Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2343

Appeal PA-040079-1

Ministry of Health and Long-Term Care

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BACKGROUND:

In August 2000, the Ministry of Health and Long-Term Care (the Ministry) was approached by the federal Department of National Defence (DND) regarding the potential for establishing a partnership with an Ottawa health care facility to provide health services to members of the Canadian Forces stationed in the National Capital Region. This was in anticipation of the closure of the National Defence Medical Centre. In December 2000, DND provided the Ministry with a Statement of Requirements that was distributed to hospitals in the Ottawa area.

On June 20, 2002, Montfort Hospital (the hospital) submitted a package of documents to DND, in draft form, in response to the Statement of Requirements. The package contained a description of the services that the hospital would deliver to the Canadian Forces as part of a possible agreement with DND. These records contain details of the services to be provided by the hospital and the corresponding infrastructure requirements, including space needs and project costs.

The hospital also provided a number of these documents to the Ministry, it order to keep the Ministry informed of its negotiations with DND and to assure the Ministry that the hospital would continue to fulfill its public mandate at all times.

The hospital and DND eventually reached agreement and signed a long-term contract in October 2003. Under the terms of the contract, the first two years would be spent preparing the space required by DND, after which the medical and clinical services components would be implemented. Significantly, the agreement contains an "off-ramp" clause giving DND the unilateral right to cancel the contract during an initial period if certain identified requirements are not met.

NATURE OF THE APPEAL:

The Ministry received the following request under the *Freedom of Information and Privacy Act (the Act)*:

> All records relative to the recent collaboration of the Ministry of Health and Long-Term Care of Ontario with the Department of National Defence of Canada leading to the identification and the choice of [the hospital], for the relocation of the National Defence Medical Centre, Alta Vista Drive, Ottawa, Ontario, including the bids from [the hospital] and the other competing hospital and the Department's proposed arrangement with [the hospital].

The Ministry identified 10 responsive records. In its initial response to the requester, the Ministry provided access to seven records in full and partial access to one record. The Ministry identified section 19 (solicitor-client privilege) as the basis for denying access to the undisclosed portions of the eighth record. The Ministry also informed the requester that it was in the process of notifying the hospital, pursuant to section 28 of the *Act*, in relation to the remaining two records.

After consulting with the hospital, the Ministry advised the requester that it was denying access to the two records pursuant to the exemptions in sections 17(1)(a) and (c) of the *Act* (third party commercial information). These two records are:

- A draft "Statement of Work", dated June 30, 2002;

- A draft document entitled "In-Garrison Clinical and Medical Services Capital Planning – Statement of Requirement".

The requester (now the appellant) appealed the Ministry's decisions.

The scope of the appeal was narrowed during mediation, as follows:

- The appellant restricted his request to the two records that had been withheld under section 17(1), thereby removing the undisclosed portions of the record withheld under section 19, and that exemption claim, from the scope of the appeal.

- The hospital withdrew its objection to disclosing all portions of the Statement of Work, with the exception of page 16, and the Ministry disclosed the other 30 pages of this records and the two attached appendices to the appellant.

Further mediation was not successful, and the appeal was transferred to the adjudication stage.

I began my inquiry by sending a Notice of Inquiry to the Ministry and the hospital. Both parties responded with representations on the issues raised in the Notice. I then provided the appellant with a copy of the Notice, along with a copy of the Ministry's representations and the non-confidential portion of a translated copy of the hospital's representations. The appellant chose not to submit representations.

RECORDS:

There are two records that remain at issue in this appeal:

Record 1 - Page 16 of the draft Statement of Work

Record 2 - The 15-page draft Statement of Requirements, together with an attached 3-page document titled "Financial Arrangements" and a 2-page consultant's report titled "Methodology for Pricing Hospital Services Prepared for [the hospital]"

DISCUSSION:

THIRD PARTY INFORMATION

General Principles

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;
>
> (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 hospital 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 Ministry 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) and/or (c) of section 17(1) will occur.

Part 1: Type of Information

Commercial and Financial Information

The hospital submits that Record 2 contains both "commercial information" and "financial information". Previous orders have defined these terms as follows:

Commercial Information

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

The hospital submits:

> These records as a whole contain a description of the services that the Hospital would deliver to the Canadian Forces as part of a possible agreement with DND for the provision of medical and clinical services. The records contain the particulars of the services to be provided by the Hospital and the infrastructure required for this purpose; i.e., the space required to accommodate the DND health centre and the cost associated with this project.
>
> The "Financial Arrangements" record sets out the financial arrangements that would be entered into by the Hospital and DND in an agreement for the provision of services, specifically the financial components of the proposed integration of the Hospital's health care services with DND's, the pattern of payments to be received by the Hospital as set out in its proposal and the proposed terms and conditions of payment for the anticipated services. …
>
> The records entitled "Methodology for Pricing Hospital Services" sets out the pricing formula for the services offered, and in so doing reveals the facts contributing to the proposed final price. …

The Ministry's representations support the hospital's position.

I accept the hospital's submissions and find that Record 2 contains commercial and financial information. This record consists of a draft proposal prepared by the hospital in the context of responding to DND's solicitation for bids to take over certain hospital services in the Ottawa area. This venture is clearly commercial in nature, relating to the buying and selling of health services that would be provided to members of the Canadian Forces. The proposal has a financial component, which is outlined in detail in Record 2, in particular the two documents attached to the proposal.

Labour Relations Information

The hospital submits that page 16 of Record 1 contains "labour relations information". It submits:

> Firstly, the content of page 16 is preceded by the title, "Human Resources Principles." As the title indicates, the information in this part of the record deals in a general manner with the integration of Canadian Forces personnel into the Hospital's operations. In this respect, the Hospital in relying on the definition of "labour relations information" set out in Order P-653, which is reiterated in IPC Order PO-2010, which stipulates, "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees."

Again, the Ministry's representations support the hospital's position.

I find that page 16 of Record 1 contains "labour relations information" as that term has been defined in the orders referred to by the hospital in its representations. The page consists of a detailed description of various human resources issues and an outline of how they will be addressed by DND and the hospital during the course of implementing the terms of the agreement. They include issues relating to the impact of collective agreements as well as linguistic and personnel policies. Clearly, the information on page 16 concerns employer/employee relationships and falls within the scope of the definition of "labour relations information".

Therefore the requirements of part 1 of the section 17(1) test have been established for both records.

Part 2: supplied in confidence

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

supplied

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 Ministry's representations on the "supplied" component of part 2 consist of the following:

> The [hospital] supplied the information described above to [the Ministry] in November 2001 in order to advise [the Ministry] of its intention to submit a proposal to provide health services to Canadian Forces to the Department of National Defence. [The Ministry] submits that the technical, commercial, financial and labour relations information referred to above and contained in Records 1 and 2 was therefore supplied directly by [the hospital] to the Ministry.

The hospital confirms that it provided both records to the Ministry:

> Firstly, it is clear that the records at issue were supplied to the Ministry because the latter was not, and never would be, party to any contract that might be negotiated between DND and the hospital. … [T]he Hospital supplied the records to the Ministry to keep it informed of the progress of the project with DND, realizing, moreover, that the provisions of subsections 4(3) and 4(4) of Ontario's *Public Hospitals Act* might eventually apply.
>
> The legislative provisions in question stipulate the following:
>
> > Approval of additions
> >
> > 4(3) No additional building or facilities shall be added to a hospital until the plans therefor have been approved by the Minister.
> >
> > Approval of sales
> >
> > 4(4) No land, building or other premises or place or any part thereof acquired or used for the purposes of a hospital shall be sold, leased, mortgaged or otherwise disposed of without the approval of the Minister.
> > R.S.O. 1990, c. P.40, s. 4(3,4).
>
> Because the question of infrastructure and the necessary space was a fundamental component of the Hospital/DND project, and because the project would involve the lease and/or possible addition of space on the Hospital site, the Hospital was in fact considering that it might have to obtain Ministry approval to implement any project finalized with DND.

The hospital emphasizes that the draft documents at issue in this appeal do not constitute formal submissions to the Ministry under the *Public Hospitals Act*. Rather:

> The Hospital supplied the records to the ministry with the simple intention of (1) keeping it informed of the developments in its negotiations with DND; and (2) clarifying the Hospital's possible intentions with regard to its buildings, facilities and premises and the scope of the medical and clinical services being considered, with the ultimate objective of assuring the Ministry that the Hospital's public mandate would continue to be fulfilled at all times.

The hospital draws a distinction between a mutually generated contract involving an outside party and an institution, and one where the institution is not a party to a contract, but has a copy in its possession for other reasons. In this case the hospital suggests that it sent the records to the Ministry for the purpose of keeping the Ministry informed of progress on the project and in case the hospital subsequently required Ministry approval. I agree with the distinction outlined by the hospital. Neither record at issue in this appeal was negotiated by the Ministry, and the reasons offered by the Ministry and the hospital to explain why the records came into the possession of the Ministry are reasonable.

Accordingly, I find that the "supplied" component of part 2 of the section 17(1) test has been established for both records.

in confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier (the hospital in this case) 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 Ministry 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 hospital prior to being communicated to the Ministry;
- 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 hospital and the Ministry both rely on the following provision on page 2 of Record 1 to support their position that the records were supplied to the Ministry with an *explicit* expectation of confidentiality.

> This Statement of Work (SOW) contains proprietary information and is the property of [the hospital]. It has been prepared exclusively for CF [Canadian Forces] and is intended solely for CF's review and consideration. The schedule and its contents remain proprietary and shall not be divulged to any third party without the prior written consent of [the hospital].

The parties argue that there was also an *implicit* expectation of confidentiality in the circumstances.

The Ministry submits:

> Furthermore, it is the practice of [the Ministry] to treat this sort of information as confidential as [the Ministry] considers it to be "pre-tender" information. In this case, [the Ministry] did, in fact, ensure that this information was not used or distributed outside East Region, Health Care Programs Division.
>
> [The Ministry] is not aware that the information described in Records 1 and 2 has been otherwise disclosed or is available form sources to which the public has access.

Similarly, the hospital submits:

> Moreover, because the information contained in the records at issue is of a delicate nature (since it is *inter alia* commercial and/or financial and labour relations information), it is entirely reasonable that the Hospital would have insisted on the strict application of the statement of confidentiality. In this case, they contain particulars concerning the Hospital's position and its commercial relationship with DND that are not all included in the final contract between the parties.
>
> … Furthermore, should the confidentiality wording incorporated in the Statement of Work be considered irrelevant for the records at issue, for any reason whatsoever, the Hospital maintains that it is clear that the records at issue were supplied to the Ministry on the implicit condition that they would be handled confidentially, in view of the circumstances of the Ministry's involvement in the project, described above, and the informal nature of the records supplied to DND at that stage.

The confidentiality provision included in the Statement of Work developed by the hospital in its proposal for the DND hospital project is strong evidence of an explicit expectation of confidentiality as between those two parties. However, in my view, this provision does not explicitly bind the Ministry in its handling of the records in draft format. That being said, the provision does support the hospital's position that the records were provided to the Ministry with an implicit expectation that they would be treated confidentially. Documents of this nature,

particularly in draft format, would not be available from public sources, and the Ministry states that it treated the records as confidential, limiting their circulation within the Ministry. In addition, in my view, the nature of documents and the fact that they were supplied to the Ministry in draft format before being finalized and submitted to DND supports the hospital's position.

I find that the affected party had a reasonably held implicit expectation of confidentiality at the time it supplied the records to the Ministry, thereby satisfying the second component of part 2 of the section 17(1) test.

Part 3: Harms

To meet this part of the test, the Ministry and/or the hospital 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 Ministry's representations do not deal with the harms component of section 17(1), relying instead on the hospital to establish part 3 of the test.

Record 2

The hospital points to a so-called "off-ramp" provision in the agreement to support its position that disclosing Record 2 would result in the harms described in section 17(1)(a) and (c). This provision gives DND the right to cancel the contract if certain identified requirements are not met.

The hospital submits:

> … Clearly, then, the provisions of the Hospital's contract with DND put the Hospital in a vulnerable position insofar as the contract could be cancelled before the Services component of the contract has even been implemented.
>
> If DND exercised its right to off-ramp, and the information at issue had been disclosed by virtue of this appeal, this information could unquestionably be used by a competitive health care institution to enable it to develop a proposal that meets DND's requirements for the same project. The financial information contained in the records at issue, especially the information related to the pricing methodology, could in fact be extremely useful to this competitive institution in such circumstances because it could be used, at least as a starting point, without the institution incurring any costs for developing its own method, in the development of financial arrangement that are suited to DND's needs. Ultimately, this would give the institution the possibility of generating revenue by

> negotiating a contract without having had to develop its own pricing methodology or service delivery structure.

The hospital also points to the potential competitive harm relating to future similar projects:

> … The information at issue could be used by any of the Hospital's competitive institutions for the development of a similar proposal, especially a financial proposal, such that any competitive advantage the Hospital currently enjoys would be destroyed in future for other similar projects. Firstly, the Hospital would be at a disadvantage with respect to other competitors in terms of its ability to negotiate other partnership agreements; moreover, a competitive institution would benefit from the particulars concerning the Hospital's pricing methodology, which would enable it to reduce the costs of preparing its submission in the context of another similar partnership. Evidently, this would give the competitive institution an opportunity to generate undue gain inasmuch as it would have benefits free of charge from certain key elements in the Hospital's proposal.

The hospital also expresses concerns about the details of the financial terms being given to another potential partner of the Hospital:

> If the information at issue was disclosed, it might be supplied to a potential partner of the Hospital in connection with another transaction related to the delivery of services. It is reasonable to believe that in such circumstances, with the financial information contained in the records at issue as a reference point, a potential partner would insist that the Hospital offer it terms that are as advantageous as, if not more advantageous than, those disclosed in the records at issue.

The hospital also argues that its long-term viability could be connected to this agreement. It points out that the "heightened competition" between all health care institutions in the current provincial economy puts innovative ideas for more revenue at a premium.

In Order PO-1894, I dealt, in part, with whether disclosing correspondence that discussed drafts of an agreement of purchase and sale or proposed terms and positions of a prospective purchaser would give rise to a reasonable expectation that one of the harms described in section 17(1). In that case, the prospective purchaser submitted that disclosing the records would harm its competitive position, particularly since the sale had not been finalized. In accepting this position, I stated:

> Given the status of the sale and the possibility that the Ministry may have to enter into a new process should the current conditional Agreement of Purchase and Sale not close, in my view, disclosure of the records could reasonably be expected to result in significant prejudice to the competitive position of the third parties –

> both the prospective purchaser and the unsuccessful third party bidders. Therefore, the third and final requirement for exemption under section 17(1)(a) has been established, and the records qualify for exemption under section 17(1)(a).

Similar considerations are at play here. As the hospital points out, if DND exercises its right to cancel the agreement, the information contained in the records could be used by a competitive health care institution to develop a comparable proposal for DND. The work done by the hospital in addressing the financial and staffing implications of its proposal would assist other health care institutions in any subsequent arrangement with DND and, perhaps more importantly as it relates to the interests of the hospital, disclosing the financial structuring and other commercial arrangements contained in Record 2 could reasonably be expected to result in competitive harm to the hospital (section 17(1)(a)) and undue loss or gain to the hospital and other health care institutions in subsequent comparable health delivery schemes (section 17(1)(c)).

Therefore, based on my review of the records and the hospital's representations, I find that the hospital has provided the necessary detailed and convincing evidence required to establish a reasonable expectation of harms under sections 17(1)(a) and (c) should Record 2 be disclosed.

Record 1

As far as Record 1 is concerned, the hospital explains that, although its contract with DND was signed in October 2003, the services component of the agreement does not kick in until October 2005. The hospital submits that this phased implementation has a significant impact on the labour relations information contained on page 16 of Record 1:

> The disclosure of the information on page 16 of the Statement of Work in the context of this Appeal would therefore be strategically premature, in the Hospital's opinion. The Hospital must be able to reserve the right to initiate its communications with its labour relations stakeholders at the time and in the manner it considers most appropriate. The disclosure of the information at issue at this stage in time could interfere with or at least negatively affect the Hospital's future contractual negotiations with its staff members and their union representatives in connection with the implementation of the Services component of this project, the details of which are still uncertain at present, moreover, for the reasons given above.

I concur. In the circumstances, it is reasonable to expect that disclosing page 16 at this time, which contains labour relations information that will be used by the hospital in upcoming discussions and negotiations with its employees and DND, would interfere significantly with these upcoming negotiations, thereby satisfying the requirements of the harm in section 17(1)(a).

In summary, I find that all three parts of the section 17(1) test have been established for Record 2 and page 16 of Record 1, and these records should not be disclosed.

ORDER:

I uphold the Ministry's decision.

Original signed by: November 12, 2004
Tom Mitchinson
Assistant Commissioner