Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3371

Appeal PA12-491

Humber River Regional Hospital

July 29, 2014

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* to Humber River Regional Hospital for records relating to an RFP involving the provision of arthroscopic supplies and equipment to the hospital. The hospital granted access to some records, in part and denied access to others, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemption in section 18(1) (economic and other interests). During the mediation of the appeal, the appellant raised the issues of the scope of the request and the possible application of the public interest override in section 23. In this order, the adjudicator upholds the hospital's decision, in part, and orders it to disclose some records to the appellant. The adjudicator also finds that the proposals of other proponents are not responsive to the request. The application of the mandatory exemption in section 17(1) is upheld, in part. The application of the discretionary exemption in section 18(1) is not upheld, and the adjudicator finds that there is no public interest in the disclosure of the information she found to be exempt.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1), 23 and 24.

Orders Considered: Orders MO-1706, MO-3058-F, PO-2435 and PO-2755.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the

Humber River Regional Hospital (the hospital) for the following information relating to RFP HRRH-10-06-11:

- A copy of the contract entered into with the successful vendor;
- A copy of successful proponent's proposal;
- Copies of any selection or decision criteria, evaluation and scoring documents, and product evaluations/clinical assessments relating to this RFP; and
- Copies of any and all emails, correspondence, notes and documentation relating to the scoring and evaluation of this RFP. This includes, but is not limited to, copies of any emails, correspondence, notes or documents exchanged between [two named staff] or other clinical staff involved in the evaluation of products, both prior to or following the awarding of this RFP.

[2] After notifying a third party (affected party A) who may have an interest in the records and upon review of the affected party's representations, the hospital issued a decision letter to the appellant, denying access either in whole, or in part, claiming the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemptions in sections 18(1)(a) (valuable government information) and 18(1)(c) and (e) (economic and other interests) of the *Act*. The appellant subsequently filed an appeal of the hospital's decision to this office.

[3] During the mediation of the appeal, the appellant indicated that he did not wish to pursue access to the information that was withheld under section 21(1). Consequently, this exemption is no longer at issue.

[4] The mediator contacted affected party A to seek its feedback on the disclosure of the records at issue. Affected party A did not consent to the release of further information and stated its position that the records at issue are exempt from disclosure under sections 17(1) and 18(1) of the *Act.*

[5] Also during mediation, the appellant indicated that he wished to pursue access to all of the unsuccessful proponents' proposals, in addition to the successful proponent's proposal, its contract and all evaluation documents. The mediator relayed the appellant's request for the unsuccessful proponents' proposals to the hospital which took the position that the unsuccessful proponents' proposals are outside the scope of this request. Accordingly, scope of the request was added as an issue.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. Representations were sought and

received from the hospital, the appellant and affected party A and were shared in accordance with this office's *Practice Direction 7*. In his representations, the appellant raised the possible application of the public interest override in section 23. Consequently, it has been added as an issue. I also provided two other affected parties (affected parties B and C), who had not previously been notified of the request, with the opportunity to provide representations. Affected party B provided representations, which I did not share with the other parties, but which are included in this order.

[7] At the outset, I note that there is duplication of records. For example, record 7 is duplicated in its entirety in record 51 and in part in record 12. As a result, I have removed record 7 from the scope of this appeal. In addition, records 12, 15 and 17 are identical in their entirety. Therefore, I have removed records 15 and 17 from the scope of the appeal.

[8] For the reasons that follow, I uphold the hospital's decision, in part, and order it to disclose some records to the appellant. I find that the proposals of the unsuccessful proponents are not responsive to the request. I uphold the application of the mandatory exemption in section 17(1), in part. I do not uphold the application of the discretionary exemption in section 18(1), and I find that there is no public interest in the disclosure of the information I have found to be exempt under section 17(1).

RECORDS:

[9] The records remaining at issue consist of:

- Portions of record 2 – RFP update and summary;
- Portions of record 3 – contract update and summary;
- Record 12 – summaries of supplier/proponent responses;
- Portions of records 20A, 20B and 20C – scoring sheets/pricing for each of three proponents; and
- Portions of record 51 – affected party A's proposal, pricing list, equipment list and the contract entered into between the hospital and affected party A.

ISSUES:

A. What is the scope of the request?

B. Does the mandatory exemption at section 17(1) apply to the records?

C. Does the discretionary exemption at section 18(1) apply to the records?

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption?

DISCUSSION:

A. What is the scope of the request?

[10] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .
>
> (2) 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 as to comply with subsection (1).

[11] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

Representations

[12] The hospital submits that the appellant's request was for, among other things, the successful proponent's proposal and was expanded by the appellant during the mediation of the appeal to include all of the other proponents' proposals. The hospital further submits that even on the most liberal of interpretations, it is clear from the plain language of the request that it did not include the proposals of the unsuccessful

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

proponents. The hospital adds that this office should not allow the appellant's expanded request because:

- This appeal would be delayed, as the hospital would have to provide notice to the unsuccessful proponents and consider any representations made by them prior to issuing a decision; and

- The appellant is familiar with the access process under the *Act* and can make a new request for the proposals of the unsuccessful proponents without interfering with this appeal.

[13] The appellant submits that some of the records at issue, namely evaluation and scoring documents as well as equipment lists and pricing information relate to not only the successful proponent, but also to the unsuccessful proponents. As a result, the appellant submits, it was well within the scope of the request for the hospital to have considered the proposals of the other bidders, given that these proposals were arguably contained or annexed within the ambit of the records responsive to part two of the request, which was for any selection or decision criteria, evaluation and scoring documents, and product evaluations/clinical assessments relating to the RFP. The appellant argues that it would have been entirely reasonable for the hospital to have notified the other proponents of the request at or before the mediation of this appeal.

Analysis and finding

[14] I find that the proposals submitted by the unsuccessful proponents to the hospital in response to the RFP are not responsive to the appellant's request. The appellant made a four-part request to the hospital for records relating to the RFP. In my view, the request is unambiguous and uses clear, direct language. The second part of the request specifically requests a "copy of the successful proponent's proposal," and does not make reference to any other proposals. The third and fourth parts of the request are for records relating to selection criteria, evaluation and scoring documents, product evaluations, clinical assessments and related email, correspondence, notes and documentation.

[15] While it stands to reason that the records responsive to parts three and four of the request would include information relating to both successful and unsuccessful proponents, this does not mean that the proposals themselves would be included in this type of information. I also note that with respect to two of the proposals, this information is not included in any other records at all. I make this finding in light of the fact that the appellant specifically turned his mind to requesting the successful proponent's proposal and could have easily requested the unsuccessful proponents' proposals at that time. I find that the hospital's interpretation of the request was reasonable and that the unsuccessful proposals are not responsive to this particular request. The appellant is free, of course, to make a new request for those proposals.

B. Does the mandatory exemption at section 17 apply to the records?

[16] The hospital is claiming the application of the mandatory exemption in section 17(1) to the following records:

- Some of the withheld portions of record 3,[3] which is a contract update and summary form;
- All of record 12, which is a summary of affected parties A, B and C's proposals, comparisons between proponents, and includes equipment lists;
- The withheld portions of records 20A, 20B and 20C, which are scoring sheets containing pricing information; and
- The withheld portions of record 51, which contain the affected party's pricing list, equipment list, proposal, and the contract entered into with the hospital.

[17] Affected party A is claiming the application of section 17(1) to the portions of its proposal and the contract entered into with the hospital that it had not provided consent to disclose when notified of the request by the hospital, as well as the withheld portions of records 3 and 12 relating to it and to record 20C. This affected party also submits with respect to records 3, 12 and 20C that it was not notified about these records by the hospital or during the mediation of the appeal, and that because it was not able to "fully participate" in the appeal, these records should not be disclosed on that basis. I note that affected party A's participation in mediation was limited to refusing to consent to the disclosure of information relating to it. I provided affected party A with the opportunity to fully participate in this inquiry by giving it notice of the records, and the opportunity to provide representations, which it did.[4] If I find that the records are exempt from disclosure, my decision will be solely based on whether the records qualify for exemption under the *Act* and not on any other considerations.

[18] Affected party B is claiming the application of section 17(1) to portions of record 12 relating to it and to record 20A. As affected party B is objecting only to portions of record 12 being disclosed, the other portions of that record relating to affected party B may be disclosed to the appellant, as no other exemptions were claimed for this record. As previously noted, affected party C did not provide representations.

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[3] I sought clarification from the hospital regarding the portions withheld under section 17(1). The hospital advised staff from this office that the portions being withheld under section 17(1) were those that were reproduced from the affected parties' proposals. Affected party A is claiming the application of section 17(1) to all of the withheld portions of the record.

[4] With respect to records 3, 12 and 20C, affected party A was asked to provide representations with respect to section 17(1) only, but it provided representations on sections 18(1) and 23 as well.

[19] Section 17(1) states, in part:

> 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,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (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;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[20] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[21] 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.

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[5] *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.) (*Boeing*).

[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[22] The relevant types of information listed in section 17(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[7] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]
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> *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.[9]

Representations

[23] The hospital states that the records contain commercial and financial information such as pricing, information relating to the purchase and sale of specialized supplies and equipment and information relating to money.

[24] Affected party A concurs with the hospital that the records contain commercial and financial information including brochures which identify products sold, product warranties, delivery requirements, equipment provision and performance reviews, insurance information, implementation and transitioning plans, customer lists, certifications and licenses, pre-market products and areas of focus, details of its own financial dealings, and information that would reveal strategic negotiations. In addition, affected party A argues that its identity as the successful proponent of the RFP is commercial information, as it reveals the details of its commercial and financial dealings.

[25] Affected party B submits that the records contain both commercial and financial information as they contain information taken verbatim from its proposal to the hospital outlining its proposal for the provision of services to the hospital, including:

- product offerings;
- value added proposal;

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[7] Order PO-2010.
[8] Order P-1621.
[9] Order PO-2010.

- quality improvement programs;
- approach to the evaluation process;
- list of current and past customers and what products they purchased;
- market share;
- certificate and customer ID numbers; and
- payment terms and pricing information.

[26] The appellant states that it would have been beneficial if the hospital had provided some level of specificity with respect to which of the records, or portions thereof contain commercial and/or financial information but that it does appear in the absence of specific detail that some of the records may contain commercial and/or financial information. The onus, the appellant argues, rests on the hospital and the affected party to establish that the information in the records is either commercial or financial for purposes of part one of the section 17(1) test.

[27] In reply, the hospital provides a record-by-record breakdown of the information that was withheld from the appellant, as follows:

- Record 3 – this record was disclosed, in part. The portions the hospital withheld under section 17(1) consist of the summary of 3 proposals, including pricing, equipment lists, and estimated total contract value per year;
- Record 12 – this record was denied in whole, and reproduces the contents of sections of three proposals;
- Records 20A, 20B and 20C – these records were disclosed, in part. The withheld portions consist of the total price for a couple of scenarios in which the hospital retains the right to purchase a specified percentage of the supplies and equipment from other providers; and
- Record 51 – is affected party A's proposal and the agreement entered into between the hospital and affected party A. Portions of these records were disclosed, in part.

Analysis and finding

[28] The term "commercial information" in section 17(1) has been defined in previous orders of this office to mean information that relates solely to the buying, selling or exchange of merchandise or services.

[29] On my review of the records, I find that they contain commercial information for the purposes of section 17(1), with one caveat. The records contain pricing information, product information and customer lists, all of which have been found by past orders of this office to constitute commercial information. In addition, many previous orders of this office have found in that proposals submitted in response to RFP's contain commercial information because the companies that submitted bids prepared them for the sole purpose of entering into a commercial venture with an institution. I find that in this case, the proposal, the contract and any records that include information from the proposal contain commercial information. In addition, the proposal sets out the methodologies for meeting the hospital's needs, which I find also qualifies as commercial information as it describes, often in great detail, precisely how the work is to be performed. Further, where the names of the affected party's staff appear in a context where their role in the fulfillment of the contract and qualifications are described, this also has been recognized as commercial information. This type of information is also contained in the records and, therefore, qualifies as commercial information.

[30] Affected party A has argued that its identity as the successful proponent is commercial information in and of itself, as it reveals details of its commercial and financial dealings. Even if I was prepared to accept that this is commercial information or that it was supplied in confidence, I find that the disclosure of the identity of a successful proponent does not meet part three of the test in section 17(1), which I will discuss below.

[31] Other records at issue consist of the evaluation scores assigned to each company that submitted a proposal in response to the RFP issued by the hospital. The evaluations were conducted by hospital staff and/or the hospital's independent contractors. Previous orders have also concluded that evaluation notes and/or scores made by institution staff which pertain to proposals relate to the process designed by an institution for selecting a company to provide the required services, and as such, qualifies as commercial information. Consequently, the information in these records qualifies as commercial information.

[32] I note that in making this finding, the commercial information in the records relates not only to affected party A but to two other companies as well, who had submitted proposals in response to the RFP, including affected party B. While I have already found that the actual proposals of these companies are not responsive to the

appellant's request, the records containing summaries of the proposals and the evaluation records contain commercial information pertaining to these other companies.

[33] In sum, I find that all of the records at issue contain commercial information for the purposes of section 17(1) and have, therefore met the requirement of the first part of the three-part test in section 17(1). It is also not necessary for me to determine if the records contain financial information for the purposes of section 17(1).

Part 2: supplied in confidence

[34] 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.[10]

[35] 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.[11]

[36] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[12]

[37] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[13]

[38] 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

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[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] See also Orders PO-2018, MO-1706 and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).
[13] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).

confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[14]

[39] 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; or
- prepared for a purpose that would not entail disclosure.[15]

Representations

[40] The hospital submits that the withheld information in the proposal was supplied by the affected party to it, and that the withheld information in the contract was either supplied by the affected party, or its disclosure would permit a competitor to infer non-negotiated financial and commercial information supplied by the affected party in its proposal.

[41] With respect to confidentiality, the hospital submits that proposals, contracts and related documentation, including those containing information relating to the evaluation of proposals, are protected by physical, administrative and technological safeguards, including passwords, firewalls and facility access controls. In addition, the hospital advises that all members of the RFP selection team and their advisors were required to sign a confidentiality agreement in order to participate in the process and were aware that they could be removed from the team for failing to maintain the confidentiality of the information submitted in any of the proposals.

[42] The hospital goes on to state:

> All information received in response to the RFP was considered absolutely confidential and [the hospital's] staff knew that it could not be disclosed except to the team and advisors to the team who required the information for the purposes of the RFP. In short, [the hospital] has consistently

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[14] Order PO-2020.

[15] Orders PO-2043, PO-2371 and PO-2497.

> treated as confidential and maintained the confidentiality of the redacted parts of the responsive records.
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> Given the competitive nature of the procurement process and [the hospital's] policy in regard to the preservation of confidential information (be it of patients or suppliers), and evidenced by the representations of the Supplier, the proposals were submitted with the expectation that they would be held in confidence.

[43] Affected party A submits that the records at issue were supplied by it to the hospital as part of the RFP process, or would allow the appellant to draw an accurate inference with respect to information actually supplied by it to the hospital. It provided two examples from the record, which will not be reproduced in this order as these portions of affected party A's representations met this office's confidentiality criteria. In addition, affected party A submits that the information was supplied "in confidence" as it has been treated consistently in a confidential manner by it. Further, the disclosure of this information has been limited internally to only those persons who have been advised of its confidential and proprietary nature and need access to the information in order to perform their duties. Affected party A goes on to state that its employees understand that they are precluded from disclosing the information other than to other authorized persons within their organizations and have entered into a written contract requiring them to maintain the confidentiality of the information. Moreover, the information is subject to security safeguards such as password protection and firewalls, and employees are not permitted to remove copies of such information from their workplaces.

[44] Affected party B states that the information at issue was taken from its proposal to the hospital and, therefore, permits the drawing of accurate inferences with respect to information that was directly supplied by it to the hospital. In addition, affected party B submits that it had a reasonable expectation of confidentiality at the time the information was supplied to the hospital. Affected party B states that it submitted its proposal in a sealed envelope and the information in it has not otherwise been disclosed and is not publicly available. Even within the company, it advises, details regarding an RFP proposal are only provided to a limited number of employees with a "need to know." Affected party B also argues that it is industry practice that RFP proposals are held in strict confidence and that it would not have shared highly commercially sensitive information, such as detailed information about it proposed product offering or its customers unless it understood such proprietary information to remain confidential. Lastly, affected party B states that it has in place various physical, technological and organizational safeguards to ensure the confidentiality of its RFP information, including:

- firewalls and encryption mechanisms;

- password protection;
- locked filing cabinets with limited employee access;
- restricted access key-cards and security systems in its office; and
- an employee Code of Conduct that includes explicit confidentiality requirements.

[45] The appellant argues that records 3, 12, 20A, 20B, 20C and 51 (pages 50-91) were not supplied by the affected parties to the hospital. In particular, the appellant submits that the summaries of proponent responses contained in records 3 and 12 do not contain the same information as originally provided to the hospital, and the onus is on the hospital to show that they do. In addition, the appellant argues that section 17(1) does not apply to protect informational assets of an institution, such as summaries or documents generated by the hospital.[16] With respect to records 20A, 20B and 20C, the appellant submits that the withheld portions would contain only limited information supplied to the hospital and, in any event, information originally provided by the proponents would have presumably been heavily filtered by the various processes and evaluations of the hospital. Lastly, the appellant argues that the contract in record 51 was not supplied, as its contents were mutually generated between affected party A and the hospital, even if the contract was preceded by little or no negotiation,[17] and even if the language in the contract is substantially based on affected party A's proposal.[18]

[46] In reply, affected party A disagrees with the appellant's position that for information to have been "supplied," it must be the same as that originally provided by the affected party to the hospital. In addition, affected party A submits that, with respect to the contract, this office has enumerated two exceptions to the general rule that a contract is treated as mutually generated. The two exceptions, affected party A states, are the "inferred disclosure" and "immutability." It argues that the "inferred disclosure" exception applies where disclosure of the information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information. Affected party A cites as examples such as baseline pricing and payment amounts under a product listing agreement[19] as qualifying under the "inferred disclosure" exception. It goes on to submit that the "immutability" exception applies where information is immutable or is not susceptible to change, such as fixed underlying costs, agreements struck between the affected party and other third parties

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[16] Order PO-1805.
[17] See *Boeing* at note 3.
[18] Order PO-2018.
[19] Order PO-3032.

and/or were not negotiated.[20] In this case, affected party A submits that the following information is "immutable" because it was not negotiated between it and the hospital:

- implementation and transition plans;
- suppliers' financial information;
- licenses;
- product information;
- insurance; and
- client references relating to fixed information, underlying costs and third party details.

[47] In sur-reply, the appellant notes that affected party A relies on Order PO-3032 with respect to its argument concerning the "inferred disclosure" exception. The appellant argues that in Order PO-3192, the adjudicator rejected the analogous application of the decision in Order PO-3032 and that I ought to do the same in this appeal, as the information at issue can be distinguished from those in Order PO-3032, which involved volume discounts.

Analysis and findings

[48] As previously stated, 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.[21]

Record 3

[49] Record 3 is entitled "Contract Update and Summary Form." Although the hospital authored this record, I am satisfied that portions of it were "supplied" for the purposes of section 17(1) because they replicate portions of the affected parties' proposals. I find that disclosure of this information would reveal the information that was directly supplied by the affected parties to the hospital during the proposal process or during negotiations between affected party A and the hospital. This information consists of a large portion of the withheld information on page 1 of the form and at the top of page 2 of the form. Consequently, these portions of record 3 meet the second part of the test in section 17(1).

[20] Order PO-3011.
[21] See note 9.

[50] Conversely, I find that other portions of this record were not supplied by the affected parties to the hospital. In particular, portions that were not supplied identify which proponent the hospital preferred,[22] set out the hospital's total weighted rating scores of the three affected parties, and provide a summary of the final outcome of the contract negotiations, the contract value, and the financial and operational implications to the hospital. This is distinct from information that was supplied to the hospital during the negotiations that took place between affected party A and the hospital. As these portions of record 3 were not supplied, they have not met part two of the test in section 17(1) and do not qualify for exemption under this section of the *Act*. However, the hospital is claiming the application of section 18(1) to this record, which I will consider below.

Record 12

[51] Record 12 is a summary of the content of the three affected parties' proposals, and consists of three parts as follows:

- a table with four columns. The first column sets out the RFP requirements and the following three columns summarize each of the three proponent's response to the RFP;
- instructions to the RFP selection team regarding rating criteria; and
- each of the three affected parties' product lists.

[52] I find that most of the information in this record was "supplied" for the purposes of section 17(1), as it consists of summaries of the three affected parties' proposals. I find that disclosure of this information would reveal information that was directly supplied by the affected parties to the hospital. In addition, the product lists in this record are duplicates of those contained in the affected parties' proposals, which were directly supplied to the hospital by them. Consequently, I find that the second, third and fourth columns of the table qualify as being "supplied" by the affected parties to the hospital, as well as the product lists. Therefore, this information has met the second part of the test in section 17(1).

[53] Conversely, the first column of the table sets out the requirements of the hospital's RFP, which does not qualify as being "supplied" to it. In fact, the hospital set and created the RFP requirements. In addition, the hospital's instructions to its selection team and rating criteria was created by the hospital and not supplied to it. This portion of the record does not contain the actual scores awarded to each proponent, but is the template to be used by the selection team. Consequently, this information does not meet the second part of the test in section 17(1). As no other

[22] The identity of the preferred proponent was disclosed in one portion of this record and withheld in another.

exemptions have been claimed with respect to this information, I order the hospital to disclose to the appellant the first column of the table which is the RFP requirements, as well as the instructions to the selection team, including the rating criteria.

Records 20A, 20B and 20C

[54] These records consist of the hospital's RFP selection team's evaluation summaries for the three affected parties. Record 20A relates to affected party B, record 20B relates to affected party C, and record 20C relates to affected party A. Most of the information contained in these records has already been disclosed to the appellant by the hospital, including the names of the affected parties. The withheld portions consist of purchasing scenarios, pricing rights of the hospital, the total available score for pricing component, scoring information, pricing rating methodology, and the affected parties' total estimated price based on the applicable purchasing scenario.

[55] I find that the only information in these records that was "supplied" by the affected parties to the hospital is their respective pricing proposals, that is, the total estimated prices. This information was derived from the affected parties' proposals, which were directly supplied to the hospital by them. Consequently, I find that disclosure of this information would reveal information the affected parties directly supplied to the hospital, and that it has met the second part of the test in section 17(1).

[56] However, I find that the purchasing scenarios do not contain information that the affected parties supplied to the hospital. The scenarios set out criteria established by the hospital in its RFP with respect to its purchasing rights. Similarly, the affected parties did not supply the pricing rating methodology and the total available score for pricing component to the hospital. Instead, these were created by the hospital. Therefore, this information does not meet the second part of the test in section 17(1). However, the hospital has also claimed the application of the discretionary exemption in section 18(1) to these records, which I will consider below.

Record 51

[57] This record consists of two parts. The first is affected party A's proposal and the second is the contract entered into between affected party A and the hospital.

The proposal

[58] In Order PO-2755, Adjudicator Diane Smith dealt with the issue of whether a proposal submitted in response to a call for tenders was considered to have been supplied for the purposes of section 17(1). She found that a proposal containing only the contractual terms proposed by a bidder, and not the subject of negotiation, could not be characterized as having mutually generated terms. She found, therefore, that

the proposal was "supplied" by the affected party to the institution for the purpose of the third party information exemption.

[59] Recently, in Order MO-3058-F, Senior Adjudicator Sherry Liang considered whether a proposal was considered to be supplied. In making her finding, she undertook a thorough examination of this office's historical approach on this issue. She stated:

> Record 1, the winning RFP submission, was also "supplied" to the town within the meaning of section 10(1). My conclusion with respect to this record is consistent with many previous orders of this office that have considered the application of section 10(1) or its provincial equivalent to RFP proposals.[23] As this office stated, in Order MO-1706, in discussing a winning proposal:
>
>> …it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution… [page 9]
>
> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.
>
> I distinguish the circumstances before me from those where a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the parties, and no separate contract between the parties is created. In Order MO-2093, for instance, this office found that where a winning proposal governed the commercial relationship between a city and a proponent, and there was no separate written agreement, the

[23] See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.

> terms of the winning proposal were mutually generated and not "supplied" for the purpose of section 10(1). In such a case, it is reasonable to view the winning proposal as no longer the "informational asset" of the proponent alone but as belonging equally to both sides of the transaction.

[60] I adopt Senior Adjudicator Liang's and Adjudicator Smith's approaches for the purpose of this appeal.

[61] In this case, the proposal is not a final agreement between affected party A and the hospital; rather, it is the proposal containing the contractual terms proposed solely by affected party A. Applying Adjudicator Smith's approach, the proposal was not the product of negotiation and, consequently, was not mutually generated by the hospital and the affected party.

[62] Therefore, I am satisfied that affected party A supplied the information at issue contained in the proposal, including the pricing lists and appendices, to the hospital for the purpose of section 17(1) of the *Act*.

<u>The contract</u>

[63] I have carefully reviewed the information at issue in the contract and the representations of the hospital, affected party A and the appellant. The information in the contract includes, but is not limited to products and prices, purchase volume commitment, purchase rebates, purchases and delivery, warranties, backorder/substitutes, insurance, indemnification, waiver, optional products, new technology, implementation/transition plan, agreement performance review, and return goods policy.

[64] I find that none of this information, as part of a negotiated contract, was supplied by affected party A to the hospital. Nor do I find that disclosure of this information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by affected party A to the hospital. Furthermore, I find that the information negotiated between the hospital and affected party A is not immutable information.

[65] Even if the information in the contract reflects information that originated from affected party A, I find that it has not been supplied within the meaning of that term in section 17(1).[24] This information is not subject to either the immutability or inferred disclosure exceptions, except perhaps the name of the proponent, that is, affected party A's identity. Rather, it is information about how affected party A and the hospital

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

will fulfill the contract, setting out each parties' contractual obligations. I find that all of this information could have been subject to negotiation.

[66] In Order MO-1706, Adjudicator Bernard Morrow dealt with the issue of whether the information contained in a contract was "supplied" for purposes of the municipal equivalent of section 17(1). In doing so, he stated:

> … the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1) [the municipal equivalent to section 17(1)]. The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).[25]

[67] In Order PO-2435, Assistant Commissioner Brian Beamish considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government requests for proposals, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. After carefully reviewing the records and representations, he rejected that argument and concluded that the government's option of accepting or rejecting a consultant's bid is in itself a form of negotiation.

[68] Consequently, I find that agreed-upon essential terms of a contract are generally considered to be the product of a negotiation process and are not "supplied," even if the "negotiation" amounts to acceptance of the terms proposed by the third party.[26] Assuming that the current agreement is based on the proposal supplied to the hospital by affected party A, the acceptance of the terms of the agreement by the hospital, including the appendices which set out products and prices, amounts to negotiation of the agreement.

[69] Further, I am not satisfied that affected party A has established that this contract is distinguishable from the other circumstances where both this office and the Courts have found that the content of a negotiated contract is not supplied.[27]

[70] Therefore, I find that the information in the contract does not meet the second part of the test in section 17(1). However, the hospital has also claimed the application of the discretionary exemption in section 18(1) to record 51, which I will consider below.

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[25] Order MO-1706. This approach was approved in *Boeing*.
[26] Orders PO-2384 and PO-2497.
[27] *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (CanLII).

[71] Lastly, with respect to the information above that I have found to be "supplied" to the hospital by the three affected parties, I am satisfied that this information was done so with a reasonable expectation of confidentiality on their part. Therefore, I find that the information that was "supplied" by the affected parties to the hospital was done so "in confidence" for the purposes of section 17(1) of the *Act* and, consequently part 2 of the test has been met with respect to this information.

Part 3: harms

[72] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".

[73] Evidence amounting to speculation of possible harm is not sufficient.[28] 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.[29]

[74] 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).[30]

[75] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[31]

Representations

[76] The hospital's representations address how disclosure of the information at issue would cause harm to affected party A only. It submits that there are a limited number of vendors of the supplies and equipment procured through this RFP, and that it is reasonable to expect that in future RFP's some if not all of the financial and commercial information supplied to it will continue to be relevant in future procurements, even as a baseline from which changes in the supplies and equipment and pricing are calculated. In addition, the hospital states:

> The detailed description of the Supplier's [affected party A] products and its unique set of service commitments as well as the detailed information about the financial terms on which it offered and is providing the supplies

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[28] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[29] Order PO-2020.
[30] Order PO-2435.
[31] *Ibid*.

> and equipment to [the hospital], including value-add products and services, make it reasonable to expect that its disclosure to a competitor would cause the type of harm that the exemption in section 17(1) is intended to prevent. [The hospital] understands that the Supplier's products and services have been developed and refined through a substantial investment by the Supplier in research and development. The IPC has recognized the value of protecting this kind of proprietary information in Orders that include PO-2020 and PO-3032.

[77] Affected party A submits that the disclosure of the information in the records would allow a competitor to develop similar products and obtain similar agreements in a shorter time period with a significantly lower capital investment that it. In particular, affected party A submits that the harm contemplated by section 17(1) would result from the disclosure of: the format and content of proposals and agreements; proprietary information of new products and pricing; details about implementation and transition plans; and reference lists of existing customers.[32]

[78] With respect to pricing information, affected party A relies on Orders PO-1791 and PO-1722, where this office held that a reasonable expectation of prejudice to a competitive position exists where information relating to price and bid breakdowns was contained in requested records and where the records would enable a competitor to gain an advantage over the third party by adjusting its bid on future business contracts. This, affected party A states, would interfere with its negotiations with other parties, resulting in agreements no longer being entered into, and result in losses to it.

[79] Disclosure of the proposal, or the content of the proposal in other records, would prejudice its competitive position, affected party A argues, as the style and format of the proposal was the result of a significant expenditure of time and resources and the application of accumulated experience. Affected party A also submits that disclosure of its customer list could be used by competitors to inappropriately interfere with its current business arrangements. Affected party A goes on to argue that disclosure of the proprietary information of new products currently in development, and new areas of focus, would allow competitors to rely on the same information for their own products without undertaking the rigorous research and product development it undertook. The disclosure of implementation and transition plans would allow competitors to follow similar strategies, including product planning and creation, developed at affected party A's cost and resources, resulting in a competitive disadvantage to it. Affected party A also argues that disclosure of the records could interfere with its negotiations with other organizations and third party payers, in that other parties could demand similar terms in other agreements.

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[32] Affected party A provided another example of the type of information that, if disclosed, would cause the harm contemplated by section 17(1). However, it will not be reproduced in this order, as it met this office's confidentiality criteria set out in *Practice Direction 7*.

[80] In addition, affected party A states that some of the information in the records could be misconstrued and used against it in third party proceedings, or for commercial or marketing purposes, to its financial detriment. Affected party A also refers to Order PO-2863 of this office dealing with volume discounts and submits that the circumstances in this appeal are analogous the volume discount scenario in that appeal.

[81] In sum, affected party A argues that the disclosure of the information at issue could damage its competitive position, resulting in undue loss, in terms of lost profits and undue gain to others.

[82] Affected party B submits that the disclosure of the information at issue would significantly prejudice its competitive position and cause undue loss to it. This information consists of proprietary and highly sensitive competitive information, including a detailed list of products and their specifications, offered payment terms, pricing information, its approach to the evaluation process, its market share and customer list, value add proposal and discounts for non-contracted items.

[83] If the above information is disclosed, affected party B argues, it will be used by competitors to undermine it and circumvent its success on future competitive tenders, as a competitor may:

- attempt to copy how affected party B operates its business;
- copy its information to include it in their own future submissions;
- tailor their submissions to specifically address any perceived weaknesses in affected party B's submissions or capabilities;
- gain insight into affected party B's business operations and strategy in responding to RFP's.

[84] Further, affected party B states that prior to the expiry of the current contract, the hospital will issue a new RFP for the supplies and equipment that were the subject of this RFP. If affected party B wishes to submit a proposal for this contract, its ability to do so will be significantly prejudiced if the information from its previous unsuccessful proposal is publicly available. Affected party B goes on to say that disclosure of the information at issue in these circumstances would interfere with its ability to negotiate this specific, pending contract. In addition this disclosure would reveal its unique approach to responding to RFP's, which would interfere with its ability to successfully participate in future unrelated RFP's at the hospital and other hospitals.

[85] Affected party B also raised the application of section 17(1)(b), submitting that disclosure of the information at issue would result in it and others bidders being reluctant to provide similar detailed product offerings and customer information to

government institutions in the future even though it is in the public interest that similar information continue to be provided. In addition, affected party B argues, bidders may not bid as aggressively on RFP's if their pricing information will be disclosed since such information will be used by competitors to undercut the price.

[86] As previously stated, affected party C did not provide representations in this appeal.

[87] The appellant submits that neither the hospital nor affected party A has provided sufficiently "detailed and convincing" evidence that disclosure of the information at issue would lead to the occurrence of harms described in section 17(1). The appellant argues that no harm has been found in this circumstance, despite the hospital's and affected party A's statements which:

> [T]reat as self-evident that other parties could somehow demand the same terms . . . regardless of the difference in their size or potential client base, or the passage of time, or other relevant factors that could be expected to inform any future negotiations. . .[33]

[88] The appellant further submits that affected party A's representations set out general statements about various alleged chilling effects that disclosure of the stale information in the records would have, but has failed to provide industry specific evidence as to how these general circumstances specifically apply to it and to the specific items of information withheld.

[89] The appellant goes on to state that in Orders MO-2686 and PO-3192, the fact that a tender process may become more competitive in the future, due to the disclosure of pricing information and product specifications, does not significantly prejudice prospective proponents. In this case, the appellant argues, affected party A has not specified the harm that would arise if the pricing and product specifications contained in its proposal were disclosed. At the very least, the appellant states, there cannot be a sufficient nexus between the disclosure of affected party A's name and the loss of contracts or business. The appellant also submits that affected party A has not taken the position that it will not bid on future contracts with the hospital, should the records be disclosed. Lastly, the appellant argues that the volume discount scenario is not analogous to the circumstances of this appeal.

[90] In reply, the hospital submits that rationale behind encouraging competition and a competitive procurement process is that the greater the number of suppliers submitting bids and the more homogeneous the product, the less flexibility any one supplier has over pricing. Contrary to the suggestion in the appellant's response, the hospital states it is not advancing the view that the procurement process will be more

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[33] Order PO-2758.

competitive if third party pricing information is disclosed. The hospital advises that its concern is that disclosing the pricing information will make the procurement process less competitive if suppliers adjust their offers to bring them in line with prices paid by the hospital in the past, and that suppliers may submit higher prices than they would otherwise.

[91] Further, contrary to the appellant's position, the hospital submits that the information in the proposal is not "stale," and there is no evidence that the suppliers' fixed costs of arthroscopic supplies and equipment, including labour and materials, have changed to any significant degree in the three years since the proposals were submitted.

[92] Lastly, the hospital states that the appellant relies on Order PO-2758 in making the argument that other suppliers may not be in a position to offer the terms offered by the affected party and for this reason, could not use the pricing information. The hospital submits that this order can be distinguished, as it involved multiple third parties with a diversity of products and business models. In this case, the hospital argues, a small company may specialize in certain types of supplies and equipment, or have an inventory of certain types of supplies or equipment that it is costly to hold, or have other reasons for offering particular terms and conditions of purchase. Having a reference point for pricing is extremely helpful to a competitor, even if it is not in a position to offer identical terms of sale.

[93] Also in reply, affected party A reiterated its original position and relies on Order PO-3011, in which Assistant Commissioner Beamish agreed that disclosure of a procurement contract could reasonably be expected to cause the requisite harms required of section 17(1).[34]

[94] In sur-reply, the appellant notes that the hospital argues that the disclosure of pricing information may result in suppliers submitting higher prices than they would otherwise. The appellant disagrees with this position and states:

> Without citing any historical data or any evidence of any kind, [the hospital] has expressed concern that the future RFP proposal prices *may* be higher – but still, it must be noted, not higher than that which was contracted with the Third Party. [The hospital] reaches that unsubstantiated assertion after relying on uncited decisions of the IPC which are *diametrically opposed* to the concerns expressed by [the hospital].
>
> [emphasis added]

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[34] Assistant Commissioner Beamish withheld <u>portions</u> of the contract under section 17(1).

[95] With respect to affected party A's position that the disclosure of pricing information would result in competitors undercutting its pricing, the appellant submits that affected party A refers to "analogous contexts" that are not applicable in this appeal, which is "fact-driven." The appellant goes on to argue that given that neither the hospital nor affected party A has provided specific facts or evidence in support of their respective positions, it is not surprising that they have diametrically opposing views of how disclosure of the records could affect pricing of future proposals.

Analysis and findings

[96] I will now determine whether the third part of the three-part test applies to the remaining information which I have found to be "supplied in confidence" consisting of:

- portions of record 3;
- portions of record 12;
- portions of records 20A, 20B and 20C;
- affected party A's proposal located in record 51; and
- affected party A's name in the contract located in record 51.

[97] The relevant subsections of section 17(1) state:

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

[98] Having reviewed the parties' representations and the records at issue, I find that, with one exception set out below, all of the information that I have found to be "supplied in confidence," if disclosed, would result in a reasonable expectation of harm to affected parties A and B under section 17(1)(a) and (c). I am satisfied that affected parties A and B have provided sufficiently "detailed and convincing" evidence that disclosure of the information could reasonably be expected to prejudice their competitive positions and cause them undue harm.[35]

[99] As previously stated, affected party C, although given notice of this appeal, did not provide representations. However, 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. 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. I have reviewed the records, and I find that it is clear on their face that the information relating to affected party C is the same type of information I have found to be exempt with respect to affected parties A and B. Having found that disclosure of affected parties A and B's information would cause the type of harm contemplated in section 17(1)(a) and (c), I find that the same harm would come to affected party C should its third party information be disclosed.

[100] As I have found most of the information in the records that was supplied in confidence exempt under sections 17(1)(a) and (c), it is not necessary to consider whether section 17(1)(b) would also apply to that information.

[101] I will now address the type of information that would not cause the type of harm contemplated in section 17(1)(a) or (c) if disclosed. I find that disclosure of the identity of the affected parties in all of the records would not cause the type of harm contemplated by section 17(1)(a) or (c). The hospital and the affected parties have not provided "detailed and convincing" evidence how the disclosure of their identities could reasonably be expected to cause prejudice to their competitive position or undue harm, nor is it evident on the face of the record. Therefore, I find that the identities of the affected parties are not exempt under section 17(1)(a) or (c). I note that the fact that affected party A was the preferred proponent has already been disclosed to the appellant as has the identity of all three affected parties as proponents. None of the affected parties has provided evidence that this disclosure actually caused them the type of harm contemplated by section 17(1)(a) or (c).

[102] Turning to the possible application of section 17(1)(b), with respect to the information I have found not exempt under section 17(1)(a) or (c), I am not satisfied that the evidence establishes the risk of harm described in section 17(1)(b) should the

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[35] I note however that in making this finding, I reject affected party A's volume discount analogy argument. I agree with the appellant that volume discounts are not applicable in the circumstances of this request.

information be disclosed. I am not convinced that disclosure of information about the affected parties' identity could reasonably be expected to lead to such information no longer being supplied in a future RFP process. On the contrary, in my view, companies submitting proposals in response to RFP's must identify themselves to the issuer of the RFP if they wish to secure the contract.

[103] Consequently, I find that all of the information that I have found to be "supplied in confidence" is exempt under section 17(1) of the *Act*, with the exception of the identities of the affected parties in records 3, 12 and 51.[36]

[104] I note that the hospital has also claimed the application of section 18(1) to records 3, 20A, 20B, 20C and 51, which I will consider below. However, as no other exemptions have been claimed with respect to record 12, I order the hospital to disclose the names of the affected parties in record 12, as well as the information I have already found not to be "supplied in confidence" in that record. I will provide the hospital with a copy of record 12 and highlight the portions that are not to be disclosed to the appellant.

C. Does the discretionary exemption at section 18(1) apply to the records?

[105] The hospital is claiming the application of sections 18(1)(c), (d) and (e) to portions of records 2, 3, 20A, 20B, 20C and 51. The hospital advised in its representations that it was not making representations in regard to section 18(1)(a), which it originally claimed in its decision letter. In addition, the hospital stated that it is making representations on section 18(1)(d), because it "rolled the injury to its financial interests into section 18(1)(c) in its decision letter." I note that the hospital has not indicated either in its representations or on the face of the records the specific portions of the records for which it is making the section 18(1) claim. As I have found some of the information in records 3, 20A, 20B, 20C and 51 exempt under section 17(1), I will consider the application of section 18(1) to the remaining portions of these records, as well as record 2.

[106] Section 18(1) states, in part:

> A head may refuse to disclose a record that contains,
>
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

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[36] The identities of the affected parties have already been disclosed in records 20A, 20B and 20C.

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

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

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

[108] For sections 18(1)(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[37]

[109] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[38] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[39]

[110] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their

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[37] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[38] Orders MO-1947 and MO-2363.
[39] Order MO-2363.

contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[40]

[111] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[41]

[112] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[42]

[113] In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution.[43]

[114] Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.[44]

[115] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.[45] The section does not apply

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[40] Orders MO-2363 and PO-2758.
[41] Orders P-1190 and MO-2233.
[42] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.
[43] Order PO-2064.
[44] Orders PO-2064 and PO-2536.
[45] Orders PO-2034 and PO-2598.

if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.[46]

Representations

[116] The hospital submits that disclosure of the information at issue would prejudice and cause injury to its economic interests, as well as the broader economic interests of Ontario, including the operation of public hospitals. Essentially, the hospital argues that disclosure of the information would discourage vendors from bidding on RFP's for medical supplies and equipment. The hospital states:

> . . . [M]aintaining the integrity of a competitive procurement process is essential to [the hospital] being able to purchase supplies and equipment on advantageous terms. Hospital performance is an important metric in the allocation of funding and it is in this sense, that [the hospital's] economic interests are affected by increases in the cost of supplies – particularly where other hospitals are able to procure the supplies and/or equipment on more favourable terms. (The Ministry of Health and Long-Term Care has metrics for various hospital services and hospitals are compared to one another for purposes that include funding). Hospitals across the province, Local Health Information Networks and the Ministry of Health and Long-Term Care are all trying to find ways of getting more value for money and improving the efficiency of health care delivery in Ontario. Permitting a competitor access to confidential information of a vendor for the competitor's own gain and at the cost of the vendor and ultimately patients and the health care system would undermine these efforts.

[117] With respect to section 18(1)(e), the hospital submits that the severed information in some of the records, including the contract contain procedures that apply to its negotiations with vendors that are not unique to this procurement and are likely to be used in future procurements.

[118] Affected party A was given an opportunity to provide representations on the possible application of the exemption in section 18(1) and did. It submits that the disclosure of the information at issue will cause harm to the hospital by diminishing its ability to obtain agreements or to obtain agreements on favourable terms. Affected party A cites Orders PO-2898 and PO-2944 in support of its position and submits that the disclosure of the records would similarly be injurious to the financial interests of the hospital, potentially affecting its ability to manage its medical device purchasing programs.

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[46] Order PO-2034.

[119] The appellant submits that the hospital has baldly submitted that disclosing the records would undermine the efforts of "getting more value for money and improving the efficiency of health care delivery in Ontario," and that the competitive process of future RFP's would be undermined. The appellant goes on to argue that the hospital has not provided any evidence that prospective vendors won't submit proposals in the future or that a reduced pool of potential vendors would increase the hospital's costs of entering into similar arrangements. In addition, the appellant submits that the current arrangement between the hospital and affected party A would likely have little effect on a future bidding process because of changes over time in the economic climate and the hospital's bottom-line needs.[47]

[120] Further, the appellant states that the hospital has not provided detailed and convincing evidence to establish a reasonable expectation of harm, taking into consideration the following factors:

- affected party A has not stated that it will not participate in bidding for future RFP's if the records are disclosed;

- if a competitor wishes to secure a contract, it will do so by charging lower fees to the institution than its competitor, resulting in a net saving to the institution;[48] and

- the hospital is making unsubstantiated allegations of a negative effect on the RFP process and has not been able to point to experiences where, because of disclosure of similar records, there was an exploitation or manipulation of the RFP process.[49] The appellant states that this type of argument presumes a lack of sophistication and integrity in the bid evaluation process.

[121] With respect to the hospital's claim that section 18(1)(e) applies to exempt the records, the appellant states:

> While [the hospital] may potentially use similar procedures in future RFP's, it is entirely unclear and unsubstantiated why disclosure of years-old records should be precluded in this instance. As noted above, the current contract between [the hospital] and the Third Party would likely have little effect on future bidding process due to changes over time in the economic climate and [the hospital's] future "bottom line" needs.

[122] In reply, the hospital argues that suppliers would be discouraged from bidding on RFP's for arthroscopic supplies and equipment, or would set their prices in a manner

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[47] The appellant cites Order MO-1706 to support this position.
[48] See Order PO-2758.
[49] See Order PO-2987.

that was disadvantageous to the hospital on the basis of their knowledge of previous arrangements accepted by it. In addition, the hospital reiterates the relationship between its fiscal performance and its funding. As such, the hospital argues, the importance of the procurement process impacts its ability to meet its budget and satisfy the demand for health care services.

[123] The hospital also argues that the appellant has suggested that any negative impact on the procurement process by the disclosure of the records would be a failure of the hospital as a result of its "lack of sophistication and integrity in the bid evaluation process," relying on Order PO-3148. The hospital counters that this order was not referring to the evaluation of the substantive provisions of proposals when it spoke of the bid evaluation process. In any event, the hospital submits that the evaluation of strong proposals is difficult and an issuer may have difficulty distinguishing between a proposal that is the product of the knowledge, skill, judgment and investment of a proponent and the proposal of a free-rider.

[124] With respect to the possible application of section 18(1)(e), the hospital states:

> The appellant's contention regarding the relevance of the Agreement in future procurements for arthroscopy supplies and equipment was addressed above. There are a number of factors that make the terms of the Agreement of continuing relevance, including the decrease in the percentage of Ontario health care funding provided to hospitals (according to data of the Ministry and the Canadian Institute for Health Information) and the inelasticity of hospital demand for the arthroscopy supplies that were purchased through the RFP.

[125] In sur-reply, the appellant contends that the hospital has failed to provide detailed and convincing evidence of the type of harm contemplated in section 18(1). In addition, the appellant states that the hospital's position is that disclosure of the records would discourage suppliers from bidding on future RFP's. The appellant argues that the hospital's position is based on an assumption, and that the hospital has not adduced actual evidence that such a thing would occur. Even affected party A, the appellant states, has not stated that it will not participate in future RFP's, should the records be disclosed.

[126] With respect to the hospital's concern about free-riders, the appellant submits that: there is no evidence that free-riding will occur if the records are disclosed; and that if the hospital's ability (or inability) to distinguish past "legitimate" proposals from free-riders has not historically resulted in harm to it, it is unclear how the disclosure of the records would now harm the hospital.

[127] In regard to the possible application of section 18(1)(e), the appellant submits that the information in the contract is over three years old and will be even older once

the next RFP process is implemented. Regardless of the alleged inelasticity of the current needs and demands of the hospital, the appellant argues, it is entirely unclear and unsubstantiated why disclosure of years-old records should be precluded in this instance.

Analysis and findings

[128] To be clear, only section 18(1) was claimed with respect to record 2. The withheld information in that record consists of the estimated cost of the project, information regarding the length of the contract and two pricing options. The remaining information at issue in records 3, 20A, 20B, 20C and 51 that I have not found to be exempt under section 17(1) of the *Act* consists of:

- record 3 – the outcome of the negotiations, the names of the three proponents, the final scores awarded to them by the selection team, the identity of the recommended proponent and justification for same, the objectives and outcome of the negotiations, the contract value and term, the financial implications and impact to the hospital, and the operational implications and impact to the hospital;

- records 20A, 20B and 20C – the pricing options, pricing rating methodology and total available score for pricing component; and

- record 51 – the withheld portions of the contract between the hospital and affected party A.

[129] Essentially, the hospital's argument is that disclosure of the information would discourage vendors from bidding on RFP's for medical supplies and equipment, or would set their prices in a manner that was disadvantageous to the hospital on the basis of their knowledge of previous arrangements accepted by it. With respect to section 18(1)(e), the hospital submits that the severed information in some the records, including the contract, contain procedures that apply to its negotiations with vendors that are not unique to this procurement and are likely to be used in future procurements.

[130] Affected party A's argument is that the disclosure of the information at issue will cause harm to the hospital by diminishing its ability to obtain agreements or to obtain agreements on favourable terms.

[131] The appellant's position is that the hospital has failed to provide sufficiently "detailed and convincing" evidence to establish a "reasonable expectation of harm" of prejudice to the hospital's economic interests or competitive position or injury to the financial interests of the province or its ability to manage the economy.

[132] I agree with the appellant's position. The hospital has argued that the disclosure of the information at issue would result in fewer proponents bidding on future RFP's or bidding to the extent that they would obtain more favourable terms than in the past. However, as previously stated, evidence amounting to speculation of possible harm is not sufficient.[50] In my view, the hospital's argument is speculative and has not made a sufficient connection between the disclosure of the type of information at issue and a resulting reasonable expectation of harm to the hospital or to the province, as contemplated by sections 18(1)(d) and (d). In addition, while I am sympathetic to the hospital's concern about the allocation of health care funding, the hospital has not provided sufficiently detailed and convincing evidence as to exactly how the disclosure of the information at issue would result in third parties no longer bidding on future RFP's, or how the acquisition of the information at issue could be used to gain more favourable terms at the hospital's expense.

[133] I also note that in the orders referred to by affected party A relating to volume discounts, the institution provided significantly detailed and convincing evidence to show how the disclosure of the volume discounts could reasonably be expected to cause the harms in section 18(1). That type of detailed evidence is lacking in this appeal.

[134] Lastly, with respect to possible application of section 18(1)(e), the hospital's argument is that the severed information in some of the records, including the contract, contain procedures that apply to its negotiations with vendors that are not unique to this procurement and are likely to be used in future procurements. As previously stated, this section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow.[51] The hospital has not provided sufficiently detailed and convincing evidence to substantiate the section 18(1)(e) claim. The hospital has simply provided a very general statement, without explaining where these procedures are in the records and how they qualify as relating to a strategy or approach to the negotiations themselves.

[135] Consequently, I find that the exemption in sections 18(1)(c), (d) and (e) do not apply to the remaining information at issue, and I order the hospital to disclose the records as set out in the order provisions. As I have not upheld the application of the exemption in section 18(1), it is not necessary for me to consider the hospital's exercise of discretion.

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[50] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[51] Order PO-2034.

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17 exemption?

[136] The appellant has raised the possible application of the public interest override in section 23 of the *Act* to the information I have found not to be exempt under section 17(1). Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[137] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[138] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [52]

[139] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[53] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[54]

[140] A public interest does not exist where the interests being advanced are essentially private in nature.[55] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[56] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[57]

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[52] Order P-244.
[53] Orders P-984 and PO-2607.
[54] Orders P-984 and PO-2556.
[55] Orders P-12, P-347 and P-1439.
[56] Order MO-1564.
[57] Order P-984.

[141] Any public interest in *non*-disclosure that may exist also must be considered.[58] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[59]

[142] A compelling public interest has been found to exist where, for example:

- public safety issues relating to the operation of nuclear facilities have been raised; [60] or

- disclosure would shed light on the safe operation of petrochemical facilities[61] or the province's ability to prepare for a nuclear emergency. [62]

[143] A compelling public interest has been found *not* to exist where, for example:

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[63] or

- the records do not respond to the applicable public interest raised by appellant.[64]

Representations

[144] The appellant submits that in this instance, there is a clear public interest in disclosing information that relates to the health care and treatment of Ontarians. The appellant states:

> It is of vital importance that it be transparent that [the] price of medical equipment and supplies were not the primary factors in this RFP process, but that the successful proponent also provided the best quality of the equipment and supplies.
>
> As such, it is equally vitally important that there be transparency with respect to the criteria used and the evaluation of that equipment and supplies. Such information is contained within the Disputed Records, as they encompass that specific process. Disclosure of the Disputed Records will evidence whether the best quality equipment and supplies were

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[58] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[59] Orders PO-2072-F, PO-2098-R and PO-3197.
[60] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[61] Order P-1175.
[62] Order P-901.
[63] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[64] Orders MO-1994 and PO-2607.

> chosen by those best qualified to do so; and, if not, whether the other criteria for selecting the Third Party were worth the potential sacrifice in quality.

[145] In addition, the appellant states that in Order PO-1805, this office held that it can be in the public interest to disclose business information where it relates to matters of public health and safety and environmental protection. In this instance, the appellant argues, the records ought to be ordered disclosed to ensure that this specific RFP process was in the best interests of maintaining the health and safety of the public.

[146] In response to the appellant's representations, the hospital submits that although hospital funding is a matter for the provincial government and the Ministry of Health and Long-Term Care, the disclosure of information relating to a single contract for what are "basic" arthroscopic medical supplies and equipment would not in and of itself provide the public with information that would permit it to voice its opinion or make political choices related to the delivery of health care or its funding. Further, the hospital states that there is a significant amount of information in the public domain about government expenditures on health care, the percentage of expenditure that goes to public hospitals, and to individual hospitals. The hospital advises that if the appellant is interested in information that would assist the public in determining whether the spending on health care is appropriate, there are other more effective sources of information.

[147] Further, the hospital advises that the province put in place and requires organizations that receive public funding to follow the "Broader Public Sector Procurement Directive" to procure goods and services over a threshold amount. The purpose of the Directive, the hospital states, is to establish processes and requirements necessary for a fair and transparent procurement process in the interest in the appropriate use of public funds. The hospital advises that the procurement of the arthroscopic supplies and equipment that is the subject matter of this appeal was conducted in accordance with the Directive.

[148] Moreover, it is the hospital's position that the appellant is seeking access to the records for a primarily private reason, which is being "dressed up" as a matter of health and safety that could influence the public vote.

[149] Affected party A was provided with the opportunity to provide representations on the possible application of the public interest override and did. It submits that the purpose of section 17(1) is to protect the confidential informational assets of businesses that provide information to government institutions. The records, affected party A states, contain just the sort of business information that should be protected by the *Act*. In addition, affected party A argues that disclosure of information acquired by a business only after a substantial capital investment has been made could discourage other firms from engaging in such an investment, or might substantially reduce the

willingness of businesses to comply with reporting requirements or to respond to government RFP's. All of these possible consequences, affected party A argues, could be contrary to the public interest.

[150] In sur-reply, the appellant states that the hospital has indicated in its representations that it has historically faced difficulty distinguishing legitimate proposals from free-rider proposals. This difficulty, the appellant argues, raises concern of a need for greater transparency in the disclosure of the records, to ensure that Ontarians have received treatment using the highest quality-for-price supplies available.

Analysis and findings

[151] In order for me to find that section 23 of the *Act* applies to override the exemption of the information that I have found qualifies for exemption under section 17(1), I must be satisfied that there is a *compelling* public interest in the disclosure *of that particular information* that *clearly outweighs* the purpose of the third party information exemption. The information at issue consists of affected party A's proposal, in part, as well as information the hospital reproduced from the three affected parties' proposals in other records.

[152] The appellant's position is that there is a compelling public interest in the disclosure of these records:

- to ensure that Ontarians have received treatment using the highest quality-for-price supplies available;
- to ensure that this specific RFP process was in the best interests of maintaining the health and safety of the public;
- to show transparency that the price of medical equipment and supplies were not the primary factors in this RFP process, but that the successful proponent also provided the best quality of the equipment and supplies; and
- to show transparency with respect to the criteria used and the evaluation of the equipment and supplies.

[153] I find that there is insufficient evidence before me that the exempt portions of the records contain specific information which identifies an actual public health or safety concern regarding the health care of Ontarians. Accordingly, in my view, there is insufficient evidence demonstrating a clear connection between the information contained in the records and a public health or safety issue identified by the appellant.

[154] In addition, while I agree that there is a public interest in the quality and cost of health care in the province, the inquiry does not end with this conclusion because I must also be satisfied that the public interest is a *compelling* one. As stated previously, while the *Act* is silent as to who bears the burden of proof under section 23, it has been acknowledged that it would be unfair to impose the full onus on an appellant who obviously cannot review the withheld information prior to providing representations in support of the application of section 23. This means that I must look to the appellant's representations *and* the information that has been withheld to answer this "compelling question." Having done so, I conclude that sufficient evidence as to the public interest being compelling in the circumstances of this appeal has not been provided by the appellant; nor is it evident upon consideration of the withheld third party information. Consequently, I do not find that there is a compelling public interest in the information that I have found to be exempt, which is third party information regarding pricing, equipment, customer lists among other information.

[155] In addition, the appellant has received information regarding the objectives of the hospitals' RFP, evaluations of the three affected parties, and will be receiving more information about the outcome of the negotiations between the hospital and affected party A as a result of this order. In my view, meaningful scrutiny of both the objectives of the RFP and the contractual terms between affected party A and the hospital is possible. As the evidence provided does not satisfy me that there is a compelling public interest in the disclosure of the withheld information, I find that the first part of the test under section 23 is not met.

[156] Since both components of the first part of the test for the application of the public interest override are not met, it is unnecessary for me to review the second part of the test. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

[157] In sum, I uphold the hospital's decision, in part, and order it to disclose some records to the appellant. I find that the proposals of the unsuccessful proponents are not responsive to the request. I uphold the application of the mandatory exemption in section 17(1), in part. I do not uphold the application of the discretionary exemption in section 18(1), and I find that there is no public interest in the disclosure of the information I have found to be exempt.

ORDER:

1. I order the hospital to disclose record 2 to the appellant by **September 4, 2014** but not before **August 29, 2014**.

2. I order the hospital to disclose records 3, 12, 20A, 20B, 20C and 51, in part to the appellant by **September 4, 2014** but not before **August 29, 2014**. With respect to records 3 and 12, I have included copies with this order and have

highlighted the portions that are **not** to be disclosed to the appellant. With respect to records 20A, 20B and 20C, I have included a sample of record 20A and highlighted the information that is **not** to be disclosed to the appellant. The severances in this record also apply to the remaining pages of record 20A, as well as to records 20B and 20C. With respect to record 51, the hospital is to disclose only the contract/agreement portion of the record. The proposal is to be withheld.

3. I reserve the right to require the hospital to provide me with copies of the records I have ordered disclosed to the appellant.

Original signed by: July 29, 2014
Cathy Hamilton
Adjudicator