Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3316

Appeal PA11-536

Ministry of Government Services

March 7, 2014

Summary: The ministry received a request for access to records relating to the successful proposal for conference event planning and management services submitted under a specified request for services. The ministry notified the third party company that provided the successful proposal of the request and sought its views on disclosure. It then granted the requester complete access to the information sought, withholding information that it determined to be exempt under section 21(1)(1) (invasion of privacy) of the *Act*. The third party company appealed the ministry's decision claiming that the mandatory exemption in section 17(1) (third party information) applied to the records. The original requester did not appeal the ministry's decision to withhold information that it determined to be exempt under section 21(1)(1). In this order, the adjudicator finds that the exemption in section 17(1)(a) applies to part of the proposal, but the other information remaining at issue does not qualify for exemption under section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(2), 17(1)(a), (b) and (c), 21(1).

Orders Considered: Orders MO-1368, MO-1504, MO-1769, MO-1888, PO-2435, PO-2453, PO-2485, PO-2637, PO-2987 and PO-2963.

Cases Considered: *R.I. Crain Ltd. v. Ashton*, [1949] O.R. 303 (H.C.), affirmed by [1950] O.R. 62 (C.A.); *Société Gamma Inc. v. Canada (Department of the Secretary of State)* (1994), 56 C.P.R. (3d) 58 (F.C.T.D.); *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

OVERVIEW:

[1] This is a third party appeal of a decision made by the Ministry of Government Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) to disclose information pertaining to the appellant in full to a requester.

[2] The requester sought access to information relating to conference event planning and management services identified by the requester relating to a specified Request for Services [RFS] pertaining to an Information Management, Access and Privacy Conference under a specified Vendor of Record [VOR] Arrangement entitled "Conference Event Planning and Management Services".

[3] In particular, the requester sought access to:

- all questions/correspondence relating to this RFS
- copies of reviewed proposals submitted under this RFS
- copies of conducted evaluations of submitted proposals

[4] The ministry identified responsive records and notified the appellant under section 28(1) of the *Act* for their position on disclosure. Relying on section 17(1) (third party information) of the *Act*, the appellant objected to the disclosure of any of its information. Notwithstanding the appellant's objection, the ministry granted partial access to the responsive records, only withholding information that it determined to be subject to section 21(1) (invasion of privacy) of the *Act*. The original requester did not appeal the decision of the ministry to withhold the information that the ministry determined to be subject to section 21(1). Accordingly, that information and the application of section 21(1) of the *Act* are no longer at issue in the appeal.

[5] The appellant appealed the ministry's decision to release the balance of the information in the records at issue.

[6] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[7] In the course of my inquiry I sent a Notice of Inquiry to the appellant setting out the facts and issues in the appeal. The appellant provided representations in response

to the Notice. Although not previously raised as an issue in the appeal, the appellant also provided supplemental representations on the application of the public interest override at section 23 of the *Act*.[1] I then sent a Notice of Inquiry to the ministry along with the representations of the appellant. The ministry provided responding representations. I determined that the ministry's representations raised issues to which the appellant should be given an opportunity to reply. The appellant provided reply representations. I then sought representations from the original requester on the facts and issues set out in a Notice of Inquiry, the representations of the ministry and the non-confidential representations of the appellant. The original requester provided brief responding submissions.

RECORDS:

[8] All of the records that the ministry identified as being responsive to the request relate to a Request for Services for Conference Event Planning and Management Services for an event held in 2012.

[9] The records at issue in this appeal consist of email correspondence, a document entitled "Request for Services", proposal documents, and a draft agreement.

[10] For the purposes of the analysis that follows, I have numbered the records at issue as Records 1 to 11.

DISCUSSION:

[11] The appellant claims that the balance of the information at issue in this appeal is subject to exemption under sections 17(1)(a), (b) and/or (c) of the *Act*. Those sections read:

> 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

[1] However, as the appellant is objecting to the disclosure of its information, and the possible application of section 23 was not raised by the ministry or the original requester, there being nothing, in my view, that merits its application in this appeal, I will not be considering the possible application of section 23 of the *Act* in this decision. That said, some of the submissions made by the appellant on this topic are germane to the discussion of section 17(1) and I have referred to certain of these submissions in this decision.

> 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.

[12] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

[13] For sections 17(1)(a), (b) or (c) to apply, the appellant must satisfy each part of the following three-part test:

> 1. the record must reveal information that reveals a trade secret or is commercial 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 information must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

Do the records reveal information that qualifies as a trade secret and/or commercial information?

[14] The appellant submits that the balance of the information at issue qualifies as a trade secret and/or commercial information.

[15] Relying on *R.I. Crain Ltd. v. Ashton.*[4] (*R.I. Crain Ltd.*), the appellant submits that the information that the ministry decided to disclose falls within the scope of trade secrets as outlined in that decision and decisions of this office. The appellant also takes

---

[2] *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.)].
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] [1949] O.R. 303 (H.C.J.), affirmed by [1950] O.R. 62 (C.A.).

the position that the information qualifies as commercial information as defined in decisions of this office. The appellant submits:

> If [the ministry] had taken the time to analyze and make a determination with respect to the specifics of the information, it would have had to have come to the conclusion that the information constitutes trade secrets and commercial information of the appellant.

[16] The appellant then provides examples of information in the records that it asserts would support its position. The appellant grouped this information under the following four categories: Risk Management Assessment, Detailed Work Plan, Marketing Strategic Plan and Event Registration.

[17] The ministry's representations do not specifically address the appellant's position with respect to the nature of the information at issue, simply submitting that:

> A large portion of the information claimed by the appellant to be subject to the section 17 exemption has already been made public or is generally known information. This information includes the fees charged to delegates, the conference schedule, marketing methods, printouts from websites for previous conferences, and the name of the registration service.

[18] In reply, the appellant submits that:

> This argument misapprehends completely the material in the record to which the section 17 exemption applies. It is trite to say that the section 17 exemption does not apply to information that has already been made public or is not generally known. The appellant does not object to the release of information in this record that has been made public or is generally known. However, the section 17 exemption is being claimed for information in this record that has not already been made public and is not generally known. [Footnote omitted]
>
> The fact is that commercially-sensitive trade secrets of the appellant that are included in this record are separate from information that has been made public or information that is publicly known, and is the kind of information that is specifically protected by section 17 of [*FIPPA*].

[19] The appellant then provides a further detailed description of the nature of the information in the records that falls within the four categories set out above[5]:

[5] Portions of the appellant's representations on this topic were withheld due to confidentiality concerns.

> Risk Management Assessment: A detailed account of the process developed … defines the firm's unique approach to managing risks throughout the planning process. [The appellant's] assessment method has been uniquely developed by [the appellant] and is not public information. It comprises the intellectual property of [the appellant] and it constitutes a trade secret of [the appellant] …
>
> Detailed Work Plan: The work plan … was designed specifically and uniquely by [the appellant] to manage the process throughout the project's life cycle. If this detailed information was disclosed, it would be accessible to the only other firm that qualified as part of the VOR procurement process for conference planning, and it would render [the appellant] commercially uncompetitive. This work plan method has been uniquely developed by [the appellant] and is not public information. It comprises the intellectual property of [the appellant] and it constitutes a trade secret of [the appellant].
>
> Marketing Strategic Plan: The detailed account of [the appellant's] methods designed to maximize market penetration of an event … discloses a unique and specific method of an effective … distribution channel … and is not public information.
>
> Event Registration: … [the appellant] invested considerable time and resources researching and securing this on-line registration process. This information has been uniquely developed by [the appellant] and is not in the public domain.

[20] The appellant further submits that:

> The position taken by [the ministry, set out above,] is simply incorrect, and betrays an apparent lack of effort to consider and analyze the information on record to comprehend which of the information has been made public or is generally known and which constitutes commercially-sensitive trade secrets of the appellant.

[21] The original requester submitted that it was their proprietary business model that formed the basis of the VOR arrangement.

Analysis and findings

[22] *R.I. Crain Ltd.* is one of the authorities discussed in the majority reasons of the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*[6] (*Merck Frosst*). Another of the authorities is *Société Gamma Inc. v. Canada (Department of the Secretary of State)* (1994)[7] (*Société Gamma Inc.*), where Strayer J. considered a claim that tender submissions made in connection with a bid to obtain a contract for translation services constituted a trade secret and were, therefore, exempt from disclosure. In the course of the analysis of the definition of trade secret under the Federal *Access to Information Act*[8], he wrote:

> The applicant appears to assert that it is the whole of the Proposal which is a "trade secret". [Footnote omitted]. There is unfortunately no authoritative jurisprudence on what is a "trade secret" for the purposes of the Access to Information Act. One can, I think, conclude that in the context of subsection 20(1) trade secrets must have a reasonably narrow interpretation since one would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial . . . confidential information supplied to a government institution . . . treated consistently in a confidential manner . . . " which is protected under paragraph (b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution. I am of the view that a trade secret must be something, probably of a technical nature,[9] which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure. Clearly the whole of the Proposal of the applicant cannot be of that nature and the applicant has not identified any particular aspect of it which must be regarded as a trade secret. Also, for reasons which I will indicate below, I think that most of the Proposal format which the applicant strives to protect cannot be regarded as "secret" at all.

[23] I find that all of the records claimed to be subject to section 17(1) contain information relating to the provision of conference event planning and that this information qualifies as commercial information as defined in past orders of this office

---

[6] 2012 SCC 3.
[7] 56 C.P.R. (3d) 58 (F.C.T.D.).
[8] R.S.C. 1985, c. A-1.
[9] Strayer J. noted that this impression is strengthened by the French version which uses the term "secrets industriels" as the equivalent of "trade secret". The same wording appears in the French version of *FIPPA*.

for the purposes of section 17(1).[10] That said, I am not satisfied on the evidence before me that the information that the appellant seeks to withhold meets the threshold of a trade secret as defined in orders of this office under the *Act*[11], or as discussed in *R.I. Crain Ltd.*, *Société Gamma Inc.* or *Merck Frosst*. This is because my review of the records, as well as the examples of information that the appellant says is its intellectual property and/or a trade secret, indicates that it does not meet the definition of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism", or otherwise meets the definition of a "trade secret" as contemplated by section 17(1).

Was the information in the records supplied in confidence either implicitly or explicitly?

Supplied

[24] 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.[12] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[13]

[25] The ministry submits that in deciding to disclose information to the requester:

> The ministry followed previous decisions of the IPC in relation to winning proposals and contracts from a competitive procurement process in making its decision to disclose the records. In particular, the ministry relied on IPC orders which have found:
>
> > Information contained in a winning proposal in a competitive procurement process will normally not qualify as information that is "supplied" to an institution for the purposes of the section 17 exemption [PO-2435, PO-2453 and PO-2963].

---

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

[11] *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which (i) is, or may be used in a trade or business, (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

[12] Order MO-1706.

[13] Orders PO-2020 and PO-2043.

[26] The appellant submits that none of the orders relied upon by the ministry:

> … is authority for the proposition that the Commissioner must rule in every case that the successful proposal in a government contracting situation is not considered to be "supplied". Each case must be examined on its own merits.

[27] The appellant submits that disclosure of the information at issue would permit accurate inferences to be made with respect to the underlying non-negotiated confidential information supplied by the appellant. The appellant provides the following non-confidential examples in support of its position:

> [The appellant] provided [the ministry] with the detailed information of its unique approach, processes and philosophy in its proposal (as described above) with the full knowledge that there was only one other competitor invited to bid under the procurement process and in confidence that the information would remain confidential.
>
> [The appellant] supplied the intellectual and commercially sensitive information (detailing specific business processes, marketing and on-line registration) under this procurement process in the confidence that it would not be disclosed to a third party, most notably to its sole competitor, in order to protect the integrity of the information and the competitive process.

[28] The appellant further submits that certain information in the proposal is immutable[14], or not susceptible of change, providing the following non-confidential examples:

- the identification of a specific type of distribution channel.
- the specific detailed disclosure of the method to register delegates and collect online payments.
- the detailed description of the firm's operating philosophy as detailed in the manner in which the firm manages the program design (identifying

[14] The appellant made this submission with respect to the "immutability exception" to the finding that the provisions of a contract in general have been treated as mutually generated, rather than supplied by a third party, even where the contract is preceded by little or no negotiation. 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. See Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

> topics and speakers), risk management assessment, marketing (including event branding) to maximize event attendance.

In confidence

[29] In order to satisfy the "in confidence" component of this part of the section 17(1) test, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[15]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[16]

[31] The appellant submits that the information was supplied to the ministry in confidence and that the appellant had "a reasonable expectation that the confidential nature of the information would be respected." The appellant submits that the cover letter to its proposal set out that:

> The information contained in this document is confidential and is being provided solely for the purposes of evaluating our submission and awarding of a contract. Should there be any other requirement for the use of this information, please contact us for permission.

[32] The appellant further submits that in the course of dismissing its objection to disclosure prior to issuing its decision letter, the ministry wrote that:

---

[15] Order PO-2020.
[16] Order PO-2043.

> Much of the information claimed to be confidential such as the fees to be charged to delegates, the conference schedule, marketing methods, the name of the third-party online registration service used by your company and printouts of websites for previous conferences developed by your company cannot be considered to have been provided "in confidence", as they are either already publicly available (previous conference websites; the name of the registration service), or will be made publicly available (delegate pricing, conference schedule, marketing methods and value-added propositions, such as conference greening initiatives) on the internet and to conference participants.

[33] The appellant states that while certain information should be withheld, it does not object to disclosure of other information, specifically:

> … the disclosure of information that has been legitimately made public (such as the fess to be changed to delegates, the conference schedule and any other information that has been legitimately made public). However, (and in contradiction to the general, sweeping conclusion of [the ministry] decision) the information that is described in this submission above has never been made public, since it is information that comprises trade secrets and commercial information of [the appellant] …

Analysis and findings

Supplied

[34] This office has previously found that RFP proposals provided to an institution as part of the process followed in seeking a supplier of goods or services through a competitive selection process are "supplied" for the purposes of part 2 of the test under section 1(1). Information contained in proposal documents that remains in the form originally provided by a proponent is considered not to be the product of any negotiation between the institution and that party.[17] Information such as the operating philosophy of a business, or a sample of its products, is thus considered relatively immutable and not susceptible to change.[18]

[35] That said, I find that records 1 to 8 include information that was provided by the ministry and not the appellant. This would include information contained in emails exchanged between employees of the ministry, emails sent from employees of the ministry to the appellant, with attachments, and a Request for Services invitation sent to the appellant.

---

[17] See, for example, Orders PO-2637 and PO-2987.
[18] Order PO-2433.

[36] Record 9 is a redacted[19] and annotated copy of the appellant's proposal and records 10 and 11 are annotated copies of the appellant's complete proposal. I will deal with each of these records individually.

Record 1

[37] This record is an email sent from the ministry to the appellant with an attached Service Level Agreement generated by the ministry based on information obtained, to a small degree, from the appellant's successful proposal. For the most part, the terms of the service level agreement mirror the provisions of the ministry's request for services dated July 12, 2011. In my view, with some small exceptions such as the registration costs, which would reveal information contained in the appellant's proposal, the information in Record 1 and the attachment was not supplied by the appellant.

Records 2 and 3

[38] Records 2 and 3 consist of email exchanges between the ministry and the appellant. The majority of the information in the first email in the exchange was not supplied by the appellant.

Record 4

[39] This is an email exchange between the ministry and the appellant. The attachment to this email exchange is the proposal which will be dealt with separately, below. The majority of the information in the first email in the exchange was not supplied by the appellant.

Records 5 and 6

[40] Records 5 and 6 consist of email exchanges between the ministry and the appellant. The majority of the information in the first email in the exchanges was not supplied by the appellant. Based on its nature, I make the same finding with respect to certain information in the third email in the exchanges, which is a list of questions with answers. I am satisfied that information in the second and fourth emails and that other information in the third email were supplied by the appellant.

Record 7

[41] This record is a Request for Services. The majority of the information in this record was sourced from and supplied by the ministry, not the appellant.

[19] With the information that the ministry claimed was subject to section 21(1) of the *Act* removed.

Record 8

[42] Record 8 consists of an email exchange between the ministry and the appellant. The attachment to this email will be dealt with separately. The majority of the information in the first and fourth emails in the exchanges was not supplied by the appellant. I am satisfied that information in the second and third emails was supplied by the appellant.

Records 9, 10 and 11

[43] Record 9 is a redacted[20] and annotated copy of the proposal submitted by the appellant in response to Record 7, the Request for Services. Records 10 and 11 are annotated unredacted versions of Record 9. It is clear by reading the annotations on Records 9, 10 and 11 that they were added to the records by the ministry in the course of its assessment of the proposal, rather than added by the appellant. That said, any determination that I make that certain portions of the proposal be withheld will also apply to the associated annotations, because disclosing them would reveal only disconnected snippets or worthless, meaningless or misleading information.[21]

[44] I am satisfied that the remainder of records 9, 10 and 11 were supplied by the appellant.

[45] I will now consider whether the information that I have not determined to have been supplied by the ministry, was provided by the appellant to the ministry in confidence.

In confidence

[46] The appellant relies upon a statement contained in a letter accompanying its proposal in support of its position that it had a reasonable expectation of confidentiality when its proposal was submitted. There is no evidence before me that the appellant provided a similar statement with respect to the other records at issue in this appeal.

[47] The appellant also submits that, in the circumstances, it had a reasonable expectation that the confidential nature of the information it submitted in the proposal would be respected. Although there is no evidence of corresponding contemporaneous confirmation from the ministry as to the confidential treatment of the proposals submitted in response to the request for services, there is also no evidence that the ministry took steps to advise the appellant that this would not be the case, nor any

[20] With the information that the ministry claimed was subject to section 21(1) of the *Act* removed.
[21] See section 10(2) of the *Act*, Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner*) (1997), 102 O.A.C. 71 (Div. Ct.).

evidence that it would not be treated in a confidential manner. In all the circumstances, and considering the nature of this request for proposals process, I am satisfied that the appellant had a reasonable expectation of confidentiality with respect to the proposal at the time that it was submitted.

[48] Except for certain discreet information in the attachment to Record 1, I do not make the same finding with respect to the information supplied by the appellant in the email exchanges comprising Records 1 to 8. There is no similar confidentiality statement applying to the email exchanges, nor in my view, could the confidentiality statement in the letter accompanying the proposal be expanded to cover this information. In my view, the appellant has failed to provide me with sufficient evidence to establish that it had a reasonable expectation of confidentiality with respect to this information.

[49] I will address the ministry's position that information in the proposal was and/or became publicly available in the discussion on harms, below.

Conclusion: Part 2

[50] Based on my conclusions set out above I find that the information in the proposal was submitted with a reasonable expectation of confidentiality. Because revealing certain discreet information in the attachment to Record 1 that originated from the proposal would reveal information from the proposal, I find that it was also supplied in confidence. In my view, none of the other information in the other records at issue was supplied in confidence and I find that part 2 of the section 17(1) test has not been met with respect to that information. As all three parts of the section 17(1) test have to be met for the information to qualify for exemption, it is not necessary for me to consider the harms portion of section 17(1) with respect to the remainder of Records 1 to 8 and I will order that they be disclosed to the appellant.

[51] I will now consider whether disclosing the information remaining at issue in the attachment to Record 1 and in Records 9, 10 and 11, being versions of the proposal at issue, will give rise to the harms alleged.

Would disclosure of the information in the records remaining at issue give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 17(1) will occur?

[52] To meet this part of the test, the appellant must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[22]

[53] 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.[23]

[54] 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*.[24]

[55] With respect to the section 17(1) test, the ministry submits that:

> Where information is general in nature or has been made public, it will not meet the test for the section 17 exemption [MO-1769]. As stated above, a large portion of the information at issue in this appeal has already been made public or is generally known information, including: the fees charged to delegates, the conference schedule, marketing methods, printouts from websites for previous conferences, and the name of the registration service.
>
> "Detailed and convincing" evidence is required to establish a reasonable expectation of harm for the section 17 exemption to apply. In the appellant's original submissions, there was not "clear and compelling" evidence to suggest harm would result from the release of the records other than the suggestion that the bidding process for government tenders would be more competitive. In determining that part 3 of the harms test was not met, the ministry followed the IPC's reasoning that "the fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them [PO-2485].

---

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

> …
>
> The ministry has considered transparency, government accountability and the third party economic interests in its decision to release the record at issue.

[56] The appellant submits that:

> Disclosure of the intellectually and commercially-sensitive information supplied to [the ministry] about the appellant's business methods, practices, procedures and processes particularly [the identified] distribution channel and registration processes, would seriously restrict the appellant's ability to compete in future not only under the VOR procurement process, but also in the general marketplace. The appellant's use of these processes is not in the public domain and provides the firm with its competitive advantage in the marketplace. If disclosure of these processes were made, the ability of the appellant to compete under the current procurement scenario would be in serious jeopardy, leaving [the ministry] with only one service supplier and a non-competitive process.

Section 17(1)(a)

[57] With respect to the section 17(1)(a) harms, in its non-confidential representations, the appellant submits in particular that disclosing the information:

> … will seriously prejudice the competitive process as [the appellant's] sole competitor will have been given access to information that was uniquely developed and funded by [the appellant] over the many years and also represents the distinct expertise of its principals and trade secrets that they have developed over time.

Section 17(1)(b)

[58] With respect to the harms that fall within the scope of section 17(1)(b), in its non-confidential representations, the appellant submits that:

> Should the records in question be disclosed under this request [the appellant's] ability to compete under the VOR procurement process will be seriously constrained in future. Knowledge of [the appellant's] unique approach, processes and philosophy by its only competitor represents an unfair advantage.

Section 17(1)(c)

[59] With respect to the harms that fall within the scope of section 17(1)(c), in its non-confidential representations, the appellant submits that:

> If the records in question are provided under this request, [the appellant] will no longer be in a competitive position to bid on future [ministry] conference management projects. This will result in a substantial loss of revenue for the firm, but also would limit future bids from the private sector. Conference planning activities represent a significant part of [the appellant's] annual revenue base. Losses resulting from being rendered uncompetitive under this request will present a serious challenge to the financial sustainability of the firm. The VOR procurement process would be rendered null and void which would lead to a situation of [the ministry] being required to directly contract with the sole contractor without the intended competitive process.

[60] The appellant concludes its submissions by stating:

> The disclosure of the records in question would represent a catastrophic breach of the VOR procurement competitive process. Further, disclosure will render [the appellant] uncompetitive through the VOR procurement process, but more importantly and substantially, in the marketplace where [the appellant] and its competitor in the VOR procurement process and other competitors directly compete for conference planning projects in the private sector. As event planning is a major part of [the appellant's] business, this disclosure will result in a serious challenge to the financial sustainability of the firm.

[61] The appellant further sets out in its confidential submissions the information that "at a minimum" should not be disclosed. The appellant specifically identified the pages of the proposal that contain the information which falls within the categories of Risk Management Assessment, Detailed Work Plan, Marketing Strategic Plan and Event Registration.

Analysis and Finding

[62] Many past orders of this office have addressed the treatment of information provided in response to Request for Proposal (RFP) processes under section 17(1) of the *Act*. The result, in terms of disclosure of the information in an RFP, will naturally differ from one appeal to the next, based on the evidence before the adjudicator, including the parties' submissions, the content of the records and other circumstances. Regardless of the conclusion, however:

> … the decision whether to disclose information contained in a tender document must be approached in a careful way, applying the tests as developed over time by this office while appreciating the commercial realities of the tendering process and the nature of the industry in which the tender takes place.[25]

[63] In my view, the same considerations apply in assessing the proposal submitted under the Request for Services at issue in this appeal.

[64] Records 9, 10 and 11 consist of the following sections:

Pages 1 and 2: Cover page and Cover Letter

Page i: Table of Contents

Pages 1 and 2: Submission Form (RFS Supplement B)

Page 3: Pricing Schedule (RFS Appendix A)

Pages 4 and 5: Implementation Plan Schedule (RFS Appendix B)

Pages 6 to 22: Event Implementation

Pages 23 to 36: Event Planning

Pages 37 to 58: Event Marketing and Communication

Pages 59 to 61: Event Registration

Page 62: Value Added Services

[65] The appellant takes the position that publicly available information can be disclosed. This is a sensible approach as it must be kept in mind that revealing information is not harm *per se*, rather revealing the information at issue has to be the cause of the harm. It must also be noted that the event that is the subject of the proposal has already taken place. Accordingly, certain information generated as a result of, or that is related to the conference, has entered the public domain.

[25] Order MO-1888.

[66] I have reviewed Records 9, 10 and 11 and come to the following conclusions:

> Page 1 is the cover page of the proposal. This page contains the name of the services requested, the reference number and the name and contact information of the appellant. I find that this page contains information that has been made public or is generally known.
>
> Page 2 is the letter that accompanied the proposal. The body of the letter contains the confidentiality statement discussed above. That said, the letter contains very general information, including information relating to the appellant's history and clients. The proposal itself contains much more detailed information. I find that this page contains information that has been made public or is generally known.
>
> Pages 3 to 5 are forms or materials that were provided by the ministry to the appellant in the RFS. With respect to the information added by the appellant to pages 3 to 5, I find that the information in the forms, which consists of corporate information and the registration fees charged, is information that has been made public or is generally known.
>
> Pages 11 to 22 consist of information pertaining to key individuals who would actually perform the contracted work if the appellant was chosen to arrange the conference, as well as the projects it has completed for other clients. In my view, this is information that has been made public or is generally known.
>
> Pages 40 to 55 (with the exception of the top portion of page 50) consist of examples of the appellant's work and details of the projects it has completed. In my view, with the exception of the top portion of page 50, this is information that has been made public or is generally known.
>
> Page 60 is an example of the online registration process used by the appellant. In my view, this information and the name of the service, which is not owned by the appellant, has been made public or is generally known.

[67] Accordingly, I find that disclosing this information would not cause the reasonably be expected to cause the section 17(1)(a) and/or (c) harms alleged. I will address whether disclosing this information gives rise to the alleged section 17(1)(b) harms, below.

[68] I will now address the balance of the information at issue in the proposal.

[69] The appellant provides confidential and non-confidential submissions in support of its position that disclosing certain portions of its proposal will give rise to the harms alleged. After reviewing the proposal and the information at issue in the attachment to Record 1, along with the representations, I am satisfied that the disclosure of certain information in the proposal could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the appellant for the purposes of section 17(1)(a) of the *Act*. This information is found at pages 26 to 36 of the proposal, which is in my view a detailed roadmap for planning this type of conference. Accordingly, I find that this information is exempt under section 17(1)(a). I have highlighted this information on a copy of the pages of Records 9, 10 and 11 that I have provided to the ministry along with this order. I will now address the balance of the information.

[70] With respect to the balance of the information at issue in the proposal and the attachment to Record 1, I find that I have not been provided with sufficiently detailed and convincing evidence to establish the section 17(1)(a) and (c) harms alleged. The information that the appellant seeks to withhold is the type of information that would be generally related to planning events of this nature, was utilized in previous conferences organized by the appellant or would have been revealed in the course of the event at issue. I note that the conference took place in 2012, and the competition process which gave rise to the submission of the proposal is, accordingly, no longer underway. Furthermore, many of the terms outlined in the proposal, such as pricing and registration techniques, would likely have been incorporated by reference into the Service Level Agreement for the 2012 conference, as well as contained in the materials for the conference.

[71] Finally, the remaining information at issue in the proposal does not have the degree of detail and specificity contained in the pages of the proposal that I have found to qualify for exemption.

[72] I find support for this finding in the discussion from Order PO-2435 where Assistant Commissioner Brian Beamish addresses the importance of transparency and public accountability when evaluating the application of the exemptions contained in the *Act,* including section 17(1). He found that:

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

by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

> …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

...

I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[73] In its representations with respect to section 23 of the *Act*, the appellant emphasizes that its compensation for the conference event is exclusively taken from the revenues generated by the event itself, and that "no public funds were put at risk by [the ministry] and no liability or chance of loss was incurred by [the ministry] in connection with the project."

[74] Whether or not the ministry expended funds in no way detracts from the important principles of transparency and accountability discussed in the Williams Commission Report and by Assistant Commission Brian Beamish in Order PO-2435.

[75] I am also not persuaded by the argument that disclosure of the information in the proposal that I have not found to qualify for exemption under section 17(1)(a) could reasonably be expected to result in similar information no longer being supplied to the ministry in the context of future projects, as contemplated by section 17(1)(b). In my view, companies doing business with public institutions, such as the ministry, understand that the information contained in a proposal is often an important part of a competitive selection process. I find that it is simply not credible to argue that the ministry would be provided with less information of this nature in future Request for Services situations. In addition, I do not accept that the prospect of the release of the type of information contained in the proposal could reasonably be expected to result in reluctance on the part of companies to participate in future Requests for Services.

[76] For all the above reasons, I find that, except for the highlighted information on pages 26 to 36 of the proposal and any related annotations, the appellant has failed to satisfy the burden of proof with respect to the harms aspect of section 17(1).

[77] As a result of my conclusions set out above, I find that except for the highlighted information on pages 26 to 36 of Records 9, 10 and 11, the section 17(1) exemption does not apply to any of the other information at issue in this appeal and I will order that, subject to the severance of the information that the ministry withheld under section 21(1) of the *Act*, that it be disclosed to the original requester.

ORDER:

1. I find that the information that I have highlighted on the copy of pages 26 to 36 of Records 9, 10 and 11 that I have provided to the ministry along with this order qualify for exemption under section 17(1)(a) of the *Act*.

2. I uphold the decision of the ministry with respect to the balance of the information at issue in this appeal. The ministry should provide to the requester the remaining information in the records at issue, subject to its redactions under section 21(1) of the *Act*, by **April 11, 2014** but not before **April 7, 2014**.

3. I reserve the right to require the ministry to provide me with a copy of the records as disclosed to the requester in accordance with paragraph 2, above.

Original Signed by: March 7, 2014
Steven Faughnan
Adjudicator