

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3186

Appeal PA11-553

Infrastructure Ontario

April 15, 2013

Summary: A requester sought access to records related to Infrastructure Ontario's (IO) RFP for construction management services for a specified Toronto address. IO denied access to portions of the successful proposal and the scoring evaluations used to rank proposals, pursuant to sections 17(1) (third party information) and 21(1) (personal privacy). The successful proponent appealed IO's decision to disclose the remainder of the records. No appeal was filed by the original requester. In this order, the adjudicator finds that the personal information of the successful proponent's employees is removed from the scope of the appeal or exempt under section 21(1). The adjudicator upholds IO's access decision under section 17(1) and dismisses the third party appeal of the decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) definition of "personal information," 17(1), and 21(1).

Orders and Investigation Reports Considered: Orders MO-1194, PO-2859 and PO-2435.

OVERVIEW:

[1] This order addresses the third party appeal of the decision of Infrastructure Ontario (IO) regarding a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought the successful bid submission and scoring records related to the request for proposal (RFP) for construction management services at an identified government building in downtown Toronto. IO notified the five

companies whose interests might be affected by disclosure of the records related to them, as required under section 28(1) of the *Act*.¹ Several of the companies responded, providing consent to disclose certain portions, while the successful proponent objected to the disclosure of the records related to its bid, in their entirety.

[2] IO's decision was to grant the requester partial access to the responsive records, which consisted of the successful proposal and scoring records for the identified RFP. Portions of the records were withheld under section 17(1) (third party information) and 21(1) (personal privacy), relying on the presumption against disclosure in section 21(3)(d) (employment or educational history).

[3] The successful proponent appealed IO's access decision to this office, which opened a third party appeal and appointed a mediator to explore resolution between the parties. No appeal was filed by the original requester or the other parties who bid on the RFP.

[4] During mediation, the third party appellant maintained the position that its entire RFP submission is exempt under section 17(1) and, further, that disclosure of information related to project organization and job duties, as well as the experience of its bid team members, would result in an unjustified invasion of the personal privacy of these individuals under section 21(1).

[5] As a mediated resolution of the appeal was not possible, it was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator originally assigned to conduct the inquiry sent a Notice of Inquiry, seeking representations from IO and the appellant. After these representations were received, the adjudicator sent a Notice of Inquiry to the original requester, along with copies of the non-confidential representations received from IO and the appellant, to invite representations in response.

[6] The original requester submitted brief representations, in which she indicated that she did not seek access to the "personal information" of the appellant's employees, such as "names, prior work history or even client reference information."

[7] The third party appellant was then invited to provide reply representations and to consider the original requester's clarified position on access to the withheld information. For this purpose, the adjudicator sent the appellant copies of the original requester's representations and the initial representations provided by IO. Together with its reply representations, the appellant submitted a version of the records with severances it was prepared to consent to for disclosure to the original requester.

¹ Sections 28(1)(a) and (b) provide third parties with an opportunity to make submissions to an institution with respect to the possible disclosure of information that may fit within section 17(1) or section 21(1) of the *Act*, respectively.

[8] The adjudicator then sought reply representations from IO and suggested that IO and the appellant discuss the proposed disclosures, as well as the possibility of narrowing the scope of the appeal in view of the original requester's position on the severance of personal information. However, IO ultimately did not submit reply representations or discuss the proposed disclosures or narrowing of the appeal's scope with the appellant.

[9] Following the completion of the inquiry, this appeal was transferred to me to write the order. In this order, I find that some information in the records is removed from the scope of the appeal according to the original requester's revised position, or that it is exempt under the mandatory personal privacy exemption in section 21(1). I also uphold IO's access decision and find that section 17(1) does not apply to the remaining portions of the records, as claimed by the appellant.

Preliminary matter: information remaining at issue

[10] As stated previously, the appellant initially argued that all of the records are exempt under section 17(1). However, the proposed version of the records sent to this office along with the appellant's representations was more similar to IO's access decision. In this version, disclosure of entire pages and sections was no longer disputed, with the appellant advising that the unsevered portions consisted of information it would "agree to have released."

[11] I am satisfied that the appellant's willingness to disclose other portions of the records at issue, as evidenced by the proposed version of the records submitted during the inquiry, renders my review of the unmarked, unsevered portions of the records under the *Act* unnecessary. As neither the appellant nor IO opposes disclosure of those portions of the records, and no other exemptions are claimed regarding them, I will order them disclosed.

[12] I am also satisfied that IO's severances to the responsive records are not at issue in this appeal, since the original requester did not appeal IO's access decision. Therefore, the only portions of the records before me for consideration in this order consist of the information the appellant seeks to withhold *in addition to* those severances applied to the records by IO in its access decision.

[13] There is also information that can be removed from the scope of the appeal as a preliminary matter. The original requester indicated that she does not wish "to obtain personal information of [the appellant's] staff, such as names, prior work history or even client reference information." Notably, some of the information that might be removed from the scope of the appeal based on this statement is not at issue because the original requester did not appeal IO's decision to withhold it. Included in this category is the client reference or contact information in Appendices "L," "M," and "N."

For these reasons, I am satisfied that it is unnecessary to review these portions of the appellant's proposal in this order.

[14] However, I will review other information in the records, as the parties appear not to share the same understanding of what type of information qualifies as "personal information." As discussed below, information that qualifies as "personal information," according to the definition of the term in section 2(1) of the *Act*, will be removed from the scope of the appeal, in accordance with the position taken by the original requester with respect to this type of information.

RECORDS:

Remaining at issue in this appeal are the following portions of the appellant's November 12, 2009 RFP proposal, as well as portions of the RFP evaluation records:

- Appendix "J" – Proposal Submission Form – page 11, in part
- Proponent's Firm, Organization of Resources and Project Methodology - pages 23-36, 39-46, 48, 49, 51, 52, 54-56, in part
- Appendix "I" - Revised Fee Schedule Form – 1 page (unnumbered), in part
- RFP evaluation records – 2 pages (unnumbered), in part²

ISSUES:

- A. Do the records contain "personal information" that is exempt under section 21(1)?
- B. Does the mandatory exemption for confidential third party information in section 17(1) apply to the records?

DISCUSSION:

A. Do the records contain "personal information" that is exempt under section 21(1)??

[15] As noted above, the original requester does "not wish to obtain personal information" of the third party appellant's employees. She refers specifically to their names and prior work history. The original requester clarifies, however, that she does seek access to the "qualifications of the staff selected for the project."

² During the drafting of this order, it was necessary to confirm that IO had submitted the correct evaluation records to this office because the title of these two pages refer to another RFP entirely. In correspondence received on April 9, 2013, IO legal counsel confirmed that the financial evaluation records submitted were related to the correct RFP, even if the title was incorrect.

[16] With certain exceptions, information fitting within the definition of “personal information” in the *Act* cannot be disclosed to any person other than the individual to whom the information relates. The mandatory exemption in section 21(1) applies to “personal information,” and is intended to protect individuals from unjustified invasions of their personal privacy.

[17] “Personal information” is defined in section 2(1) of the *Act* as “recorded information about an identifiable individual” that fits within eight listed categories. Most relevant in this appeal are paragraphs (b) and (h), which refer to:

information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved, ...

the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual

[18] Also relevant in this appeal is section 2(3) of the *Act*, which addresses an exception to the definition of personal information and states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[19] As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.

[20] IO submits that it severed the “employment histories of a number of individuals” (the appellant’s employees) from the records because it was personal information, but did not sever other portions because the information related to those individuals in their “current business and professional capacity.” IO argues that because these portions of the appellant’s proposal do not constitute personal information, section 21(1) cannot apply to them.

[21] The appellant disagrees with IO’s position on this issue. According to the appellant, pages 31-56 of its proposal³ contain personal information:

³ The exception to this page range is page 37, which represents a proposed project schedule. I ordered it disclosed, above, because its disclosure is not opposed by the appellant (or IO).

Personal information as contained in the RFP does relate to their education and to their employment history, to which this information has been allowed in our RFP's under the condition that our RFP is confidential...

We disagree completely with [section 2(3) of] the *Act* in this manner, as any information provided by an individual to another party is their personal information, otherwise this information would not be available to anyone.

[22] The appellant does not refer to any of the presumptions against disclosure in section 21(3), but does claim that the factor favouring non-disclosure in section 21(2)(f) (highly sensitive) applies to its employees' information in the circumstances.

[23] Other than the submissions already outlined, the original requester's representations do not address the definition of personal information in section 2(1) of the *Act*.

Analysis and findings

[24] To begin, pages 31-34 of the appellant's proposal contain information under the heading, "Roles & Responsibilities," outlining the project accountabilities of each of the five proposed construction management team members. The appellant consents to release the names and job titles of the individuals, which accords with section 2(3) of the *Act*, under which this information does not qualify as "personal information." However, the appellant opposes disclosure of the listing of roles and responsibilities. In my view, this information does not qualify as personal information under section 2(1) of the *Act* because it is not information about these individuals in a personal capacity, but rather in their professional capacity, as members of the appellant's team for this project. Accordingly, I find that the names of the individuals who are intended to work on the project, their job titles, and the general descriptions of their assigned tasks or responsibilities for the project does not qualify as "personal information" under the definition in section 2(1).

[25] Pages 35 and 36 consist of organizational charts, the first representing the company, as a whole, and the second representing the proposed organizational structure for the specified project. Names and positions or titles are identified on both charts. Additionally, four roles are described on the project-specific organization chart. Pursuant to section 2(3) of the *Act*, and consistent with the reasons provided above regarding the professional context in which the information appears, I find that none of this information qualifies as "personal information."

[26] Finally, pages 39-46, 48, 49, 51, 52, 54-56⁴ of the proposal, titled "Proponent Team Member Experience," contain descriptions of the background and qualifications of each member of the proposed construction management team. Similar to pages 31-34, the appellant does not oppose disclosure of the team members' names and job titles, but does challenge the disclosure of duties and responsibilities. On these profiles, there is information about each individual in his or her role and there is a list that relates to each individual's responsibilities for the proposed project. On subsequent pages, there are also descriptions of past projects on which the individual has worked.

[27] In my view, as with pages 31-34, the role description and proposed responsibilities of the team members on pages 39, 42, 45, 48, 49, 51 and 54 relate to the appellant's employees only in their professional capacity. I am not persuaded that disclosure of the information on these pages would reveal something of a personal nature about these individuals. Therefore, I find that the information and listing of duties and responsibilities on pages 39, 42, 45, 48, 49, 51 and 54 does not qualify as "personal information" according to the definition of the term in section 2(1) of the *Act*.

[28] In addition, there is information provided about past projects the team member has worked on. However, the information provided about the past projects is not specific to the individual but, rather, summarizes the construction work done at an identified site address by the appellant. I am not satisfied that this information is about the individuals in any personal capacity and I find, therefore, that the list of past projects on pages 40, 41, 43, 44, 46, 49, and 52 does not fit within the definition of "personal information."

[29] However, there is an exception to this finding for information that appears on page 56. This page contains additional information that I am satisfied is "about" one of the appellant's team members in a personal capacity. Specifically, I find that some of the information contained in this individual's profile, which was not severed in IO's access decision and is under appeal here, relates to that individual's education, training, and other employment and fits within paragraph (b) of the definition of "personal information."⁵

[30] Several of the employee profiles also feature a photo and, because these photos were not severed in the appellant's version of the records, it appears that the appellant does not oppose disclosure of the photos. Generally, however, past orders have found photographs of individuals to be their "personal information."⁶ I agree. As these photos are recorded information about identifiable individuals, I find that they are the appellant's employees' "personal information."

⁴ IO's decision denied access to certain pages in this section of the proposal, pursuant to section 21(1). As the original requester did not appeal IO's decision, pages 47, 50, 52 (part), 53 and 55 (part) are not at issue in this order.

⁵ See Orders P-727, MO-1444 and MO-2151.

⁶ Orders MO-1570, PO-2477, and PO-3172.

[31] The appellant also opposes the disclosure of the signatures of individuals who signed or witnessed RFP documents on its behalf.⁷ Although the basis of the opposition is not entirely clear from the information before me, I will review the possible application of both sections 17(1), below, and, for the sake of completeness, whether these signatures constitute "personal information." In Order PO-2632, where Ontario Power Generation sought to withhold the signatures of its corporate officers under section 21(1), I reviewed past orders,⁸ including Order MO-1194, in which former Assistant Commissioner Tom Mitchinson stated:

In cases where the signature is contained on records created in a professional or official government context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition.

[32] This approach acknowledges that the determination is context driven and that signatures may, in some exceptional circumstances, constitute the personal information of the individual. In this appeal, however, I conclude that the signatures appear solely in a professional context and that the proposal documents were not signed under "exceptional circumstances." Therefore, I am not satisfied that disclosure of the signatures would reveal something that is inherently personal in nature about the individuals. Accordingly, I find that the signatures do not fit within the definition of "personal information" in section 2(1) of the *Act*.

[33] In summary, given my finding that the names, titles, designations, proposed roles or responsibilities, organizational charts, and signatures do not qualify as "personal information", this same information is not eligible for exemption under section 21(1) of the *Act*.⁹ As the appellant also opposes disclosure of the same information on the basis that it is confidential business information, I will review it under section 17(1), below.

[34] However, I have found that the education, training, other employment information and photos of the appellant's employees, on pages 56, 39 and 42, respectively, qualifies as their "personal information," according to the definition of the term in section 2(1) of the *Act*. Given the original requester's indication that she "does not wish to obtain personal information of [the appellant's] staff," I find that this information is removed from the scope of the appeal. Even if this particular personal information remained within the ambit of the appeal, I would find that its disclosure constitutes an unjustified invasion of personal privacy and that it is exempt under the mandatory exemption in section 21(1).

⁷ The signatures appear on page 11 (final page of Appendix "J") and on the unnumbered second page of Appendix "I."

⁸ See also Order PO-2435, which asks if there something about the specific information that, "if disclosed, would reveal something of a personal nature about the individual?"

⁹ See Orders PO-2637, PO-2987 and MO-2856.

[35] I will now review whether section 17(1) of the *Act* applies to portions of the successful proposal and RFP evaluation records, as asserted by the appellant.

B. Does the mandatory exemption for confidential third party information in section 17(1) apply to the records?

[36] IO's decision was to deny access to certain limited portions of the records, such as the appellant's hourly rates, similar project details, insurance certificates and Workplace Safety Insurance Board (WSIB) information under the mandatory exemption in section 17(1) of the *Act*.

[37] On appeal, IO takes the position that section 17(1) does not apply to the additional portions of the records claimed to be exempt by the appellant.

[38] Although the appellant did not specify which particular parts of section 17(1) it is relying on in opposing disclosure, it appears from the representations provided that the appellant is arguing that sections 17(1) (a) and (c) apply to the information.

[39] Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[40] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹⁰ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.¹¹

[41] Section 53 of the *Act* provides that the burden of proof that a record, or a part of it, falls within one of the specified exemptions in the *Act* lies with the head of the

¹⁰ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

¹¹ Orders PO-1805, PO-2018, PO-2184, and MO-1706.

institution. Affected (third) parties who rely on the exemption provided by section 17(1) of the *Act* share the onus of proving that this exemption applies.¹²

[42] The appellant's proposed version of the RFP evaluation summaries submitted with its representations indicates its opposition to disclosure of the information relating to the scoring of all five proponents bids. For clarity, however, I reiterate that the other four proponents (affected parties) did not appeal IO's decision respecting the disclosure of the RFP evaluation summaries. The appellant cannot oppose disclosure on their behalf. In the circumstances, therefore, the only information at issue in the scoring evaluation records is the additional information from the column relating to the appellant's bid.

[43] For section 17(1) to apply, I must be satisfied that each part of the following three-part test is met:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) or (d) of section 10(1) will occur.

[44] For the reasons set out below, I find that section 17(1) does not apply to the information remaining at issue.

Part 1: type of information

[45] IO submits that the proposal and scoring records contain commercial and/or financial information.

[46] The appellant claims that the withheld information contains trade secret, technical and financial information. The appellant submits that if their

... confidential submission is released in whole or part it will provide necessary trade secrets on how we do what we do and how we put it in writing. These RFPs provide all required technical and financial information. ...

¹² Order P-203.

A company's trade secret on how they win bids and secure projects are just that, "trade secrets". If we as a company wanted our trade secrets made public, we would not utilize the term "Confidential" on our documents that we submit.

[47] The appellant's submissions do not otherwise address how the records contain information that fits within the definitions of trade secret, technical or financial information, as those types have been defined in past orders of this office.

[48] The original requester's representations do not address this issue.

Analysis and findings

[49] Based on my review of the records, I am satisfied that they contain commercial and financial information for the purpose of the first part of the test for exemption under section 17(1) of the *Act*.

[50] The meaning and scope of these two types of information have been discussed in past orders of this office, as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order PO-2010). The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information (P-1621).

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs (Order PO-2010).

[51] I adopt these definitions for the purpose of this appeal.

[52] The appellant's successful RFP submission represents its submission for the supply of construction management services for the retrofit construction of the identified government building. In my view, this record qualifies as commercial information because it contains some of the elements of a proposed commercial services arrangement between IO and the appellant. Accordingly, I find that the records contain commercial information for the purpose of part 1 of section 17(1).

[53] I am also satisfied that the evaluation summary records contain financial information. Although these documents were created by IO to summarize the

performance of each of the proponents with respect to certain RFP criteria, they contain the same details about the fees and costs of each proponent. Specifically, I am satisfied that information set out in Appendix "I" of the appellant's proposal (the revised fee schedule), which is not at issue, also appears in some form in the evaluation summaries. Therefore, I find that the scoring records also contain financial information for the purpose of part 1 of section 17(1).

[54] In summary, I find that the requirements of part 1 of the section 17(1) test have been established for the records at issue in that all of them contain commercial information, and some of the information also qualifies as financial. This being the case, it is not necessary for me to determine whether the records also contain trade secret or technical information, as argued by the appellant.

[55] I will now consider whether the appellant's commercial or financial information was "supplied in confidence" to IO under part 2 of the test.

Part 2: Supplied in Confidence

[56] In order to satisfy part 2 of the test under section 17(1), the appellant must provide evidence to satisfy me that it "supplied" the information to IO in confidence, either implicitly or explicitly.

[57] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties (Order MO-1706).

[58] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.¹³

[59] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁴

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

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

¹³ Orders PO-2020 and PO-2043.

¹⁴ Order PO-2020.

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.¹⁵

[61] IO takes the position that the additional portions of the records that the appellant seeks to withhold, which it refers to as the "Appeal Portions," were not supplied to IO in confidence as required by section 17(1) of the *Act*. IO submits, in particular, that

In Order PO-2435, the IPC has made it clear that accepted proposals submitted by potential vendors are negotiated because the government either accepts or rejects the proposal. Since the Appeal Portions of the record at issue [were from] an accepted and successful proposal, the proposal cannot be said to have been supplied.

[62] The appellant rejects IO's position in this regard, stating that "the proposal was a supplied document in response to the RFP put out regardless of it being a successful proposal or not." Further, the appellant argues that the personal information of its employees was supplied in confidence. According to the appellant, its bid submission was provided to IO on the understanding that it would "not be shared with anyone other than the anticipated recipients necessary for the evaluation process." The appellant refers to a clause in the RFP that stated:

The Proponent hereby consents, pursuant to subsection 17(3) of [the Act], to the disclosure, on a confidential basis, of this submission by ORC¹⁶ to ORC's consultants retained for the purpose of evaluating or participating in the evaluation of this submission.

[63] In relying on this clause, the appellant submits that "we have clearly demonstrated that we submitted our proposal in a manner to which confidential [sic] was expected."

[64] The original requester's representations do not address the second requirement for exemption under section 17(1) of the *Act*.

¹⁵ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis and John Doe*, cited above.

¹⁶ ORC refers to Ontario Realty Corporation, which was, at the time of the RFP, how Infrastructure Ontario was identified.

Analysis and findings

[65] Past orders of this office have established that RFP proposals provided to an institution as part of the competitive selection process followed in seeking a supplier of goods or services are "supplied" for the purposes of part 2 of the test under section 17(1). In particular, information contained in proposal documents that remains in the form originally provided by a proponent is not necessarily viewed as the product of negotiation between the institution and that party.¹⁷ Information such as the operating philosophy of a business, or a sample of its products, may thus be considered relatively immutable and not susceptible to change.¹⁸ I agree with this reasoning, and I will apply it in my analysis in this appeal.

[66] The purpose of section 17(1) is to protect the "informational assets" of a third party that is doing business with an institution. In my view, certain portions of the proposal that the appellant seeks to withhold, such as pages 22-30, qualify as its informational assets, in that these portions reflect the appellant's approach to addressing the RFP requirements. I am satisfied that this information appears in the form it was submitted by the appellant to IO, and I find that it meets the definition of "supplied" accordingly.

[67] With regard to the financial evaluation records and in specific reference to the actual information at issue, I am also satisfied that the figures contained in the column representing the appellant's bid are connected to information that was supplied by the appellant to IO. The first number represents the sum of the appellant's proposed monthly fees, percent fees and costs for additional work, while the second figure represents the cost for site labour. I accept that there is at least an arguable basis for concluding that disclosure of this information could permit accurate inferences to be made about the information on which it is based, which IO withheld under section 17(1). Accordingly, I find that this information was supplied by the appellant to IO within the meaning of section 17(1).¹⁹

[68] I am also satisfied by the appellant's representations, including the fact that each page of its proposal is marked "Confidential," that it reasonably expected that the information it supplied would be treated in a confidential manner by IO.

[69] Therefore, I find that the appealed portions of the appellant's proposal were supplied in confidence for the purpose of part 2 of the test for exemption under section 17(1). I now turn to part 3 of the test.

¹⁷ See, for example, Orders MO-1368, MO-1504, PO-2637 and PO-2987.

¹⁸ Order PO-2433.

¹⁹ See Order PO-2859 and PO-2987.

Part 3: harms

[70] To meet this part of the test, the appellant must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.²⁰

[71] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus (Order PO-2020).

[72] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1) (Order PO-2435).

[73] According to IO, it could not justify withholding the portions of the RFP and scoring records as argued by the appellant because these portions “fell short of the last test required under section 17, as neither the Appellant nor IO could demonstrate or prove harm to the Appellant resulting from the release of the Appeal Portions.” Further, IO submits that:

The Appellant responded to IO in writing [upon notification under section 28(1) of the *Act*] stating that they objected to the release of any of their information contained in the responsive records, adding the comment that “Our trade secrets and methods are not for public viewing.” IO understands that the Appellant regards the Appeal Portions as confidential and that the Appellant expects IO to treat the Appeal Portions confidentially. However, the Appellant did not demonstrate or even mention any harm that might be caused by disclosure of the Appeal Portions. As such, it is difficult for IO to ascertain the harm without supporting details, examples or other convincing evidence.

[74] The appellant strongly disagrees with IO’s submissions, countering that they have met the “conditions” of section 17(1), the burden of proof in section 53, and “declare that we are 100% exempt under section 17.” The appellant responds to IO’s submissions on its response to notification by stating, “we provided our response to this request, with a simple no.”

²⁰ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[75] The appellant repeats its view that it has met the requirements of section 17(1) several times in its representations. Regarding harms, the appellant's representations consist of the following statements:²¹

- "Disclosure of our submission would be detrimental to both our company and the owner personally;"
- "If our submission is release[d] is whole or in part, undue harm will [be] brought upon our company. Our competitive edge will be lost;"
- "Should our document be released in the manner to which [IO] wishes to release it, it will provide the requesting party with relevant information on how we win prequalification and projects, to which would then cause financial hardship to our company;" and
- "We have clearly indicated the damages [that] can arise for the disclos[ure] of our proposal."

Analysis and findings

[76] The disclosure of information relating to an RFP process must be approached in a careful manner, applying the tests developed over time by this office while appreciating the commercial realities of the RFP process and the nature of the industry in which the RFP occurs.²² In Order PO-2859, Adjudicator Bernard Morrow outlined this office's approach to the section 17(1) exemption as follows:

Each case must be considered independently, with a view to the quality of the evidence presented and the impact of other factors, such as the positions taken by all affected parties, the passage of time, and the nature of the records and all of the information at issue in them. As well, the strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability. The importance of transparency and government accountability is a key reason for requiring "detailed and convincing" evidence under section 17(1), as articulated by Assistant Commissioner Brian Beamish in Order PO-2435:

Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation,

²¹ Provided in correspondence from the appellant dated May 11, May 31, and July 31, 2012.

²² See Orders MO-1888, PO-2987, and PO-3055.

the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385). Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." ...

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. ...

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). ... Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

[77] I concur with the reasoning articulated by Adjudicator Morrow and Assistant Commissioner Beamish in Orders PO-2859 and PO-2435, and I have applied it in this appeal. With due consideration of the appellant's representations, and review of the portions of the records under appeal, I find that insufficient evidence has been provided to persuade me that the harms contemplated by sections 17(1)(a) or (c) could reasonably be expected to result from disclosure.

[78] I agree with IO's view that the appellant's representations fall short of the "detailed and convincing" evidence required to support a finding that disclosure could reasonably be expected to significantly prejudice the appellant's competitive position or significantly interfere with contractual or other negotiations under section 17(1)(a). I am also not satisfied by the appellant's representations that disclosure of the disputed portions could reasonably be expected to result in undue loss to the appellant or undue gain to the original requester or others under section 17(1)(c).

[79] With specific reference to the portions of the appellant's proposal actually at issue, I conclude that this information consists of general information about the proponent and its employees. Even where the portions relate more directly to the specifics of the appellant's method of doing business contained in the submission in response to the RFP and its requirements, I am not persuaded that disclosure would result in the harms contemplated by section 17(1) because I find the information to be rather generic in nature and not specific to the particular project being undertaken. My conclusion as to the failure to establish a reasonable expectation of harm also applies to the appellant's opposition to disclosure of the signatures contained in the proposal. In the absence of detailed and convincing representations to support the appellant's position that disclosure will result in the harms under sections 17(1)(a) or (c), I find that part 3 of the test for exemption has not been met.

[80] I am also not persuaded by the appellant's representations of the existence of a reasonable expectation of harm under section 17(1)(a) or (c) with disclosure of the figures in the relevant column for its bid in the financial evaluation records. There is no appeal of IO's severances of the appellant's actual monthly or hourly fees, or its percent fees. To be clear, only the summative figures resulting from IO's calculations are at issue, and I do not accept the appellant's generalized assertions as to the harms projected with their disclosure. Accordingly, I find that the information at issue in the scoring records also does not meet part 3 of the test for exemption under section 17(1).

[81] All three parts of the test under section 17(1) must be satisfied for the exemption to apply. Having concluded that the appellant has failed to provide the requisite detailed and convincing evidence to persuade me that the harms contemplated by section 17(1)(a) and (c) could reasonably be expected to result with disclosure of the portions of the records at issue, I find that section 17(1) does not apply.

[82] Accordingly, I uphold IO's access decision under section 17(1), and I will order the disclosure of all portions of the records that remain within the scope of this appeal.

ORDER:

1. I uphold IO's decision, with the proviso that information that I found to qualify as "personal information" according to the definition in section 2(1) is removed from the scope of the appeal and should not be disclosed. This information is highlighted in orange in the copy of the records provided to IO with this order. To be clear, IO should not disclose the highlighted portions of the records.
2. As I have upheld IO's decision, except for the marked personal information, I order it to provide the records to the appellant by **May 15, 2013** but not before **May 9, 2013**.

3. In order to verify compliance with provisions of this Order, I reserve the right to require IO to provide me with a copy of the records disclosed to the appellant.

Original Signed By:
Daphne Loukidelis
Adjudicator

April 15, 2013