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

ORDER PO-2344

Appeal PA-020319-3

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Ministry of Health and Long-Term Care (the Ministry), made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to information about two hospital projects in the province.

As background, in 2001, the government of Ontario approved two pilot hospital projects using a public-private partnership (P3) approach. The model of public-private partnership, referred to as "DBFO" (Design-Build-Finance-Operate), includes the selection of a private sector partner to design, build and finance a new hospital facility and to operate select non-clinical services. The two pilot hospital projects are the William Osler Health Centre (WOHC) project in Brampton, and the Royal Ottawa Health Care Group (ROHCG) project in Ottawa.

The appellant sought access to the following information in relation to these two projects:

1. Latest house cards on DBFO, and its two DBFO pilot capital hospital expansion projects (William Osler, Royal Ottawa Hospitals).
2. The short bullet criteria points document or document extract on selecting hospitals for the DBFO pilot projects.
3. The record extract or record with the proposed timetable for bidding, selection, agreements, implementation of the two DBFO pilot projects.
4. Request for Qualifications document for both DBFO pilot projects (the table of contents is sufficient).
5. Final Draft RFP in one DBFO pilot, final RFP in other DBFO pilot (the appellant understands that one RFP has gone to the bidders).

Parts 4 and 5 of the request deal with documentation issued by the hospitals during the process of eliciting proposals from private sector proponents.

The Ministry located a number of records in response to the request. With respect to Part 1, the Ministry granted partial access to two "house notes", severing specific portions. With respect to Part 2, the Ministry denied access to the entirety of a record containing bullet point criteria on selecting hospitals for the DBFO pilot projects. With respect to Part 3, the Ministry located a briefing document for the Minister, and denied access to it in its entirety. With respect to Part 4, the Ministry located the Tables of Contents for the Requests for Qualifications (RFQ's) and denied access to them in their entirety. Finally, with respect to Part 5, the Ministry located the Requests For Proposal (RFP's). Access to these records was also denied in their entirety. In its decision, the Ministry relied on the discretionary exemption in section 13 (advice or recommendations) and the mandatory exemptions in sections 12 (Cabinet records) and 17 (third party information).

The appellant appealed the Ministry's decision. Following receipt of the appeal, the Ministry notified the WOHC and the ROHCG (the affected parties or the hospitals), inviting them to provide their comments on the request for disclosure of the information. The Ministry also issued a supplementary decision in which it released more portions of the "house notes" in relation to Part 1 of the request.

As mediation did not result in a resolution of the appeal, it was referred to me for adjudication. I sent a Notice of Inquiry inviting representations from the Ministry and the affected parties, initially. I shared portions or summaries of their representations with the appellant, who also submitted representations. I then invited the Ministry and the affected parties to reply to certain issues raised in the representations of the appellant. Only the Ministry submitted representations in reply. Neither affected party replied to the appellant's submissions, although one affected party raised a new issue which I will describe below.

The general issue before me is whether the information withheld by the Ministry is exempt from disclosure under sections 12, 13 and 17 of the *Act*.

RECORDS:

The records are listed below, numbered with reference to the request:

1. Record 1A is a seven-page document dated January 8, 2003, discussing the status of the ROHCG hospital redevelopment project. Most of this document has been released. Remaining at issue are severed portions on pages 3, 4, 5 and 6. Record 1B is a seven-page document dated November 25, 2002, discussing the status of the WOHC's hospital redevelopment project. Most of this document has also been released, and remaining at issue are severed portions on pages 4, 5, 6 and 7. For some severances in these records, the Ministry relies on section 12(1). For others, it relies on section 17(1).

2. This is a two-page document containing bullet points outlining objectives and criteria in relation to the P3 pilot projects and the selection of P3 hospital pilots. Access to this record has been denied in its entirety, based on section 13(1).

3. This is a two-page document setting out the estimated timelines leading up to construction in relation to the WOHC and ROHCG projects. Access to this record has been denied in its entirety, based on section 13(1).

4. Record 4A is a three-page Table of Contents to the RFQ in relation to the WOHC project. Record 4B is a two-page Table of Contents to the RFQ in relation to the ROHCG project. Access to these records has been denied in their entirety, based on section 17(1).

5. The two records under this part of the request total approximately six thousand pages. These are the RFP's for the WOHC (Record 5A) and the ROHCG (Record 5B) projects. Access to these records has been denied in their entirety, based on section 17(1).

DISCUSSION:

CABINET RECORDS

The Ministry relied on section 12(1)(a) to withhold access to portions of Records 1A and 1B, the "house notes", in relation to the two hospital redevelopment projects. In its representations, the Ministry also refers to sections 12(1)(b) and (e). These sections provide:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;

The use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331]. A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

The Ministry submits that disclosure of portions it withheld from the "house notes" based on section 12(1) would reveal the substance of deliberations of the Cabinet or its committees or are records prepared to brief a Minister in relation to those matters.

The Ministry submits that the matters in these records were under consideration by Cabinet and the Cabinet Committee on Privatization and SuperBuild ("CCOPS"). The Ministry describes these records as having been prepared for the Minister following the deliberations of CCOPS and Cabinet. It is said that the records are in the standard format for submission of such records to a Minister for funding and financial decisions. The Ministry submits, among other things, that the information and recommendation contained in the records were received and deliberated upon at CCOPS and Cabinet meetings.

The Ministry also submits that the Minister is provided with routine briefings including background for policy and financial details on matters affecting the Ministry, taken to Cabinet or other committees, as he may be required to speak to questions or issues raised by his Cabinet colleagues. Some of the severances, it states, make specific references to decisions by CCOPS and Cabinet.

The Ministry states that the implementation of the projects is not yet complete and current negotiations are in progress for the future. Disclosure of the details of negotiations could inhibit future Cabinet deliberations on the topic.

The appellant has not made specific representations on the application of section 12(1). In his appeal letter, he suggested that the information in these records has become publicly known, and there is no significant prejudice in the release of information from outdated briefing notes.

Analysis

The records at issue under section 12(1) consist of "house notes". As the title suggests, they are intended to provide assistance to a Minister in answering questions as part of an open legislative debate, as opposed to a debate or deliberations within Cabinet. As a general matter, therefore, I find that they do not constitute the type of records addressed by sections 12(1)(a), (b) and (e).

Nevertheless, I must consider whether disclosure of the information in the severed portions would "reveal the substance of deliberations of the Executive Council or its committees", as set out in the opening words of section 12(1). After review of the records and the submissions of the Ministry, I find that disclosure of the severed portions would reveal the substance of deliberations of Cabinet and of the CCOPS, in that they discuss the nature of certain decisions made or directions given about the implementation of the hospital redevelopment projects, at a time when these projects were still the subject of ongoing discussion, negotiation and decision-making by Cabinet.

I am satisfied, therefore, that the portions severed from Records 1A and 1B by the Ministry based on section 12(1) qualify for exemption under the introductory wording to this section.

Section 12(2)(b)

Section 12(2)(b) provides that, despite section 12(1), an institution shall not refuse to disclose a record where Cabinet consents to its disclosure.

Previous orders have held that, while this provision does not impose a requirement on an institution to seek the consent, the head of the institution must at a minimum turn his or her mind to this issue [Orders P-771 and P-1146].

The Ministry's representations on section 12(2)(b) state that it considered and made a discretionary decision not to refer this matter to the Executive Council for consent. It submits that none of the information in the records is available elsewhere in the public domain. The matters have been the subject of deliberation by CCOPS and Cabinet. The Ministry states that seeking consent for subsequent disclosure of these records could undermine the remaining

negotiations and implementation of future redevelopment projects, as set out in the house notes, which have not yet been created, and would reveal the nature of the discussions on the issue. For these reasons, it is said, the Ministry considered the option but decided not to exercise its discretion to seek permission of Cabinet to disclose the records.

Having regard to these representations, I am satisfied that the Ministry turned its attention to the requirements of section 12(2)(b), as required under the *Act*.

I now turn to consider whether Records 2 and 3 are exempt under section 13(1).

ADVICE TO GOVERNMENT

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Record 2 consists of a two-page briefing document that includes a list of the key principles used to determine the hospitals suitable for the DBFO pilot projects. Record 3 is also a two-page briefing document that contains estimated timelines for the bidding, selection, agreements and implementation (up to start of construction) of the two pilot projects.

The Ministry submits that these records contain information that relate to a suggested course of action that will ultimately be accepted or rejected by its intended recipient during the process of deliberation, and thus qualifies as "advice" or "recommendations" for the purposes of the *Act*.

The appellant has not made specific representations on the application of section 13. In his letter of appeal, he questioned whether the list of criteria could be classified as advice, as they have been applied and decisions made. He also questions whether a timetable can be considered as advice.

On my review of the records and the representations, I find that Records 2 and 3 do not qualify as advice or recommendations within the meaning of section 13. They were not created as part of a deliberative process of government decision-making and policy-making. They do not suggest any courses of action. Rather, they provide factual or background information for the Minister as to decisions already made and events anticipated in accordance with those decisions. I also find that Records 2 and 3 do not contain information that would permit accurate inferences about advice or recommendations that may have been given in the deliberative process leading up to those decisions.

I find, therefore, that Records 2 and 3 are not exempt from disclosure.

I will turn to consider whether portions of Records 1A and 1B and the entirety of Records 4A, 4B, 5A and 5B are exempt under section 17(1).

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency

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].

Prior orders have established the following three-part test for the application of section 17(1):

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: type of information

The Ministry submits that the records contain trade secrets as well as financial and commercial information. The affected parties submit that the information at issue is commercial in nature. One of them also refers to the information in the RFP as including its technical and proprietary information. The appellant does not address whether the records contain any of the types of information described in section 17(1).

I am satisfied that Records 4A, 4B, 5A and 5B contain commercial information in that they were created and used as part of a process of procurement. As to Records 1A and 1B, the portions severed on the basis of section 17(1) do not clearly contain the types of information described in that section, as they relate primarily to the Ministry's oversight of the redevelopment projects. It is unnecessary for me to make a definitive determination on this issue as, for reasons given below, I am not satisfied that this information was "supplied" to the Ministry in any event.

Part 2: supplied in confidence

The requirement that it be shown that the information was "supplied" to the Ministry 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 the Ministry by the affected parties, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected parties [Orders PO-2020, PO-2043].

The Ministry submits that the records were created and supplied to it by the affected parties in confidence. It submits that the records contain explicit and/or implicit references to confidentiality. Examples are fax cover sheets that bear embedded watermarks, and publication of documentation on Web pages accessible by password only.

The Ministry submits that it has assured the affected parties that their information will be held strictly confidential, subject to the requirements of the *Act*. It considers all documentation provided to the Ministry as part of the RFQ's and RFP's as subject to this assurance of confidentiality.

The affected parties state that Records 4A, 4B, 5A and 5B were prepared by or on behalf of themselves, and provided to the Ministry for review, as part of an ongoing reporting relationship with the Ministry and in order to ensure that the framework for the bid and negotiation process was in keeping with regulatory and statutory requirements imposed on the hospitals. The information was provided to the Ministry on the basis that it was confidential and would be treated as such.

These parties submit that the RFP's (Records 5A and 5B) were not issued by the Ministry, but by the hospitals. It is said that all recipients of the records have been required to sign confidentiality covenants, including the professionals involved in their preparation.

One of the affected parties submits that the procurement process used in this instance did not entail a public competition, as sometimes occurs. Rather, suitable candidates were pre-qualified and then invited to submit proposals. The RFQ's and RFP's have been made available to prospective bidders only under specific covenants of confidentiality.

The appellant submits that the Ministry is the primary architect of the P3 projects. Further, most of the costs associated with building the hospitals and paying for the hospital services contracted for will come from general provincial revenues. In fact, it is said, funding for the P3 planning process, including the development of the RFP's, came from the Ministry. The appellant submits that the hospitals can more accurately be described as agents of the Ministry in the

development of the RFQ's and RFP's, rather than third parties within the meaning of the *Act* and section 17.

The appellant submits that there is nothing inherent to the tenders in question that justifies the "regime of secrecy" that has been adopted by the Ministry and hospitals. The appellant cites the findings in previous orders of this office that excludes contracts between institutions and third parties from section 17, on the basis that they are not "supplied" within the meaning of that section, and submits that this principle applies to this case.

Analysis

To begin with the last point set out above, the appellant accurately describes prior orders of this office that treat contracts between an institution and a third party as containing mutually generated information, rather than information "supplied" by the third party: see, for instance, Orders PO-2018 and MO-1706. However, I do not accept the appellant's argument that the RFQ's and RFP's are equivalent to a contract between the Ministry and the affected parties. It may well be the case that the level of involvement by the Ministry in the development of the records was significant. As high-profile, large-scale pilot projects, these ventures have likely seen a higher level of co-ordination between the Ministry and the hospitals than many other projects involving publicly-funded organizations. Nevertheless, I find that at the end of the day, the RFQ's and RFP's "belong" to the hospitals, in the sense recognized by section 17(1). The involvement of the Ministry in reviewing and advising on the records as they were being developed and ultimately approving them does not transform the RFQ's and RFP's into contracts between the Ministry and the hospitals.

I find, therefore, that the information in the RFQ's and RFP's was "supplied" to the Ministry within the meaning of section 17(1).

I also find that this information was supplied in confidence. I accept the submissions of the affected parties as to their expectations of confidentiality in providing the records to the Ministry for its review. The description of the tendering process used in these projects establishes that they were not intended to be open competitions in which these documents were available to all prospective bidders. Rather, access to the records was strictly controlled. In this context, I find that in providing the Ministry with these documents, the affected parties expected that Ministry employees would also adhere to the confidentiality requirements imposed on other recipients.

In conclusion, I am satisfied that part two of the test for exemption under section 17(1) has been established, with respect to Records 4A, 4B, 5A and 5B.

I am not convinced that the information in the severed portions of Records 1A and 1B was "supplied" to the Ministry within the meaning of section 17(1). This information arises out of the Ministry's involvement in the projects, and reflects information either generated by the Ministry or mutually agreed to between the Ministry and the affected parties.

Part 3: harms

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

In this appeal, the affected parties submitted that disclosure of the information in the records would prejudice their competitive positions and interfere with their negotiations with the successful bidders. At the time of their representations, both affected parties described the negotiations with the successful bidders as ongoing. It was submitted that release of the RFP would interfere with the negotiation and conclusion of the transactions. On behalf of one affected party, it was said that the bidder would reconsider its position with respect to the negotiating process given that other competing organizations would have insight into the terms and conditions upon which it was prepared to enter into negotiations. It was also submitted that the negotiating process could be interfered with if unrelated parties or bidders that had been eliminated from the process decided to take action based on the information released.

On behalf of the other affected party, it was submitted that if negotiations fail to conclude successfully, it wants to be able to negotiate with other private sector parties. The hospital could be prejudiced in those negotiations by the disclosure of confidential information exchanged with the initial private sector party in that it may lessen the competitive pressures that it wishes to impose on other private sector parties.

In response, the appellant submitted, among other things, that the hospitals are not private sector entities that have competitive positions to protect. They are not-for-profit institutions that operate under a statutory mandate. Thus, they do not compete with other publicly-funded hospitals. It is submitted that there is no evidence to support the claim that disclosure of the tender documents will interfere with the negotiations process. Further, the appellant submitted that disclosure would not prejudice potential future negotiations with other parties because the tender documents were released to the health care consortia bidding on the projects and not just to the successful proponent. Thus, the information the appellant seeks has already been made available to the parties most likely to be competing for these or other similar projects.

I provided the affected parties and the Ministry with an opportunity to reply to the submissions of the appellant on the issue of harm. Only the Ministry responded with further representations. However, one of the affected parties (the WOHC) wrote with information about certain developments. The WOHC states that in response to a written direction from the Ministry, it has made the tender documents in relation to its project available for public viewing. This includes the RFQ and RFP at issue in this appeal. The WOHC also notes that the same documents have

been provided to the litigants and their counsel in the context of a judicial review, and that the same counsel also represents the appellant in this appeal. The WOHC submits that as a result of these developments, "it is the position of WOHC that records 4A and 5A have been made available. It is our position that this should resolve the issues related to those records in this appeal." The WOHC directed me to its website on which it has posted the process by which members of the public may access the documents. The website also contains a summary of the project agreement.

I requested comments from the other parties as to whether and how the facts raised in the letter from this affected party might have a bearing on the issues in this appeal. The ROHCG responded by stating that it has not, as yet, received any written direction from the Ministry to make any of its documents available for public viewing; however, it anticipated that once there was a commercial closing it would be receiving a similar direction.

The appellant responded by noting, among other things, that the documents disclosed in the context of the judicial review application are subject to the constraints under the *Rules of Civil Procedure* on the use of such materials for purposes unrelated to the litigation. Such a constraint is to be contrasted to the lack of any like limitations on the use of information acquired under the *Act*. As to the disclosure by the WOHC in response to the Ministry direction, it is said that this disclosure is also subject to significant constraints as to access, copying and use.

Since the above representations were received, it came to my attention that the ROHCG has also reached an agreement with respect to the redevelopment of its hospital, and I invited the ROHCG and the Ministry to provide their comments on whether this apparent commercial closing has an effect on the issues in the appeal.

I received no response from the ROHCG. The Ministry sent a letter in which it states that commercial close (when the agreements are executed) has taken place, but not financial close (when the consortium's debt is rated and lenders commit and flow funds to the consortium to start construction). The Ministry submits that the process leading to financial close involves potentially sensitive negotiations between potential lenders and the project company. It indicates that disclosure of the records "prior to financial close could undermine that process (rating of debt, negotiations with lenders, financing rate, etc.)." The Ministry submits that negotiations are not considered completed until financial closing has occurred, and since this has not yet occurred, negotiations are still ongoing.

The Ministry acknowledges that redacted project agreements for both hospitals are available for public viewing.

Analysis

I am not satisfied that disclosure of the records could reasonably be expected to lead to the harms described in section 17(1). Based on the representations of the affected parties, it appears that their primary concern regarding the prospect of disclosure was its potential effect on ongoing negotiations. As well, they expressed a concern that should negotiations fail and new

negotiations with another proponent initiated, the affected parties might be prejudiced in those negotiations by the disclosure of this information.

I am not convinced that the evidence provided in support of these assertions of harm is "detailed and convincing" as required by section 17(1). First, it is important to note that the records at issue in this appeal consist of RFP's and RFQ's. They are the initiating documents in the bidding process for the redevelopment projects. As such, they are well known to the parties with whom the hospitals negotiated the project agreements (the proponents), since they formed the basis of the bids and ensuing negotiations. Therefore, disclosure of the RFP's and RFQ's does not provide the proponents with new information that could be detrimental to the hospitals in these negotiations.

As to the prospect of disclosure to competing bidders, I find the assertion that the proponents might reconsider their participation in the projects if their competitors gained insight into the terms and conditions upon which they were prepared to enter negotiations unconvincing. As the appellant has stated, the tender documents were released to other health care consortia bidding on the projects and not just the successful proponents. I accept the appellant's submission that the information has thus already been made available to the parties most likely to be competing for these or other similar projects.

For the same reasons, I also find unconvincing the assertion that release of the information may prejudice the hospitals if negotiations fail with the current proponents. If new negotiations are required, it is reasonable to expect that the hospitals would turn to one of the parties that has already received this information through the prior bidding process.

In any event, I am also satisfied that any harm that may befall the negotiations process through disclosure of the RFP's and RFQ's has been resolved by the conclusion of negotiations as well as a degree of public disclosure of the tender documents and project agreements.

I acknowledge that the Ministry does not consider the negotiations as having concluded. It relies on the distinction between "commercial close" and "financial close". According to the Ministry, while the hospitals and the proponents have executed their agreements (commercial close), potentially sensitive negotiations between potential lenders and the proponents are still awaiting conclusion (financial close). On the material before me, I am not satisfied that the contents of the RFP's and RFQ's could reasonably be expected to prejudice those other negotiations. The Ministry has not provided me with a sufficient basis to support a conclusion that the disclosure of the specific information in those tender documents could reasonably be expected to prejudice the negotiations over the subject matters it describes (such as rating of debt and financing rate).

The RFP's and RFQ's are, as I have indicated above, the initiating documents in the contract negotiations between the hospitals and the proponents. They were developed by the hospitals and, in a general sense, represent the expectations of the hospitals about the projects. They do not reflect final economic terms, and they do not contain financial or other information of the proponents. In light of these factors, and the lack of further detail from the parties on this point, I am not convinced that disclosure of these records could reasonably be expected to interfere significantly with negotiations over financing as between the proponents and potential lenders.

There is also nothing in the submissions of the affected parties supporting a conclusion that the state of financial close has a bearing on the application of section 17(1) to disclosure of the RFP's and RFQ's. Their representations do not make a distinction between commercial close and financial close. On the issue of harm from disclosure, the affected parties focused on the state of negotiations between the hospitals and the proponents, and the possible effect of disclosure on those negotiations. Earlier, I found this unconvincing. Had I reached a different conclusion, however, the execution of the agreements between the hospitals and those proponents removes these concerns.

My conclusions are supported by the events following commercial close. As I have indicated, the WOHC has made its tender documents available for public viewing, on instructions from the Ministry. The ROHCG has made available to the public its signed project agreement. Although I accept the general principle that there is a difference between "commercial close" and "financial close", it is apparent that negotiations over these two projects are sufficiently concluded that a certain measure of public disclosure about the terms of these agreements is acceptable to the parties involved.

In conclusion, I am not satisfied that the Ministry or the affected parties have provided me with detailed and convincing evidence establishing that disclosure of the RFP's and RFQ's could reasonably be expected to result in the harms described in section 17(1). As all three parts of the three-part test for exemption under this section must be met, I find that these records must be disclosed.

In arriving at this finding, I do not accept the position of the WOHC that its release of the tender documents "resolves" the issues related to those records in this appeal. To the extent that there is a suggestion that this release results in a situation where my determinations are no longer required, I do not find that to be the case. The opportunity to review the documents through the offices of the WOHC is not a substitution for release of the records under the *Act*. This opportunity carries restrictions with it, as described by the appellant. Neither is the receipt of the documents through the litigation process a substitution for disclosure under the *Act*. It cannot be said that the issues in the appeal have been entirely resolved and that there would be no purpose served by my determinations.

CONCLUSION

In conclusion, I have found portions of Records 1A and 1B exempt from disclosure. The remaining records are not exempt.

ORDER:

1. I order the Ministry to disclose the records to the appellant with the exception of the portions of Records 1A and 1B that the Ministry severed under section 12(1).

2. Disclosure is to be made by sending the appellant copies of the records ordered to be disclosed by **December 20, 2004** but not before **December 14, 2004**.

3. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to the above provisions, upon request.

Original signed by: November 15, 2004
Sherry Liang
Adjudicator