

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3175

Appeal PA12-119

Muskoka Algonquin Healthcare

March 5, 2013

**Summary:** The appellant sought access to the proposal submitted by a law firm which was the successful bidder in an RFP for the supply of legal services to several hospitals. Access to the proposal was denied pursuant to section 17(1) (third party information). The hospitals' decision to deny access to portions of the records, consisting of certain pricing and client information, was upheld. The remaining portions of the records were ordered disclosed, along with the agreement entered into between the parties following the completion of the RFP process.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1)(a), (b) and (c).

**Orders and Investigation Reports Considered:** Orders PO-3038 and MO-2070.

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

### OVERVIEW:

1. Muskoka Algonquin Healthcare, on behalf of several central Ontario hospitals (the hospitals), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information regarding a request for proposal (RFP) for corporate legal services consisting of:

- A copy of the successful proposal(s) in response to the RFP; and
- A copy of the subsequent agreement(s) entered into between Muskoka Algonquin Healthcare and the successful vendor(s).

2. Following third party notification under section 28 of the *Act*, the hospitals granted partial access to the responsive records, with certain information severed pursuant to sections 17(1)(a) and (c) (third party information) of the *Act*. Specifically, the hospitals disclosed to the requester the agreement between it and the successful proponent and denied access to the proposal submitted by the affected party in response to the RFP. The requester, now the appellant, appealed the hospitals' decision.

3. During mediation, the mediator contacted the successful proponent in the RFP (the affected party), seeking its consent to disclose additional records to the appellant. The affected party did not consent to the disclosure of any additional information contained within the records. The appellant advised the mediator that he would like to pursue the appeal and the file was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*.

4. I issued a Notice of Inquiry to the parties who are resisting disclosure of the record, the hospitals and the affected party, and received representations from both. In its representations, the affected party maintained its objection to the disclosure of any of the information in the records, with the exception of Appendix A to the proposal. This portion of the records consists of certain biographical information about the affected party's staff, which is also available on its website. As the affected party has consented to the disclosure of this information, it is no longer at issue in the appeal.

5. A complete copy of the representations of the affected party and the hospitals was then shared with the appellant, along with the Notice of Inquiry. The appellant also provided me with representations in response to the Notice.

6. In this order, I uphold the hospitals' decision to deny access to certain pricing and client information that is contained in the records, but order that the remaining portions be disclosed.

## **RECORDS:**

7. The records at issue in this appeal are the affected party's response to a request for proposal from the hospitals. It consists of a 3-page cost proposal and a 19-page response to the hospitals' RFP.

## **ISSUES:**

8. The sole issue for determination in this appeal is whether the records are exempt from disclosure under the mandatory exemption in section 17(1) of the *Act*.

## **DISCUSSION:**

### **Are the records exempt from disclosure under the mandatory exemption in section 17(1) of the *Act*?**

9. 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;
- (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.

10. Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>1</sup> 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.<sup>2</sup>

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

<sup>2</sup> [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

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

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

12. The affected party submits that the records contain both commercial and financial information within the meaning of section 17(1). It argues that the entire response to the request for proposals, with the exception of the biographical information that is also available in its website, qualifies as commercial information for the purposes of satisfying the first part of the test under section 17(1). Because the records also include the affected party's proposed fee structure and billing practices, it submits that the records also include information that qualifies as "financial information" within the meaning of that term in section 17(1). The terms "commercial" and "financial" information have been defined in previous orders 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].

13. I have reviewed the three-page cost proposal, as well as the 19-page response to the RFP, and conclude that they both contain information that satisfies the definitions of commercial and financial information as they outline the affected party's proposal for the provision of legal services to the hospitals. The records contain information about the manner in which the affected party proposes to fulfill its obligations for the

provision of legal services and the remuneration to be charged under this arrangement, thereby meeting the first part of the test under section 17(1).

## **Part 2: supplied in confidence**

### ***Supplied***

14. 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].

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

16. The affected party argues that the proposal was supplied by it to the hospitals in response to a request for proposals issued by the hospitals. On its face, it is clear that these records, which form the proposal from the affected party in response to the RFP, were supplied by the affected party to the hospitals.

17. I note that the information contained in the proposals relating to the affected party’s hourly rates were not incorporated into the final agreement between the parties, which has been disclosed to the appellant. Instead, the agreement describes the law firm’s billing arrangements using different language from that included in the proposal.

### ***In confidence***

18. 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 [Order PO-2020].

19. 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
- 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
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497].

20. The affected party and the hospitals submit that this RFP process was governed by the procedures set forth in the *Broader Public Sector Procurement Directive* (the BPS Directive), which supplanted the earlier *Broader Public Service Supply Chain Guidelines* (the BPS Guidelines), and the *Broader Public Sector Supply Chain Code of Ethics*. They argue that these policy documents mandate confidentiality in the treatment of proposals submitted in response to an RFP and that section 4.12 of the RFP itself explicitly states that all proposals submitted are to be considered confidential by the hospital. The affected party notes that the proposals made in response to the RFP were made by way of sealed bids and there was no public reading of the proposals. The affected party further indicates that it continues to treat the information submitted in the proposal confidentially, as is the custom in relation to any hospital procurement process.

21. The appellant simply states that the information in the records was not supplied within the meaning of section 17(1), without explaining further his reasons for taking this position.

22. Based on my review of the RFP documents and proposal submitted by the affected party, I am satisfied that the information contained in them was provided to the hospitals by the affected party with a reasonably-held expectation that they would be treated in a confidential fashion by the hospitals. In my view, this expectation was implicitly understood by the parties to the process, as evidenced by section 4.12 of the RFP and the language of the proposal submitted by the affected party. As a result, I find that the affected party and the hospitals have satisfied me that the records were supplied in confidence in accordance with the requirements of the second part of the test under section 17(1).

### **Part 3: harms**

#### ***General principles***

23. To meet this part of the test, the institution and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.<sup>3</sup>

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<sup>3</sup> [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

24. 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].

***Representations of the parties on harms***

25. The hospitals indicate that it is relying on the representations of the affected party with respect to this aspect of the section 17(1) exemption, adding that the confidentiality of submissions is fundamental to the procurement process. It argues that there is a public interest in maintaining the integrity of the bidding process and that confidentiality is essential to ensure the participation of vendors in this process.

26. The appellant, on the other hand, simply suggests that the affected party has not met its burden of proof to establish the harms contemplated by section 17(1) without offering further submissions.

27. The affected party provides a number of arguments in support of its position that a reasonable expectation of harm will result from the disclosure of the records at issue. With respect to the harm to its competitive position described in section 17(1)(a), the affected party submits that the records convey "fundamental information with regards to what makes [it] unique and successful" and that disclosure to competitors would result in the loss of its "competitive edge." It goes on to argue that the proposal and the underlying knowledge base which allowed for its preparation "includes an understanding of the organizational culture and context in which hospitals operate."

28. The affected party also refers to several decisions of this office, particularly Orders PO-1791, PO-1932 and P-408, in which an institution's decision not to disclose unit price information, including cost breakdowns for separate services and fees charged by consultants, was upheld on the basis that disclosure could reasonably be expected to result in harm to the proponent's competitive position. As a result, the affected party argues that disclosure of its cost proposal would result in similar harm to its competitive position in what it argues is clearly a very cost conscious marketplace.

29. The affected party goes on to refer to harm to its contractual or other negotiations with existing or potential clients that which could reasonably be expected to result from disclosure. It submits that the proposal that is reflected in the records was drafted with the specific needs of the hospitals in mind and its disclosure will compromise its "ability to negotiate to its advantage in other situations." It also objects to the disclosure of its client list and contact information, arguing that these clients have not consented to the public disclosure of their names.

30. The affected party's representations on the application of section 17(1)(b) focus on the benefits to public hospitals that flow from "participation in public or broader public sector procurement processes" and the need to "ensure that there is confidence

in the process.” The affected party argues that disclosure of its proposal would result in “a significant deterrent to hospitals that chose to engage in these [procurement] processes” because law firms would be less likely to participate in them.

31. Finally, with respect to section 17(1)(c), the affected party argues that disclosure of its proposal would “permit a competitor to obtain sensitive proprietary and confidential business information that it could not obtain otherwise” and that this would give the requester “an unfair competitive advantage” over it. It suggests that disclosure could reasonably be expected to result in its proposal being replicated by its competitors and would provide them with a valuable resource, in the form of its successful response, which would work towards its own detriment.

### ***Analysis and findings***

32. Evaluating the representations of the affected party and the hospitals concerning the possible harms that will result from disclosure, I propose to address each aspect of the arguments against the disclosure of the 3-page cost proposal and the 19-page Response to the RFP separately.

33. First, addressing the affected party’s arguments respecting the application of section 17(1)(a) and (c) to the “form and content” of its submissions made to the hospitals in response to the RFP generally, I find that such information does not qualify for exemption under these sections. I find support for this finding in several decisions of this office, including that of Adjudicator Daphne Loukidelis in Order PO-2478 in which she held that:

In general, I do not accept the position of the Ministry and affected party concerning the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the disclosure of the “form and structure” of bid would result in the identified harms under sections 17(1) (a) and (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent Order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms. In Order PO-2435, Assistant Commissioner Beamish made the following statement:

The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

I accept the position taken by the Assistant Commissioner. In my view the arguments put forward by the Ministry and affected party regarding



their concerns that disclosure of the "form and structure" of the bid, or its general format or layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in either section 17(1)(a) or (c).

34. I adopt this reasoning with respect to the "form and structure" of the proposal documents generally and concur that such information does not fall within the ambit of the exemption in section 17(1)(a) or (c).

35. Moving on to the pricing information contained in the 3-page Cost Proposal, I find that the table containing hourly rates, as well as the section of the proposal entitled "Alternative Fee Structure", including the sub-headings "Travel Costs" and "Other Costs" contain information that meets the requirements of part three of the test under sections 17(1)(a) and (c). A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records.<sup>4</sup>

36. The 3-page Cost Proposal includes price information including the cost breakdown for the provision of legal services and is comprised of the hourly rates which the affected party proposes to charge for each of the lawyers on its staff and its intended treatment of other costs associated with such work, such as travel and disbursements. I accept the reasoning in Orders PO-1791 and PO-1932, and applying it here, I find that the pricing information in the 3-page Cost Proposal, if disclosed, may be used by the affected party's competitors to gain a competitive advantage over it. I find that the affected party has provided the kind of detailed and convincing evidence required to establish the harms aspect of the section 17(1)(a) exemption with respect only to the pricing information contained in the 3-page Cost Proposal. Specifically, I find that the table on page 2 of the Cost Proposal and the information described under the heading *Alternative Fee Structure* on pages 2 and 3 is exempt under section 17(1)(a). I note that neither the final agreement between the hospitals and the affected party nor the 19-page Proposal document contain any such pricing information.

37. The affected party also objects to the disclosure of its client lists, which are included at pages 4 and 15 of the 19-page Proposal and consist of other health care institutions. In Order PO-3038, Adjudicator Cathy Hamilton made the following finding, and approved of a similar conclusion made in Order MO-2070:

I have carefully reviewed the representations from all the parties. I accept that disclosure of the appellant's customer list could reasonably be

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<sup>4</sup> Orders P-166, P-610, M-250, PO-1791 and PO-1932.

expected to result in prejudice to the competitive position of the appellant and/or result in an undue loss for it or undue gain for its competitors. Customer lists are created and compiled as a result of a significant degree of work on the part of the company to whom the list relates, and disclosure could reasonably be expected to provide a competitor with a significant advantage facilitating its ability to compete with the appellant and attempt to solicit existing clients away from the appellant.

38. I adopt this approach with respect to the client lists that are included in the Proposal and find that their disclosure could reasonably be expected to cause harm to the competitive position of the affected party as contemplated by section 17(1)(a). As all three parts of the test under section 17(1) have been satisfied, I find that the client information on pages 4 and 15 of the Proposal document is exempt under that section.

39. To summarize, I am satisfied that all three parts of the test for exemption under section 17(1) have been met for the pricing information contained in pages 2 and 3 of the 3-page Cost Proposal and the client information contained in pages 4 and 15 of the 19-page proposal. The remaining information contained in these documents, as well as Appendix A to the Proposal which contains only information that the affected party acknowledges to be publicly available on its website, is not exempt under section 17(1). As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that it be disclosed to the appellant.

40. The second part of the appellant's request as originally framed sought access to the agreement entered into between the hospital and the affected party. Neither the affected party nor the hospital has raised any objections to the release of this document to the appellant, who claims not to have received it. I will, accordingly, order the hospital to disclose this document to the appellant, as well.

## **ORDER:**

1. I uphold the hospitals' decision to deny access to:
  - the table on page 2 and the information following the title *Alternative Fee Structure* on pages 2 and 3 of the 3-page Cost Proposal; and
  - the client information on pages 4 and 15 of the 19-page Proposal.
2. I order the hospitals to disclose to the appellant:
  - the agreement entered into between the affected party and the hospital following the completion of the RFP process and Appendix A to the 19-page Proposal;

- all of the three-page Cost Proposal, with the exception of the table on page 2 and the information following the title *Alternative Fee Structure* on pages 2 and 3; and
- all of the 19-page Proposal, with the exception of the client information and pages 4 and 15.

by providing him with a copy by **April 11, 2013** but not before **April 5, 2013**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the hospital to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ March 5, 2013