ORDER PO-2300

Appeal PA-020090-1

Ministry of Health and Long-Term Care

NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a proposal submitted to the Ministry by an identified company (the affected party) in response to a request for proposals (RFP) for the operation of a long-term care facility on certain identified lands.

The Ministry responded to the request by advising the requester that it was notifying the affected party of the request. The affected party responded to the Ministry's notification by consenting to the release of some records and objecting to the release of others.

The requester subsequently contacted the Ministry and clarified that he was interested in obtaining access to the following records:

1. All documentation and correspondence evidencing the allocation by the Ministry to [the affected party] of a bed allocation, pursuant to [an identified file number] (120 beds);
2. All documentation and correspondence evidencing the allocation by the Ministry to [the affected party] of a bed allocation, pursuant to [an identified file number] (72 beds);
3. Complete copies of any development or construction agreements and other documentation effecting the above-captioned bed allocations.

The Ministry then issued an access decision to the requester, identifying three responsive records, totaling 430 pages, and granting access to a small number of pages from one of the three records (record 2 – see section below titled "RECORDS'). The Ministry stipulated that access to the remaining pages of these three records was being denied under section 17(1)(a) (third party information) of the *Act*.

The appellant appealed the Ministry's decision to deny access to the responsive information.

In his letter of appeal, the appellant clarified that he wished to receive all records relating to this long-term care facility, including the site plans and leases regarding the actual construction.

During the mediation stage the Ministry located 21 additional responsive records (approximately 400 pages), and issued a decision denying access to these records in their entirety on the basis of section 17 of the *Act*.

Mediation was not successful in resolving all of the issues in this appeal, so the appeal was transferred to the inquiry stage of the appeal process.

I first sent a Notice of Inquiry to the Ministry and the affected party. As some of the records at issue relate to an identified school board (the Board), I also sent this Notice of Inquiry to the Board. I received representations from the Ministry and the affected party. The Board did not

submit representations. Both the Ministry and the affected party agreed to share their representations in their entirety with the appellant.

I then sought representations from the appellant. The appellant chose not to submit representations.

Upon a further review of the records at issue, it came to my attention that two records (a portion of record 17a and all of record 21a – see section below titled "RECORDS") contain information authored by an engineering consulting firm (the consulting firm), which had not been previously notified. Accordingly, I sought representations from the consulting firm in regard to the possible application of section 17 to these records. The consulting firm chose not to submit representations.

During the adjudication stage, the mediator had further discussions with the affected party, in which it confirmed its consent to the disclosure of certain identified portions of the records.

RECORDS:

There are 24 records at issue in this appeal. They are described as follows:

Records located initially:

Record 1 – Agreement for Development of Long-Term Care Facility Beds in Toronto West, dated July 20, 2001.

Record 2 – Proposal to Develop Long-Term Care Facility Beds, dated January 31, 2001.

Record 3 – Lease Agreement between the affected party and the Board (unsigned and undated)

Records located as a result of appellant's clarified request:

Record 1a – Agreement for Development of Long-Term Care Facility Beds in Toronto West, dated June 18, 1999.

Record 2a – Proposal to Develop Long-Term Care Facility Beds, dated July 31, 1998.

Record 3a – Ministry letter to the affected party, dated September 16, 1998, regarding scheduled interview in response to the RFP.

Record 7a – Amending Agreement between the Ministry and the affected party for the development of long-term care facility beds, dated July 27, 2000.

Records 4a-6a and 8a-21a – correspondence. This includes correspondence between the affected party and the Ministry and/or the Board, the consulting firm and the affected party and the consulting firm and the City of Toronto.

CONCLUSION:

Some of the severed information in the record qualifies for exemption under section 17(1)(a) of the *Act*. The remaining information does not and must be disclosed.

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1): the exemption

The Ministry claims that the severed portions of the records are exempt under sections 17(1)(a), (b) and/or (c) of the *Act*. These 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, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 (Orders PO-1805, PO-2018, PO-2184, MO-1706).

For section 17(1) to apply the Ministry and/or the affected 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) and/or (c) of section 17(1) will occur.

Part 1: type of information

Both the Ministry and the affected party submit that the information at issue consists of commercial and financial information, and trade secrets.

The terms commercial information, financial information and trade secret have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *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].

I adopt these definitions for the purpose of this appeal.

The Ministry provides its own definitions of the terms commercial and financial information and trade secret and concludes that the information satisfies part one of the three-part test under section 17(1).

With respect to the trade secret category, the affected party states that it "is developing or has developed numerous programs and techniques specific to [its] operations that are not generally known in the business." The affected party submits that clients are selecting its facilities over its competitors because of "several unique programs" that are described in some detail in proposals submitted to the Ministry and in a development agreement.

With regard to the financial information category, the affected party states that information provided in the "Development Agreement" and proposal documents include the affected party's balance sheet, cash flows, net worth, revenue and expense ratios relating to how it manages its business as well as information about its shareholders.

With respect to the commercial information category, the affected party states that the "Agreement to Lease or the Lease Agreement itself" contains commercial information regarding its relationship with the Board.

On my review of the records at issue, I am satisfied that the severed information constitutes commercial information since it pertains to the proposed and agreed upon terms of a commercial relationship between the affected party, the Ministry and other partners regarding the development of a long-term care facility. In addition, I am also satisfied that some of the withheld information contains financial information, including a pro-forma balance sheet and budget forecast for the development project, financial statements for principal corporate shareholders and credit references.

I acknowledge both the Ministry's and the affected party's position that some of the information in the records contains trade secrets, including several unique programs and techniques specific to its operations that are not known in the industry. However, in my view, neither their representations nor the records themselves demonstrate how certain information meets the test under Order M-29.

In conclusion, I find that part one of the test under section 17(1) has been met.

Part 2: supplied in confidence

Introduction

In order to satisfy part 2 of the test, the affected party and/or the Ministry must show that the information was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

Supplied

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

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

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 [Orders PO-2018, MO-1706].

The affected party does not provide representations on the supplied requirement.

The institution states that the records meet the criteria for having been supplied since they were supplied in response to RFPs for the development of long-term care facility beds issued by the Ministry.

Based on my review of the records I find that they fall into the following five categories:

1. Proposal documents (records 2 and 2a)

2. Agreement documents (records 1, 1a, 3, 6a, 7a, 8a and 19a)

3. Correspondence from the affected party to the Ministry (records 4a, 10a, 12a, 14a, 16a, 17a, 18a and 20a)

4. Correspondence that reveals information supplied by the affected party to the Ministry (records 5a, 9a and 21a)

5. Correspondence to the affected party from the Ministry and the Board (records 3a, 11a, 13a and 15a)

Category 1

In my view, it is clear that the information contained in the two proposal documents was supplied by the affected party to the Ministry in response to the Ministry's solicitation of proposals from prospective developers of a long-term care facility. The information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution (see Orders MO-1368 and MO-1504).

Accordingly, I find that records 2 and 2a meet the "supplied" requirement.

Category 2

Records 1, 1a and 3 are traditional "long-form" agreements. Records 6a, 7a, 8a and 19a are either agreements or amending agreements in "letter-form".

As stated above, past decisions of this office have established that the provisions of a contract have normally been treated as mutually generated, rather than "supplied", even where the contract substantially reflects terms proposed by a third party. In Order MO-1706 I dealt with this issue in regard to a "vending and pouring agreement" between a cold beverage company and a school board for the exclusive provision of soft drinks and snack vending machines in the board's schools. In finding that the negotiated terms of a contract between the beverage company and the board did not meet the supplied test, I stated:

> In general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. Except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret) agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied".

Applying this analysis to the circumstances of this appeal, and considering the Ministry's representations and the contents of the category 2 records, I am satisfied that these records are the product of a negotiation process. Furthermore, I have not been provided with any evidence to suggest that any of the information contained in these records meets the "unusual circumstances" criteria.

Accordingly, I find records 1, 1a, 3, 6a, 7a, 8a and 19a do not meet the "supplied" requirement.

Category 3

The records in this category are comprised of correspondence authored by the affected party and sent to various employees within the Ministry. In one case (record 18a) the correspondence is from the affected party's solicitors to the Ministry.

It is self-evident that the affected party supplied all of these records to the Ministry. Accordingly, I find that the "supplied" requirement has been met for records 4a, 10a, 12a, 14a, 16a, 17a, 18a and 20a.

Category 4

The three records in this category are authored respectively by the Ministry (record 5a), the Board (record 9a) and the consulting firm (21a). They all refer to information that was supplied by the affected party to the Ministry with respect to the Ministry's RFP process.

Accordingly, I find that records 5a, 9a and 21 meet the "supplied" requirement.

Category 5

The records in this category are comprised of correspondence to the affected party from the Ministry (records 3a, 11a and 15a) and the solicitors for the Board (record 13a). None of the information contained in these records could be construed as having been supplied by the affected party to the Ministry, nor would disclosure of these records reveal information that was supplied.

Accordingly, I find that records 3a, 11a, 13a and 15a do not meet the "supplied" requirement.

To conclude, only 13 of the 24 records at issue, numbered 2, 2a, 4a, 5a, 9a, 10a, 12a, 14a, 16a, 17a, 18a, 20a and 21a (corresponding to Categories 1, 3 and 4), meet the "supplied" requirement.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis (Order PO-2020).

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 (Order PO-2043)

The Ministry submits that the records at issue were supplied explicitly in confidence. The Ministry states that from the outset of the RFP process it assured the affected party through the wording of various documents that the affected party's information would be held strictly confidential, subject to the requirements for disclosure under the *Act*.

In support of this position the Ministry refers to the wording of the 1998 RFP document ("Ministry of Health Request for Proposals to Develop 420 Long-Term Care Facility Beds in the Regional Municipality of York"), which the affected party responded to with its initial proposal (record 2a). At page 47 of the 1998 RFP it reads:

> The Ministry […] will consider all Proposals submitted in response to this Request for Proposals as confidential.

The Ministry also refers to its "2001 Bed Allocations - Application Guidelines", dated November 2000 (the Guidelines), through which the affected party was awarded further beds. The Guidelines set out that all applications submitted to the Ministry are subject to the access provisions of the *Act*, unless the information is exempt under the *Act*. The Guidelines set out the wording of the third party exemption (section 17) and put the onus on the affected party to clearly mark as "confidential" any information that it feels meets the section 17 test for exemption. The Guidelines indicate that if the Ministry receives a request for information in connection with a proposal application, it will contact the affected party to enable it to make representations on the release of the information requested. In regard to an affected party's responsibilities when submitting a proposal application, the Guidelines also state:

> You will be required, in the Applicant's Declaration, to consent to the disclosure of information to the public of the following information:
>
> - Your name
> - The number and location of proposed beds requested
> - The number of beds awarded to you in the 1998 and 1999 process, if any
> - The type of building you propose
> - Key facility design features of your proposed facility

The Ministry submits that the affected party in its 2001 proposal application completed a declaration in which it agreed to abide by the terms of the Guidelines. The Ministry states that apart from this declaration, the affected party did not consent to the disclosure of information contained in the 2001 proposal application.

The Ministry also refers to confidentiality provisions in Article 5 of the two development agreements (records 1 and 1a). Article 5 reads in part:

> During the Term and after the termination or expiry of this Agreement, the Applicant shall,
>
> (a) treat as confidential any data, information (whether oral, written, in computer readable format or otherwise) or any other item in any form (including any data, information or other item derived from any data) relating to the Ministry, **the application process**, this Agreement or the Service Agreement which the Applicant or the Applicant's Personnel may have acquired or learned in the course of, or incidental to, the performance of this Agreement, the application process or otherwise, which was labelled or otherwise identified by or on behalf of the Minister as confidential (the "Confidential Information"); [my emphasis]

The affected party's representations on the "in confidence" requirement are brief. It also relies on the language of Article 5 to establish the confidential nature of the information at issue.

Dealing first with the Category 1 records, the evidence of both the Ministry and the affected party supports a finding that there was an explicit shared understanding and expectation that information provided in the application process, including information contained in the proposal documents, was being supplied by the affected party to the Ministry in confidence.

Neither the Ministry nor the affected party have directly addressed the "in confidence" requirement with regard to the Category 3 and 4 records. However, on my review there is a clear connection between these records and the application process and I am satisfied that the affected party implicitly supplied the information in these records in confidence to the Ministry.

Conclusions

I have found that the information contained in the Category 1, 3 and 4 records meets both aspects of part 2 of the three-part test under section 17. I will next consider whether any of the information at issue in these records meets the part 3 "harms" test.

Part 3: harms

General principles

To meet this part of the test the Ministry and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of

anything other than the records at issue and the evidence provided by a party in discharging its onus (Order PO-2020).

The affected party's representations focus on section 17(1)(a) (prejudice to competitive position/interference with contractual negotiations) while the Board's submissions address section 17(1)(a), section 17(1)(b) (similar information no longer being supplied) and section 17(1)(c) (undue loss or gain).

Section 17(1)(a): prejudice to competitive position

The affected party states that it is developing or has developed numerous programs and techniques specific to its operations that are not generally known in the long-term care industry. The affected party states that clients are selecting it over its competitors because of its unique programs. The affected party asserts that these programs provide it with a competitive advantage in the long-term care market where supply exceeds demand for beds. The affected party believes that if these processes are copied by competitors the result will be a loss of revenue since there is extreme pressure for preferred accommodation which attracts $18.00 per resident per day beyond the standard accommodation rate in long term-care facilities.

The affected party is also concerned about the release of financial information that provides insight into how it manages its business and its principal shareholders. It feels that this information in the hands of its competitors or within the public domain would impair its competitive advantage.

As indicated above, the affected party has also recently confirmed its consent to the release of portions of the information at issue in this appeal. Some of this information comprises significant sections of the Category 1 records.

The Ministry reinforces the affected party's concerns stating that disclosure of the records at issue could reasonably be expected to significantly prejudice the competitive position, negotiations and commercial interests of the affected party given the competitive climate in the long-term care industry. In any event, the Ministry states that the affected party is in a better position to provide evidence on any harm to their interests under section 17 and it defers to the representations of the affected party.

I agree with the Ministry that the affected party is in the best position to determine whether the release of the withheld information would lead to the harms set out in section 17. With this in mind, I take special note of the affected party's consent to the release of significant portions of the Category 1 records, including background material, published articles and corporate information pertaining to the affected party (for example, articles of incorporation). Therefore, with respect to those portions of the Category 1 records, I am satisfied that the release of this information would not meet the harms test under section 17(1)(a) (or paragraph (b) or (c)) and should be released.

With respect to the remaining information in Category 1 and the information in Categories 3 and 4, the representations of the affected party and the Ministry do not on their own provide detailed and convincing evidence that disclosure of this information could lead to a reasonable expectation of harm. However, coupled with a close examination of the information contained in these records I am convinced that portions of this information could provide a significant advantage to competitors in future bidding on long-term care facility projects. In particular, there is information contained within the Category 1 records that provides substantial insight into the affected party's needs assessment methodologies, development strategies, design plans, logistics, budget forecasting and financial means. I am satisfied that this information would be valuable to a competitor and so I find that the harms described in section 17(1)(a) could reasonably be expected to occur if this information was released to the appellant.

On the other hand, I find that some of the remaining information is either generic in nature, public knowledge or published supporting material and its release could not reasonably be expected to result in the harms contemplated in section 17(1)(a). This information includes:

- Portions of record 2 that contain signed "applicant declarations" and set out generic undertakings and consents that any applicant submitting a proposal would have had to complete

- Portions of record 2a that contain generic information relating to services provided in a long-term care facility

- Correspondence (Category 3 and 4 records) relating to the existing contractual relationship between the affected party and the Ministry with regard to the development of the long-term care facility that is the subject of this appeal.

Section 17(1)(b): similar information no longer supplied

Notably, the affected party's representations do not address the harms set out in section 17(1)(b).

The Ministry states that disclosure of the records at issue could be expected to result in similar information no longer being supplied to it. The Ministry submits that if applicants cannot reveal their proprietary information to the Ministry in confidence, they may choose not to do so. This would result in either the Ministry not having full information or the applicant not being prepared to provide this important public service.

I am not persuaded by the Ministry's arguments. I have already found considerable portions of the information at issue exempt under section 17(1)(a). As well, the affected party has consented to the release of substantial portions of information. The information that remains at issue is not, in my view, proprietary and, even if it were, the Ministry's submissions are highly speculative. Perhaps I would find the Ministry's arguments more compelling if the affected party had made similar submissions. I find that the harm component under section 17(1)(b) has not been established.

Section 17(1)(c): undue loss or gain

The Ministry states that disclosure of the records at issue can be reasonably expected to result in undue loss to the affected party. The Ministry submits that while the "magnitude of this loss is not quantifiable, there is a real risk of substantial loss".

The affected party does not specifically provide representations under section 17(1)(c).

With respect to the section 17(1)(c) harm provision, I find that my analysis under section 17(1)(a) applies, given that the Ministry's arguments under paragraph (a) are very similar, if not identical, to those underpinning paragraph (c). I find that the harm aspect of the section 17(1)(c) test has not been established for the information remaining at issue.

Conclusion

I find that portions of records 2 and 2a qualify for exemption, while the remaining information at issue does not.

ORDER:

1. I order the Ministry to provide the appellant with complete copies of records 1, 1a, 3, 3a, 4a, 5a, 6a, 7a, 8a, 9a, 10a, 11a, 12a, 13a, 14a, 15a, 16a, 17a, 18a, 19a, 20a and 21a.

2. I order the Ministry to disclose to the appellant portions of records 2 and 2a no later than **August 6, 2004** but not before **July 30, 2004**, in accordance with the highlighted versions of these records included with the Ministry's copy of this order. To be clear, the Ministry should not disclose the highlighted portions of these records.

3. In order to verify compliance with provisions 1 and 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the records it discloses to the appellant.

4. I remain seized of this appeal in order to deal with any issues that may be outstanding.

Original signed by: June 30, 2004
Bernard Morrow
Adjudicator