

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4031

Appeals PA17-501 and PA18-129

William Osler Health System - Brampton Campus

February 28, 2020

Summary: The William Osler Health System - Brampton Campus (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to its linen and laundry services agreement with a third party provider. The hospital denied access to the responsive records in part, citing the application of the mandatory third party information exemption in section 17(1). Both the requester and the third party service provider (the third party appellant) appealed the hospital's decision.

In this order, the adjudicator orders the hospital to withhold the four options offered by the third party appellant to the hospital that are not set out in the hospital's agreement with the third party appellant. She orders the hospital to disclose the remaining responsive information that she finds is not exempt under section 17(1).

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

Orders Considered: Orders MO-1706, PO-3885, PO-3886 and PO-3887.

OVERVIEW:

[1] The William Osler Health System - Brampton Campus (the hospital) received a request for the following records under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

1. All linen and laundry services agreements, currently in force or which were in force at any time between January 1, 2016 and the present, relating to or in the custody or control of William Osler Health System,
2. All successful proposals for linen and laundry services not yet subjected to executed agreements, and
3. All documents relating to the documents in parts 1 and 2 including, but not limited to, amendments, proposed amendments, extensions, internal and external correspondence, briefing notes, memos, successful bids, quotations or proposal documents, whether those documents form part of the institution's contract and agreements, facilities management records, laundry services records or other classes or records and whether stored in paper or electronic form.

[2] Following notification to a number of affected third parties, the hospital issued an access decision to the requester and to a number of affected third parties granting partial access to the responsive records. The hospital denied access to portions of the responsive records pursuant to sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

[3] The hospital also took the position that some portions of the records are not responsive to the access request and denied access to them. These portions of the records concern other linen and laundry service providers other than the third party appellant.

[4] The requester appealed the hospital's decision to this office. Appeal PA18-129 was opened to address the requester's concerns.

[5] One affected third party, a linen and laundry services provider who is party to an agreement with the hospital, (now the third party appellant or the TPA) also appealed the hospital's decision, and Appeal PA17-501 was opened to deal with its concerns.¹ This office mediated the two appeal files together.

[6] During mediation, the requester stated that she was not seeking access to the portions of the records withheld pursuant to section 21(1) of the *Act*; therefore, those portions of the records are not at issue in these appeals. The requester also stated that she was not pursuing access to the withheld portions of the records that are not responsive to her access request; therefore, those portions of records are also not at issue. The requester stated that she was seeking access only to the portions of the records withheld pursuant to section 17(1) of the *Act*.

[7] As mediation did not resolve the issues in these appeals, they were transferred

¹ Although both parties are appellants in their respective appeals, I refer to the original requester as the requester and the third party as the third party appellant (TPA) in this order to avoid confusion.

to the adjudication stage where an adjudicator conducts an inquiry.

[8] Representations were sought and exchanged amongst the hospital, the TPA and the requester in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*. In its representations, the TPA revised its position as to what portions of the records it is claiming are subject to section 17(1). The TPA's new position on the scope of its appeal and what is at issue is reflected in the index of records, below.

[9] Record 3 in this appeal is the TPA's service agreement with Headwaters Health Care Centre dated June 5, 2012 and it is the same record being considered in Appeals PA17-522 and PA18-120, which involve the same third party appellant and requester as in this order. Those appeals concern a request for access to the TPA's information in the custody or control of Headwaters Health Care Centre. As those appeals concern the actual institution that is a party to Record 3, I will determine the issue of access to Record 3 in that order, rather than this one.

[10] In this order, I partially uphold the application of the section 17(1) exemption. In particular, I order the hospital to not disclose the four options offered by the TPA to the hospital in the emails and in the chart comprising Records 4, 5, 6, 8 and 13. I order the hospital to disclose the remaining non-exempt responsive information in the records.

RECORDS:

[11] The information remaining at issue is described in the following index of records from the TPA:

#	General Description of Record	Section Heading in Record	Page #	Portions subject to section 17(1) according to the hospital	Additional portions subject to section 17(1) according to the TPA
1	Executive Summary to Record 2	Cost	2	Lines 1 and 2	Entire Section
		Commitment Value	2	Line 1 Note 2	Line 2 – Term Note 3
		Termination Rights	2	Point 3, last line	Supports the position of the Hospital

		Savings Table	3	First two rows Note 2 Note 5: costs	Row savings Note 3
		Cost Avoidance Savings Table	3	First two rows	3rd row
2	Services Agreement – Agreement [#] (Osler) September 2016				
		Schedule 4, Article 2, Table 4.2.1 (a)	19-20	Last Column General Linen \$/KG Last Row	Entire third column (including the heading) Notes 1 and 2
		Schedule 4, Article 2, Table 4.2.1 (b)	19-20	Year 1 Price/Pack	Supports the Hospital's Decision
		Schedule 4, Article 2, Table 4.2.1 (c)	20	Year 1 Price \$/piece	Supports the Hospital's Decision
		Schedule 4, Article 2, Table 4.2.1 (d)	20	Year 1 Price \$/piece	Supports the Hospital's Decision
		Schedule 4, Article 2 Additional Costs	20	Charges set out in point 1, lines one and three	Supports the Hospital's Decision
		Price Adjustment	21		Price adjustment 4.2.2 – Entire

					Section
4	Email Linen Proposals June 1, 2016, 8:55:18 p.m.	Paragraph related to contents of spreadsheet	1		All of the information below the spreadsheet until the name of the individual who sent the email
5	Email Linen Proposals, June 1, 2016, 9:02:04 p.m.		1		Paragraph 2, the last sentence and All of the information below the spreadsheet until the name of the individual who sent the email
6	Linen Rate Comparison against 2016/17 Budget (Cost Analysis)		1 - 2		All of the information related to TPA and Options 1 and 2 (including the note) on p. 1
8	Email – Linen Proposals - June 9, 2016 and Email June 2, 2016, 9:54 a.m.	Last line severed (other party)	2		Email [name to name]: the 2 nd and 3 rd paragraphs (June 9) Email [name to

					<p>name]: the entire 1st paragraph after the words "comments below"</p> <p>Email [name to name]: the 2nd and 3rd paragraphs</p> <p>Email [name to name]: 2nd sentence (June 6, 9:37 pm)</p> <p>Email [name to name]: 3rd paragraph beginning "[TPA] has provided..." 4th paragraph: beginning with "are" until the end of the sentence and All of the information below the spreadsheet until the name of the individual who sent</p>
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					the email
			3		Lines after line 5 and Options set out after line 11
13	Email call with vendor July 1, 2016 ² (this call was with another respondent to the RFP ³)		1		Paragraph 2 – the TPA’s \$ value

DISCUSSION:

Does the mandatory third party information exemption at sections 17(1)(a) or (c) apply to the records?

[12] 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,

(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 undue loss or gain to any person, group, committee or financial institution or agency.

[13] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁴ 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

² In its representations, the hospital indicates that it is now inclined to disclose Record 13.

³ Request for Proposals.

⁴ *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 Co.*).

parties that could be exploited by a competitor in the marketplace.⁵

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

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

Part 1: does the record reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information?

Representations

[15] The hospital states that, other than Record 13, the records illustrate a pricing model/strategy, in which discounts are offered or anticipated, given specific volumes and/or other factors. It states that the business knowledge and experience that goes into crafting a complex model of this sort is, reasonably speaking, financial information (i.e. a "pricing practice") in and of itself, which could be "reverse engineered" by a competitor, to their advantage. The hospital submits that such models have lasting value, long after the item-level prices of specific products/services have changed, as is the case with these records, which are a few years old.

[16] The hospital also submits that the records contain trade secrets but its representations did not specifically address this type of information.

[17] The TPA states that the request seeks access to information that is related to the exchange of services between a not-for-profit entity, the hospital, and the TPA as a commercial services provider.

[18] The TPA submits that some of the information at issue also constitutes financial information, namely the information severed from the Cost Savings Table and the Cost Avoidance Savings Table in Record 1, the Executive Summary.

[19] The requester states that she has not reviewed the records and is, therefore, constrained in her ability to assess whether they contain the types of information claimed by the other parties. She does specifically refer to Record 6, and submits that

⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

to the extent that this record contains numerical scores, rankings, or evaluator comments on the TPA'S bid, this is not the type of information carved out for protection in section 17(1).

Analysis/Findings re part 1

[20] The types of information in section 17(1) relied upon by the hospital and the TPA have been discussed in prior orders:

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.⁶

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

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

[21] I agree with the hospital and the TPA that the records contain commercial and financial information relating to the selling of linen and laundry services to a hospital and the costs of these services.

[22] I disagree with the hospital's position that the records contain trade secrets. The hospital did not provide specific representations on this type of information and there is insufficient evidence in the records themselves to suggest such a conclusion.

⁶ Order PO-2010.

⁷ Order PO-2010.

⁸ Order P-1621.

⁹ Order PO-2010.

[23] I have taken into consideration the requester's suggestion that Record 6 may contain scoring or related information. From my review of this record, it does not contain such information; rather, it contains pricing information, which constitutes financial information, as defined above.

[24] I find that part 1 of the test under section 17(1) has been met, as all of the records at issue contain commercial and financial information.

Part 2: was the information supplied to the hospital in confidence, either implicitly or explicitly?

Supplied

Representations

[25] The hospital did not provide representations on the issue of whether the information was supplied for the purpose of part 2 of the test in section 17(1).

[26] The TPA states that the information at issue relates to the agreement between the hospital and the TPA for the provision of linen and laundry services. It states that the Executive Summary at Record 1 describes the background and provides a summary of the process that led the hospital to select the TPA as its supplier of linen and laundry services in 2016. This process ultimately culminated in the signing of Record 2, the Services Agreement with the hospital.

[27] The TPA submits that by "piggybacking" on Record 3, the 2012 Headwaters Health agreement with the TPA, the hospital did not have to enter into another public procurement process for these services in 2016 to be compliant with the province's Broader Public Services Directive.¹⁰

[28] The TPA states that Records 4, 5, 8 and 13 all relate to internal hospital discussions about deciding which of the four options provided by the TPA it would choose, once it became apparent that the TPA was their vendor of choice. It states that Record 6 contains the hospital's detailed cost analysis of the four options presented by the TPA as against the budget of the hospital for linen and laundry services, in order to determine which option would be the most financially beneficial.

[29] The TPA states that nowhere in the records is there any suggestion or evidence that the hospital was attempting to negotiate with it with respect to the terms of Records 1 or 2.

[30] In particular, the TPA submits that the substance of the agreement comprising

¹⁰ Procurement rules in the purchase of goods and services using public funds by broader public sector organizations, according to <https://www.doingbusiness.mgs.gov.on.ca/mbs/psb/psb.nsf/English/bps-procurementdirective>.

Record 2 is different from that of the agreements found not to have been “supplied” by the Divisional Court in the *Boeing Co.*,¹¹ *Miller Transit*,¹² *Aecon*¹³ and *Accenture*¹⁴ decisions. It states that, as a result, Record 2 should be found to have been supplied for the following reasons:

- i. Record 2 is a simple services contract.
- ii. Record 2 involves only two parties: the TPA and the hospital.
- iii. There is nothing in the information at issue in Record 2 to suggest that it was in any way “customized.”
- iv. The other records demonstrate that the information at issue in the Record 2 contract was supplied by the TPA in its proposal to the hospital for linen and laundry services.
- v. The information at Issue in Record 2 is exactly the same as that included in the TPA’s RFP responses.
- vi. The TPA did not engage in any negotiations with the hospital prior to the execution of Record 2.
- vii. Nowhere in any of the records is there any suggestion or evidence that the hospital was attempting to negotiate with the TPA with respect to the four options it presented in its proposal, rather it was deciding upon which of the options presented by the TPA would be the most financially beneficial.
- viii. As documented in the Executive Summary (Record 1), once the hospital had made its decision on which of the four options provided by the TPA was the most financially beneficial, it then proceeded to enter into an agreement for the provision of linen and laundry services - Record 2. The information severed from Schedule 4 (Pricing, Payment and Reimbursements) includes that related to:
 - i. Additional costs
 - ii. \$ Prices/kg or identified item (piece).

[31] The requester submits that Record 1, the Executive Summary, should be disclosed because the information is part of a larger negotiation process for linen and

¹¹ *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*).

¹² *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al*, 2013 ONSC 7139 (Can LII) (*Miller Transit*).

¹³ *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, ONSC 1392 (Div. Ct.) (*Aecon*).

¹⁴ *Accenture Inc. v Ontario (IPC)*, 2016 ONSC 1616 (*Accenture*).

laundry services. She refers to the TPA's statement that this record "describes the background to, and provides a summary of the process that led the hospital to select the TPA as its supplier." She submits that the IPC has previously held that summaries of the final outcome of contract negotiations, including the contract value and financial and operational implications to the hospital, are not "supplied."¹⁵

[32] The requester states that Record 2, the service agreement between the hospital and the TPA, was not supplied. She refers to the IPC and the Divisional Court jurisprudence that has found that the contents of a contract involving an institution and a third party are mutually generated and not "supplied" by the third party, even when the contract is preceded by little or no negotiation or discussion.¹⁶

[33] The requester states that Record 2 arose in the context of an RFP by the hospital for linen and laundry services. She submits that many previous orders of the IPC have determined that contracts resulting from a bidder's proposal in an RFP process are considered negotiated and not "supplied", even if the information in the contracts was "simply directly copied from the proposal."¹⁷

[34] The requester states that the fact that some orders of the IPC have been regarding contracts between multiple parties or were of a complex nature is not central to the holding in those cases, as the IPC has also mandated disclosure of straightforward services or product agreements made between two parties.¹⁸ She specifically refers to three recent orders, Orders PO-3885, PO-3886, and PO-3887, where I ordered three hospitals to disclose their services agreements for linen and laundry services.

[35] Concerning any pricing information in Record 2, the requester submits that this is a contractual term subject to negotiation (whether actual or deemed) and entirely subject to change depending on the parties, services, and overall agreement.¹⁹

[36] With respect to Record 6, the cost analysis, the requester submits that this information relates to the hospital's assessment, scoring or evaluation of the proposals and is not considered information that was "supplied" to the hospital.²⁰ She states that previous orders of the IPC have found that bid information that is incorporated into a bid analysis document, including pricing information, is not "supplied" to institutions.²¹ She submits that any pricing information in the TPA's bid which was used in the bid

¹⁵ She relies on Order PO-3371.

¹⁶ The requester relies on Orders PO-2755, PO-3264, PO-3311 (upheld in *Aecon*, cited above), and *Miller Transit Ltd.*, cited above.

¹⁷ The requester relies on Orders MO-2435, MO-2494, P-1545, PO-2018 and PO-2435.

¹⁸ The requester relies on Orders MO-1706, MO-2494, PO-2018, and PO-2435.

¹⁹ The requester relies on Order PO-2435.

²⁰ The requester relies on Orders MO-3508 and PO-3418.

²¹ The requester relies on Orders PO-2453 and PO-2753.

analysis came to represent the essential terms of the negotiated agreement.²²

[37] In reply, the TPA states that Record 1 is a process summary of the circumstances that resulted in the agreement between the hospital and the TPA and was supplied, not negotiated.²³ For Record 2, the TPA submits that while the IPC may have ordered disclosure of straightforward bilateral services or product agreements, it is clear that none of the Divisional Court decisions involved straightforward bilateral services or product agreements.

[38] The TPA states that all of the Divisional Court decisions concerning the supplied test referred to by the requester involved IPC orders in which the contracts involved a number of parties, very complex issues and/or a suite of agreements that together formed the basis of the commercial relationship between and among the parties. It submits that these agreements related to commercial matters that, on their face, demonstrate that the "final contracts" resulted from negotiations. It states:

It is clear from the orders themselves that not only did the recent orders cited by the requester - Orders PO-3885, PO-3886 and PO-3887 - involve such a fact situation, they also involved a fact situation that was clearly very different from the RFP context as is the case in the current appeal.

[39] In sur-reply, the requester states that neither *Boeing* nor *Miller's* endorsement of the IPC's approach of treating contracts as mutually generated and not supplied depends on the contract being multi-party, complex, or part of a "suite of agreements". She states that although the broader context of Orders PO-3885, PO-3886 and PO-3887 involved multiple parties, the contracts at issue were bilateral services agreements.

Analysis/Findings re supplied

[40] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.²⁴

[41] 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.²⁵

[42] 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

²² The requester relies on Order PO-2435.

²³ The TPA relies on Order PO-3371.

²⁴ Order MO-1706.

²⁵ Orders PO-2020 and PO-2043.

single party.²⁶

[43] 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 third party to the institution.²⁷ The "immutability" exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.²⁸

[44] The TPA has not submitted that any of the records contain information that is subject to the "inferred disclosure" and "immutability" exceptions. Nor is such information apparent to me from my review of the records. Therefore, I find that these exceptions do not apply in these appeals.

Records 1 and 2

[45] Record 1 is referred to by the TPA as the Executive Summary to the services agreement comprising Record 2. The actual title of this record is, "Commitment Summary Cover Memo." Besides the subtitle of "Executive Summary," it contains other subtitles:

- Financials,
- Reviews/Approvals,
- Hospital Reviews/Approvals,
- Finance Approvals,
- CEO Approval,
- Received for Filing purposes, and
- Comments.

[46] Record 1 contains a summary of the financial terms of the services agreement. Record 1 is signed by a number of officials from the hospital. It contains details as to why Record 2 was entered into with the TPA without the TPA first having to go through the public procurement process. It also contains details of the agreed-upon financial terms for the provision of laundry and lined services by the TPA to the hospital.

²⁶ This approach was approved by the Divisional Court in *Boeing Co. and Miller Transit*, cited above.

²⁷ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

²⁸ *Miller Transit*, above at para. 34.

[47] The various hospital signatories to Record 1 signed this record on or about the same date that the hospital signed Record 2 in September 2016.

[48] I agree with the TPA that Record 1 describes the background to, and provides a summary of the process that led the hospital to select the TPA as its supplier of linen and laundry services in 2016, which culminated in the signing of Record 2, the services agreement.

[49] However, Record 1 also contains details of the financial terms of the services agreement in Record 2. In both Records 1 and 2, the TPA is seeking to have withheld the financial terms of its agreement with the hospital. I find that these terms were not supplied by the TPA, but were instead negotiated between the parties. I do not agree with the TPA that just because there was no public procurement process by the hospital through which other bidders for the supply of linen and laundry services might be qualified, the terms of the agreement were not negotiated.

[50] The reason there was no public procurement process is that another hospital, Headwaters Health Care Centre, had already hired the TPA as its linen and laundry supplier. This was accomplished through a not-for-profit shared services organization in which Headwaters Health Care Centre and the hospital are involved.

[51] In deciding whether to undertake a public procurement process, Record 1 indicates that pricing proposals were obtained by the hospital from both the TPA and another linen and laundry services provider and that a financial analysis of these proposals was completed by the hospital.

[52] Many officials from the hospital signed Record 1 indicating that, on behalf of the hospital, they:

...indicate our approval and agreement with the results of the procurement process and this contract...

[53] I find that it is not relevant that there was no public procurement process regarding the services to be offered by the TPA. A Request for Proposals was made to both the TPA and another service provider. In response, the TPA submitted a proposal for its services to the hospital that contained four different options for the hospital's consideration.

[54] The hospital reviewed the TPA's and the other supplier's proposals²⁹ and decided to enter into an agreement with the TPA. Record 1 contains details of the annualized cost to the hospital of the TPA's services. It also contains details of other financial terms of the hospital's agreement with the TPA, as well as the savings to the hospital with proceeding with the TPA as its supplier.

²⁹ The other supplier advised the hospital that it had no concerns with the release of the records pertaining to it.

[55] The annualized costs of all four options submitted by the TPA to the hospital are set out in Record 6, the Linen Rate Comparison chart. The figures in Record 1 for the annualized costs of the agreed-upon terms between the TPA and the hospital appear to me to be different from those set out in Record 6. Record 6 predates Records 1 and 2.

[56] Based on my review of the records, I conclude that the terms of the TPA's linen and laundry services agreement with the hospital, as reflected in Records 1 and 2, was negotiated.

[57] I find that the information at issue in both Records 1 and 2 was not supplied.

[58] In any event, I agree with the requester's submission that many previous orders of the IPC have determined that contracts resulting from a bidder's proposal in an RFP process are considered negotiated and not "supplied", even if the information in the contracts was "simply directly copied from the proposal."

[59] I disagree with the TPA's position that the agreement comprising Record 2 is distinguishable from those considered and found not to have been supplied by the Divisional Court in the *Boeing Co.*, *Miller Transit*, *Aecon* and *Accenture* decisions. I find that even if Record 2 is a simple services contract between the hospital and the TPA and the information in it was derived from the TPA's response to an RFP, it does not mean that the agreement was supplied rather than negotiated.

[60] In Orders PO-3885, PO-3886 and PO-3887, which involved three different hospitals, I found that the linen and laundry services agreements between a service provider and each of the hospitals were not supplied. In those cases, the third party appellant argued that the almost-identical services agreements were supplied because they were based on a template derived from a Master Services Agreement. As such, the third party appellant argued that these agreements were supplied, not negotiated. In those orders, I stated:

However, the fact that the terms of the Services Agreements do not significantly vary from hospital to hospital does not mean that each Services Agreement is not negotiated. As indicated in Order MO-1706:

[T]he 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).³⁰ The terms of a contract have been found not to meet the criterion of having

³⁰ Section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* is the municipal equivalent to section 17(1) of *FIPPA*.

been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.³¹

I find that the hospital, as a member of the affected party and also in its own right as the defined customer in the Services Agreement between it and the affected party, would have had to agree to the terms of this agreement.

[61] I adopt this reasoning from Orders MO-1706, PO-3885, PO-3886 and PO-3887.

[62] Based on the contents of Records 1 and 2, I disagree with the TPA that the hospital simply adopted the appellant's proposal without negotiation. This information was part of a proposal made to the hospital, which the hospital had the option of accepting or not.

[63] As well, although the TPA states that the hospital adopted one of its four options in its RFP response into its agreement with the hospital, I cannot ascertain from my review of the records which of the four options was actually incorporated directly into Records 1 and 2.

[64] Relying, in particular, on the findings set out above in Order MO-1706, and considering the contents of both Records 1 and 2, I find that the information at issue in both Records 1 and 2 was not supplied to the hospital.

[65] Therefore, I find that part 2 of the test under section 17(1) has not been met for these two records, and I will order the information at issue in these records disclosed to the requester.

Records 4, 5, 8 and 13

[66] Records 4, 5, 8 and 13 are all internal hospital emails and predate Records 1 and 2. These emails all discuss aspects of the four options provided by TPA in its proposal.

[67] Records 4 and 5 each contain the same comparison of the TPA's rates in the four options set out in its proposal to the hospital with that of another linen and laundry services provider. This other provider advised the hospital that it does not object to disclosure of its information in the records. However, Record 5 contains an extra paragraph. The TPA is seeking to have withheld from this paragraph one sentence related to the four options it offered the hospital.

[68] Record 8 contains the same information that is at issue in Record 4 plus additional internal hospital discussion about the merits of various aspects of the options offered by the TPA.

³¹ This approach was upheld in *Boeing v. Ontario (Ministry of Economic Development and Trade)* Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

[69] At issue in Record 13 is one figure, namely one of the TPA's rate being offered in one of its four options to the hospital. Also at issue in this record is the current supplier's rate to the hospital. The requester is not interested in receiving the other supplier's information.

[70] I agree with the TPA that the portions of Records 4, 5, 8 and 13 that it has identified as being subject to section 17(1) were supplied by the TPA to the hospital, as they reveal the details of the four options offered by the TPA to the hospital. The four options that the TP presented to the hospital pre-date the agreement and do not constitute information that was negotiated between the parties. I will consider, below, whether these portions of the emails at Records 4, 5, 8 and 13 were supplied in confidence.

Record 6

[71] Record 6 is a chart titled "Linen Rate Comparison." This record is a chart comparing the TPA's proposed four options for providing linen and laundry services with that of the other supplier.

[72] This chart compares the rates for linen and laundry services as between the TPA's four options and that of another supplier.

[73] The TPA states that at issue in Record 6 is hospital's detailed cost analysis of the four options presented by it against the budget of the hospital for linen and laundry services.

[74] I accept the TPA's position, and I find, that the information about the four options it offered the hospital, which is the information identified by the TPA as being subject to section 17(1) in Record 6, was supplied by the TPA to the hospital. This information is not information comprising the essential terms of the negotiated agreement, as submitted by the requester. This information reveals the details of the four options offered to the hospital by the TPA in its response to the RFP.

[75] I will consider whether this information was supplied in confidence to the hospital.

Conclusion re supplied

[76] In conclusion, I have found that Records 1 and 2 were not supplied to the hospital and I will order these records disclosed.

[77] I have found that the information identified by the TPA as being subject to section 17(1) in Records 4, 5, 6, 8 and 13, which is information that reveals the details of the TPA's four options, was supplied to the hospital. I will now consider whether this information was supplied in confidence.

In confidence

Representations

[78] The hospital states:

As to the expectation of confidentiality around the details in the records, as explained in Test Part 1, vendors presumably (implicitly) wish for their pricing model/strategy (based on their industry experience) to remain confidential, to help maintain their competitive position. In that our Third Party has appealed the release of the documents, this would seem to be an accurate assumption.

[79] The TPA submits that it supplied the information at issue to the hospital with a reasonable expectation of confidentiality for the following reasons:

- i. it has (and will continue to) consistently treated information about its pricing related to the provision of linen and laundry services as confidential
- ii. such information is only used internally within the company to prepare its proposals to potential clients, such as the hospital
- iii. the information is not otherwise disclosed; nor is it available from sources to which the public has access
- iv. it was communicated to the hospital on the basis that it was confidential and that it was to be kept confidential
- v. given that it was provided to the hospital for the purposes of submitting a proposal, the [TPA] held both an implicit and explicit expectation of the maintenance of the confidentiality of the information.

[80] The TPA quotes provisions from Record 2, as follows:

14.2 Confidentiality

(i) The Service Provider [the TPA] and the Client [the hospital] agree that all Confidential Information supplied or obtained by either party shall be kept confidential and secure. Each party agrees to exercise the same degree of care in maintaining the other party's Confidential Information as it does with its own Confidential Information and to confine knowledge of Confidential Information only to its employees, servants or agents who require such knowledge for use in the ordinary course and scope of their employment, service or agency and consistent with this Agreement. The parties shall not, during the term of this Agreement or

thereafter, use, disclose, divulge or make available each other's Confidential Information to any third party either directly or indirectly in any manner whatsoever without the prior written consent of the other party or as otherwise required by law. Section 14.2 [sic] addresses disclosure of Service Provider's Confidential Information pursuant to a request for information under FIPPA.

...

14.3 Freedom of Information and Protection of Privacy

Without prejudice to the Parties' respective rights and obligations under Section 14, the Service Provider acknowledges that the Client is bound by the Freedom of Information and Protection of Privacy Act ("FIPPA"), as amended from time to time and that this Agreement and any information provided to the Client in connection with its performance or otherwise in connection with this Agreement **may be subject to disclosure in accordance with FIPPA**. If, pursuant to FIPPA, a third party requests access to or disclosure of, or if, pursuant to FIPPA, access or disclosure is required with respect to any of Service Provider's Confidential Information or this Agreement or any other agreement, instrument, document or communication or other record (as defined in FIPPA), or any part thereof, relating to this Agreement, the Service Provider or the Services, the Client shall provide prompt notice of the same to the Service Provider prior to granting such access or making such disclosure and shall give the Service Provider a reasonable opportunity prior to such access or disclosure to discuss the same with the Client, challenge such access or disclosure, make redactions (or cause such redactions to be made) or otherwise preserve the confidentiality of the Confidential Information and the contents of any such agreement, instrument, document, communication or other record (as defined in FIPPA) to the extent permitted under FIPPA or otherwise by law. [emphasis added by TPA]

[81] The TPA states that while the term "Confidential Information" is not defined in Record 2, all of the information at issue in the records is "Confidential Information" and is thus subject to Sections 14.2 and 14.3 of Record 2.

[82] The TPA submits that, read together, these sections establish that it had an explicit and reasonable expectation of confidence, subject only to the decision that would be made by the hospital and/or the adjudicator in the event that the hospital received a *FIPPA* request for the "Confidential Information" of the TPA.

[83] The TPA submits that although it presented four options to the hospital, it is clear on the face of Records 4, 5, 6 and 8 that it was solely the hospital staff responsible for evaluating the proposals who discussed and compared the options with each other and against those proposed by the other respondent to the RFP.

[84] The requester points out that Article 14.3 of Record 2 acknowledges that *FIPPA* applies to the information in this record. She also states:

...the RFP process which Record 1 summarizes and which Record 3 and 4 relate to likely acknowledged the hospital's obligations under *FIPPA* and operates as Article 14.0 does above to counter the TPA's reasonable expectation of confidentiality. ...Since the TPA did not have a reasonable expectation of confidentiality with respect to the RFP process, it follows that the TPA could not have a reasonable expectation of confidentiality in information summarizing the process, email correspondence related to the process and the hospital's analysis and evaluation of its proposal.

[85] In reply, the TPA submits that the existence of a reference to the hospital's legal obligations under *FIPPA* merely serves to put any entity dealing with the government on notice that its assurances of confidentiality cannot be absolute and that it may be subject to disclosure under *FIPPA*.

Analysis/Findings

[86] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.³²

[87] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.³³

³² Order PO-2020.

³³ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[88] I find that the information at issue in Records 4, 5, 6, 8 and 13, which reveals the four options provided by the TPA in its proposal to the hospital for the provision of linen and laundry services, was supplied in confidence.

[89] I agree with the TPA that the information at issue in these records, which is information that evaluates and discusses the TPA's four options, was:

- communicated to the hospital on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the TPA in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access, and
- prepared for a purpose that would not entail disclosure.

[90] In making this finding, I acknowledge that certain records and the RFP process may have referred to the records or the RFP process being subject to *FIPPA*, but this does not mean that the records cannot have been supplied in confidence for the purpose of the second part of the test for exemption under section 17(1) of *FIPPA*.³⁴

[91] Therefore, I find that the TPA's information in Records 4, 5, 6, 8 and 13 was supplied in confidence and, therefore, meets part 2 of the test under section 17(1).

Part 3: does the prospect of disclosure of the information give rise to a reasonable expectation that one of the harms specified in section 17(1) will occur?

Representations

[92] The hospital submits that the information could be used by a competitor to "jump start" their business, and put them in a much more competitive position relative to the TPA, from whom the information would have been "harvested."

[93] The TPA states that it is a large linen processor and has operated as such for more than 30 years.³⁵ It provided detailed confidential representations as to why disclosure of its pricing information could lead to the harms specified by sections 17(1)(a) and (c); specifically, that under these exemptions disclosure could reasonably be expected to:

³⁴ See, for example, Order PO-3530.

³⁵ The TPA provided both confidential and non-confidential representations on this issue. I will be referring only to the non-confidential representations in this order, although I considered all of the TPA's representations.

- prejudice significantly its competitive position, or
- interfere significantly with the contractual or other negotiations with other government institutions, or
- result in undue loss to it, or
- undue gain to its competitors.

[94] The requester submits that both the hospital's and the non-confidential portions of the TPA's submissions it was provided with are general in nature and do not meet the harms test in part 3. Concerning the TPA's submissions, the requester states:

...the IPC has determined that being subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice a third party's competitive position or result in undue loss to them, as required by section 17.³⁶ Further, a finding that information contained in a bid is several years old has also been found to undermine a determination that the harm step is satisfied.³⁷ And finally, in the IPC's recent case mandating disclosure of documents related to a linen and laundry services agreement of Lakeridge Hospital, the IPC found that disclosure of the third party's slide deck presentation which contained information about the services agreement could not reasonably be expected to result in the harms claimed by the third party.³⁸

... the identity of the person seeking access to information is not generally considered to be a relevant factor in determining whether documents must be disclosed under *FIPPA*.³⁹ In the IPC's recent orders mandating disclosure of three hospitals' linen and laundry services agreements, the identity of the requestor was not considered and it should not be considered here.⁴⁰

[95] In reply, the TPA submits, relying on *Bricklayers*, that the identity of the person seeking access to the information is a contextual factor that assists in considering the extent of the risk that the harms alleged will materialize. It states that in that case, the alleged harms were relevant only because of the identities of the requester and an affected party.

[96] The TPA states that it assumes that in Orders PO-3885, PO-3886 and PO-3887,

³⁶ Order PO-2435.

³⁷ Orders MO-2093 and MO-2072.

³⁸ Order PO-3885.

³⁹ *Bricklayers and Stonemasons Union Local 2 v Information and Privacy Commissioner of Ontario and Canadian Bricklayers and Allied Craft Unions Members v Information and Privacy Commissioner of Ontario (Bricklayers)* 2016 ONSC 3821.

⁴⁰ Orders PO-3885, PO-3886, and PO-3887.

where disclosure of three hospitals' linen and laundry services agreements was ordered, the identity of the requester was not considered because the third party appellants did not raise it as a consideration that impacted its arguments on the "harms" issue.

[97] In sur-reply, the requester states that the TPA has offered no explanation why this case qualifies as having the "unusual circumstances" referred to in *Bricklayers* in which the IPC should consider who the requester is in assessing the harm. She submits that the IPC should apply its general approach that the identity of the requester is not relevant.

Analysis/Findings

[98] The party resisting disclosure must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁴¹

[99] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁴²

[100] At issue are the four pricing options of the TPA in one chart (Record 6) and in four emails (Records 4, 5, 8 and 13). I have found that these pricing options are not contained in the agreement with the hospital, as reflected in Records 1 and 2.

[101] These price options were part of the TPA's proposal to the hospital, which set out four different pricing options over six years for the hospital to consider for the utilization of the TPA's services. As stated, the TPA provided confidential representations regarding the harms set out in sections 17(1)(a) and (c).

[102] The TPA also provided detailed evidence about the highly competitive linen and laundry services industry, particularly as it pertains to the markets it competes in for business. Although the actual identity of the requester may not be relevant in an access request, in considering the application of sections 17(1)(a) and (c) to the records in these appeals, the ability of the TPA's competitors and customers to have access to the requested information is relevant.

[103] I find that disclosure of the information at issue in Records 4, 5, 6, 8 and 13, which is information that reveals the actual financial details of the TPA's four pricing

⁴¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁴² Order PO-2435.

options in these records, meets part 3 of the test under sections 17(1)(a) and (c). I find that this information, combined with disclosure of the actual terms of the agreement entered into with the TPA at Records 1 and 2, could provide information to the TPA's competitors and its other customers as to the rate structure under which the TPA is willing to offer its services and the price differential range it is prepared to accept.

[104] Specifically, I find that disclosure of this information in Records 4, 5, 6, 8 and 13 could reasonably be expected to significantly prejudice the competitive position of the TPA under section 17(1)(a) and could also reasonably be expected to result in undue loss to the TPA or gain to its competitors under section 17(1)(c).

[105] Accordingly, I find that the information identified by the TPA as being subject to section 17(1) in Records 4, 5, 6, 8 and 13 is exempt under section 17(1). This information reveals the actual financial details of the TPA's four pricing options offered to the hospital.⁴³

ORDER:

1. I order the hospital to withhold the information identified by the TPA as being subject to section 17(1) in Records 4, 5, 6, 8 and 13. For ease of reference, I am providing the hospital with a copy of these records highlighting this information and the non-responsive information in these records that should not be disclosed to the requester.
2. I order the hospital to disclose the remaining information in the records to the requester by **April 3, 2020** but not before **March 30, 2020**.

Original signed by: _____

Diane Smith
Adjudicator

February 28, 2020 _____

⁴³ Information about linen and laundry suppliers other than the TPA is not responsive to the request.