clarified and amended to require specific portions of the records.

The Ministry was of the view that the records contained third party information relevant to BLJC. The Ministry sought representations from BLJC, which it received essentially stating that the documents requested were exempt by the third party exemption. Upon review by the Ministry of BLJC's submission, it gave notice that there existed insufficient justification to prevent disclosure of the records with specific portions and pages deleted. BLJC then initiated the application for review of the Minister's decision.

The records identified as responsive to the request comprised some 170 pages. After consideration of BLJC's submission, the records were redacted and reduced to some 70 pages with further deletions within those pages. Also, bidders were requested to specify any information considered to be proprietary and therefore not subject to disclosure without consent, or use by government for any reason other than evaluation of the proposal. The BLJC title page contained a statement

¹⁸ *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 348.

to the effect that the information contained in the document is proprietary to BLJC and that use or disclosure, except to evaluate the proposal, is prohibited without the written permission of BLJC. Each page of the proposal also included the statement, "Proprietary Data - Use or disclosure of proposal data is subject to the restrictions on the title page of this proposal."

BLJC argued that its unique formula for responding to requests for proposals regarding property management is a trade secret. They argued that a trade secret does not have to be something of a scientific or technical nature, but can include art, craft, rhetorical design and flavour. The Court was not persuaded by this submission, and stated that the presentation is nothing more than one would expect of any individual attempting to secure employment or a contract. The technique is merely the skill of putting the punch in the first paragraph, and creating a positive impression which, is not, by any definition, a trade secret.

BLJC also argued that there is a "public interest in maintaining confidentiality over information conveyed to government as part of a competitive procurement process because it encourages bidders to submit detailed and complete binds". In addressing this argument, the Court assumed that the records are of a commercial nature, but queried whether they were confidential. The Court noted that the answer to the question regarding confidentiality must be established objectively, and that the weight of judicial authority is to the effect that it is not possible to contract out of the *Act*. The Court concluded that while confidentiality agreements may be taken into account, they cannot override or trump the express statutory provisions of the *Act*.

With respect to the contractor's argument related to the competitive procurement process, the Court relied on the decision of Justice Strayer in the *Societe Gamma*¹⁹ case wherein Justice Strayer stated as follows:

“One must keep in mind that these proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld, there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract, he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability”.

The Court also concluded that BLJC was invited to indicate the portions of its proposals that it considered to be proprietary. Rather than indicate what it considered to be proprietary information, it characterized each page in that manner. The Court found that this approach dilutes the substance of BLJC's position and militates against a finding of confidentiality in the objective sense. The records that remained in dispute were found not to be confidential.

The Court then addressed BLJC's argument regarding harm. BLJC argued that if the records were disclosed, there would be a marked decline in its business if competitors obtained the confidential information in the records, as their

¹⁹ *Societe Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 (T.D.).

competitors would be able to copy BLJC's approach to a bid at no cost with the result of financial loss to BLJC and financial gain to its competitor. BLJC argued that its competitive position and future requests for proposals would be prejudiced and its approach to bids is unique and involves alternative forms of service delivery.

The Court stated that an applicant cannot demonstrate a reasonable expectation of probable harm from disclosure simply by attesting in an affidavit that such a result will occur if the records are released. Further evidence that establishes that those outcomes are reasonably probable is required. The Court noted that at its highest, it can only be said that the competitive position of BLJC will be prejudiced, and that there was insufficient evidence to conclude that there is a basis to establish financial loss or financial gain to a competitor. As a result, the Court held that there did not exist a reasonable expectation of probable harm if the records in question are released.

The High-Rise Group²⁰

In this case, High-Rise Group Inc. (HRG) responded to the Public Works and Government Services Canada request for proposals for bids to provide leased office accommodation for various federal government departments in Hamilton. The RFP required a bidder to provide a lease term of 15 years with an option to extend the lease for a five year term, as well as options to purchase at the end of years 2, 5, 10 and 15. HRG was awarded the contract.

Public Works received a request for disclosure of the "initial bidding documents showing the government's requirement for the building, a summary of the bids,

²⁰ *High-Rise Group Inc. v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 602.

and the department's bid evaluation summary showing the scores in each evaluation category for each bid". HRG was invited to make submissions with respect to the disclosure of the records, to which it objected. Public Works was of the view that there were not sufficient reasons to prevent full disclosure of the records. HRG objected on the basis that the records fell into the third party exemption.

It was agreed that the records under consideration contain financial information. The primary position taken by the government is that the records in question were not submitted by HRG to the government, that is they are not proposal documents but rather "evaluations prepared by or on behalf of government staff from raw proposal data supplied by HRG in its bid".

HRG Group had submitted an affidavit of a business evaluator who was of the view that if the records are released in their current form, it is possible to calculate both the annual rents and purchase option prices with some degree of certainty. The Court therefore held, on the strength of that evidence, that the raw data supplied by HRG in its proposal and the evaluation record produced based on that raw data constituted, for the purpose of applying the exemption, one and the same record.

The only issue left for determination is whether the information that was supplied by HRG is confidential within the meaning of the exemption. The Court stated the test for determining whether information is confidential on an objective standard is as follows:

"Whether information is confidential will depend upon its content, its purpose and the circumstances in which it is compiled and communicated, namely":

- (a) the information is not available from sources otherwise accessible by the public, or that could be obtained by observation or study;
- (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed; and,
- (c) that the information be communicated in a relationship between the government and the party supplying the information that is either a fiduciary relationship or one that is not contrary to public interest, and which relationship will be fostered for public benefit by confidential communication.

The Court found that the first consideration of the confidentiality test was satisfied. The Court found that the information was communicated with a reasonable expectation that it would be kept confidential as a result of the RFP specifically indicating that only certain information would be made public, and therefore ruled that the second consideration of the test is also satisfied.

The Court then turned to the third consideration of the confidentiality test, whether the relationship between the government and HRG will be fostered for public benefit by keeping the record under consideration confidential. The Court referred to Justice Strayer's statement that is set out above in this paper. The Court then found that Justice Strayer's comments regarding the release of tender information should be read in the factual context of that case. The Court was of the view that Justice Strayer's comments should not be taken to apply to all tender fact scenarios. The Court was of the view that the requirement to keep the

information in the bid confidential, other than this specifically enumerated information, should be viewed as necessary and in the public interest, to guarantee the integrity of the bidding process in the complicated lease and option-to-buy proposal in the present case. The Court therefore found that HRG has adequately demonstrated that, tested objectively, the record under consideration is of a confidential nature.

It should be noted that counsel for HRG and the government agreed that certain records would be disclosed, and the Court ordered that certain other records not be disclosed. The decision does not describe which records were ordered not to be disclosed.

*Promaxis Systems*²¹

Promaxis, an engineering consulting firm, contracted with the government to provide technical publications management services for aircraft maintenance support equipment and was also awarded a contract for the aircraft maintenance policy. A request was made for a copy of the public management services for aircraft maintenance support equipment contract, which was released to the requestor, and to disclose certain total cost figures contained in the Promaxis original proposal for that contract.

Promaxis argued that the disclosure of the information was likely sought by a potential competitor. Promaxis argued that the following damage or potential damage would be caused by disclosure:

²¹ *Promaxis Systems Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] F.C.J. No. 1204

- (a) by knowing the total bid price, a competitor would be able to make several relevant calculations, particularly concerning the labour costs and exact rates of pay upon which the proposal was based;
- (b) the disclosure could improve a competitor's ability to under-bid Promaxis, hire away key Promaxis staff, or cause Promaxis staff to demand higher wages;
- (c) if the contracts are lost by Promaxis, it would lose up to 12% of its total revenue; and,
- (d) without the air maintenance support equipment contract, Promaxis would have to close down part of its operations, resulting in layoffs, which would have a ripple effect forcing Promaxis to either subcontract certain work or lose other contracts.

Promaxis sought a declaration that the information was exempt under the third party exemption. In argument, it was conceded that the only issue under the third party exemption is whether the information is confidential. The Court relied on the comments by Justice Strayer, set out above, and concluded that the principles set out by Justice Strayer are applicable to the circumstances of this case and, concluded, for reasons of public policy, that the information is not confidential information within the meaning of the third party exemption, however it may have been considered and treated by Promaxis.

The Court went on to consider whether there was a reasonable expectation of harm. The Court, after considering the affidavit evidence, concluded that there is no evidence to warrant the conclusion that the information in question should be withheld. It is not sufficient that the affidavit swear to concerns about reasonable

expectations of probable harm with some further evidence of specific harm anticipated. The Court went on to note that even if the assertions in the affidavit are correct, and that the labour cost and hourly wage figures could be calculated by knowledgeable people from total costs proposed, that does not in and of itself demonstrate that the information ought not to be disclosed. The evidence regarding potential layoffs arising from loss of contracts and the ripple effect on Promaxis's ability to serve its clients is speculative, and did not meet the burden required.

With respect to the issue of whether the disclosure could reasonably be expected to interfere with contractual or other negotiations of Promaxis, the Court stated that the applicant must show an obstruction in actual contractual negotiations, and not merely a "heightening of competition". The Court found that the evidence on this point was vague and may effect only the daily business operations of Promaxis as distinct from its actual contractual negotiations. The Court therefore concluded that the information in question is not exempt under the third party exemption.

*Town of Thessalon*²²

This is a recent decision of the Ontario Information and Privacy Commissioner wherein the Town of Thessalon received a request for access to the following records:

1. copies of tender packages submitted by contractors in respect of the location of existing docks;

²² Re: *Town of Thessalon* [2004] O.I.P.C. No. 95.

2. copies of tender packages submitted by contractors in respect of the construction of new docks;
3. recent tender package and submissions from contractors for repairs to maintain the docks;
4. a copy of the points system that was used to evaluate contractors for the relocation of existing docks contract;
5. a copy of the application to Heritage for the funding of the above tenders;
6. copies of the signed contracts for the relocation of existing docks and the construction of new docks;
7. copies of letters sent to contractors eliminating the 2% penalty on those contracts;
8. a copy of the contract between the Town and a named project manager;
9. a copy of proof of insurance and WSIB submitted by the project manager;
and,
10. a copy of the Diving Authorization for diving in the marina.

The matter first went to mediation. At that stage, the requestor agreed to withdraw items 3, 6, 7, 8, 9 and 10 from its request, leaving only four types of records at issue.

The Town had decided to grant partial access to records relating to parts 1 and 2 (copies of the tender packages submitted by contractors) of the request.

The remaining records at issue consisted of the undisclosed portion of certain tender documents, (items 1 and 2), a complete copy of the points system ranking (item No. 4) and the application to Northern Ontario Heritage Fund Corporation submitted by the Town for the marina construction project (item 5).

Although other exemptions were relied upon, this paper will focus only on the third party exemption.

The Town argued that the undisclosed portion of the tender documents and the funding application contain information that qualifies as confidential commercial and financial information belonging to the affected parties. The affected project manager also argued that the grant application contains technical information relating to the specification for the construction of the marina project, as well as commercial information related to the costs and services required for its completion. The project manager also argued that the tender documents at issue contain bidder specific information designed and included to foster a better image of the submissions. The Town also argued that the point ranking document is information of a technical nature belonging to a third party.

The Commissioner held that the point ranking document does not contain information which qualifies as either technical or labour relations information for the purposes of the exemption. The information in the document simply lists the evaluation of two of the bidders on various criteria. The Commissioner also found that the information is not sufficiently detailed to qualify as technical information. The point ranking document was found to relate only to an

evaluation of potential contractors. Therefore, the Commissioner held that the third party exemption did not apply to this document.

The Commissioner found that the undisclosed portion of the tender documents and the grant application contain information that qualifies as technical, commercial and financial information. The records include information about proposed costs of products and services to be provided to the Town by each bidder, details of the construction work to be undertaken by them, as well as various suggested improvements to the project, along with each bidder's guarantees and warranties of work. All of this information satisfied the requirement of technical, commercial or financial information.

The Commissioner then turned to address whether the information was supplied in confidence. The Town argued that the information contained in the tender documents and in portions of the grant application were supplied to the Town by the bidders in a bidding or tender competition and with a reasonably held expectation that they would be treated confidentially. The Town argued that the final bid prices are made public, however the specific details of each bid are not disclosed publicly. The Town also argued that in the tender packages made available to the bidders, the bidders were specifically advised that their bids would be sealed. The Commissioner held that in the circumstances surrounding the submission of the tenders, that the records were supplied to the Town with a reasonably held expectation that they would be treated confidential.

The Commissioner did however note that some of the information contained in the grant application, which did not form part of the proposals submitted by the affected parties, was information which originated with the Town and therefore not exempt. Only those portions of the grant application that were provided directly by the affected parties or that would reveal information provided by the

affected parties, meets the confidentiality requirement under the third party exemption.

The Commissioner then turned to determine whether there was a reasonable expectation of harm. The Town argued that disclosure of the tender documents and those portions of the grant application that were provided by the affected parties could reasonably be expected to result in other competitors of the bidders gaining a competitive advantage in the future. The Town argued that the tender documents would disclose particular methods of tendering, costs and work techniques that could be used by competitors to out-bid the affected party in future tenders or requests for proposals. The Town argued that other competitors could copy the tendering methods and implement cost, warranty structures and work techniques that are the same or better than those of the bidders, thereby providing the competitor with an advantage in the marketplace. In addition, the Town submitted that future bidders may adjust their bidding methods to avoid disclosing certain information, thereby reducing the quality of the information used by the Town in selecting a successful bid.

After review of the contents of the tender documents and the grant application, the Commissioner made the following findings:

1. the information that described certain additional work to be undertaken by one of the affected parties, that is included in the quoted price is not to be disclosed, as the disclosure of this information could result in prejudice to the competitive position of that party;
2. the disclosure of the facsimile cover page could not reasonably be expected to result in any of the harms contemplated by the exemption;

3. the disclosure of the statement of warranty offered by the affected party could reasonably be expected to result in significant prejudice to its competitive position. The information could be used by competitors to undermine the affected party's position with respect to future tender situations;
4. the disclosure of information that bears directly on certain additional work proposed to be performed by the affected party, in addition to the work called for in the tender, the disclosure of which could reasonably be expected to result in harm to its competitive position was ordered not to be disclosed;
5. the disclosure of certain schedules to the grant application that relate to the work to be performed and includes detailed calculations of the projected costs for each affected party is not to be disclosed as it could reasonably be expected to result in prejudice to the competitive positions of the affected parties; and,
6. the remaining undisclosed information contained in the records could not reasonably be expected to result in any harm contemplated by the third party exemption. The Town, the Commissioner concluded, failed to provide evidence which is sufficiently detailed and convincing to allow the Commissioner to make a finding with respect to that remaining information.

4. Conclusion

In the text *Bidding and Tendering, What is the Law?*²³, in addressing fairness in bidding, the authors state as follows:

“So, the moral of the *Martel* story is:

- don't invent criteria not disclosed in the bid documents (unfair);
- Apply the disclosed evaluation criteria evenly (be fair).

In a sense, it's all about contractual accountability.”

As the courts have strived to instill an element of contractual accountability in the bidding and tendering process, the legislature has attempted to instill an element of government accountability by adopting the *Freedom of Information and Protection of Privacy Act*. However, in its decisions on tender cases, a policy objective that is expressed by the Supreme Court of Canada is the promotion and protection of the integrity of the tender system. Does disclosing scores on a tender tarnish or damage the integrity of the tender system? Or, does it enhance the tender system by permitting all to review the scores to ensure that all bidders are treated fairly and equally in terms of the evaluation process and award.

The issue is which interests should be protected. Is it more important to a democratic society to make a government fully accountable and therefore require

²³ *Bidding and Tendering, What is the Law?* (3rd ed.) (Paul Sandori and William M. Pigott) (Butterworths, 2004).

the disclosure of tender documents, or is there more to be gained by exempting from disclosure the tender documents submitted by third parties to the government?

Disclosure of all bid documents may affect the integrity of the bidding process. It is a rare case however, where all information in a tender document submitted to the government is disclosed to the public under the *Act*.

A contractor can take steps to protect itself. It can, early on in the tender process, request the tendering authority to permit the contractor to specify which information it considers to be of a commercial and confidential nature. Designating that certain information is confidential and commercial, based on an objective standard, may be a step in preventing the disclosure of the record. A contractor can also appoint a person in its organization to be ready to respond to situations where disclosure is sought.

A contractor submitting a tender to the government should proceed on the basis that the government may be required to disclose portions or all of the contractor's tender document. A contractor should ask itself whether it is prepared to have that information disclosed to the public in the event that a request is made under the *Act*. This may be the price for doing business with the government.