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

ORDER PO-2467

Appeal PA-030308-2

Ministry of Health and Long-Term Care

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BACKGROUND:

This appeal arises as a result of the SARS crisis in 2003. The Ministry of Health and Long-Term Care (the Ministry) states that during the crisis the need for "acute medical staff quickly reached an unprecedented level" as the hospital system became "overtaxed" and the "provision of supplementary health care resources was therefore necessary to ensure both staff and patient safety." Under these conditions, the Ministry "entered into an agreement" with [a named company (the affected party)] to act as "a single source for hospitals that needed additional staffing resources on an emergency basis."

NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry for access to all records relating to dealings between the Ministry and the affected party during the SARS crisis. The appellant specified in his request that he was interested in any documents relating to "any financial arrangements with, and payments to" the affected party by the Ministry for "efforts to recruit health care professionals" and the provision of "any other services" during the SARS crisis.

The Ministry located responsive records and denied access to them, in their entirety, on the basis of the exemptions in section 18(1) (economic interests), section 17(1) (third party information), section 12(1) (cabinet records), section 13(1) (advice to government) and section 19 (solicitor-client privilege).

The appellant then appealed the Ministry's decision to this office.

Prior to the commencement of the mediation stage of the appeal process the Ministry provided our office with an index of records, which set out the records at issue and the exemptions claimed for each record.

During the mediation stage of the appeal, the Ministry advised that it was no longer relying on the section 19 solicitor-client privilege exemption. The application of section 19 is therefore no longer at issue in this appeal.

Mediation was not successful in resolving the issues in the appeal, so the matter was streamed to the adjudication stage of the appeal process.

I commenced my inquiry by issuing a Notice of Inquiry, in which I sought representations from the Ministry on the application of all of the exemptions claimed, and from the affected party on the application of section 17(1) only.

I received representations from both the Ministry and the affected party. In its representations, the Ministry took the position that portions of Record 5 are not responsive to the appellant's request. The Ministry also raised for the first time the application of the section 13(1) exemption to Record 5.

I then sought representations from the appellant on all issues and included with my Notice of Inquiry copies of the non-confidential representations for both the Ministry and the affected

party. The appellant was also invited to comment on the Ministry's position on the responsiveness of portions of Record 5 to his request and the late raising of the section 13(1) exemption in respect of that record.

The appellant submitted representations and raised for the first time the application of the section 23 "public interest override" to the records at issue. I shared the appellant's representations with the Ministry and the affected party (absent personal identifiers) and sought representations from them on the section 23 issue.

Both the Ministry and the affected party submitted representations in response to the appellant's representations, including comments on the application of section 23. I shared their representations with the appellant and invited the appellant to respond to the Ministry's and affected party's further representations. The appellant did so in regard to the section 23 public interest override.

RECORDS:

There are seven records at issue in this appeal, as described below:

Record	Description	Exemption claimed
1	Document setting out "nursing hours" provided by the affected party between April 9 and June 16, 2003, broken down by date, and indicating relevant facilities (1 page)	17(1) 18(1)
2	Document entitled "Summary of 'Issues' regarding Labour Acquisition by MOHLTC during SARS I & SARS II" (3 pages)	17(1) 18(1)
3	"Submission Review/Approval" forms, document entitled "Business Case" and "Contract Management and Reporting System" form (9 pages)	12(1) 13(1) 17(1) 18(1)
4	Email message from the Ministry to the affected party dated June 3, 2003 (1page)	17(1) 18(1)
5	Exchange of email messages dated April 23, 2003 together with Submission Review/Approval form, dated April 16, 2003(4 pages)	13(1) 17(1) 18(1)
6	Letters to the Ministry from the affected party re: contract addendum dated April 21, 2003 (5 pages)	17(1) 18(1)
7	Proposal/Agreement by the affected party to provide services to the Ministry dated April 25, 2003 (7 pages)	17(1) 18(1)

DISCUSSION:

PRELIMINARY ISSUES

Responsiveness of records

As alluded to above, the Ministry takes the position that portions of Record 5 are not responsive to the appellant's request. The Ministry states that it reached this conclusion "upon careful review of the details of the record" during the course of preparing its representations. The Ministry submits that "only one sentence on the final page of [Record 5] is responsive" to the appellant's request, as it is the only reference in this record to the agreement between the Ministry and the affected party. The Ministry states that the first three pages of Record 5 do not relate to "dealings" between the Ministry and the affected party or payments to the affected party but rather to "internal" Ministry communication regarding "budget codes" and "signing procedures and protocol". The Ministry emphasizes that this exchange "does not provide information responsive to the appellant's request." With regard to page 4 of the record, the Ministry states that it is a "Ministry sign-off sheet that is the subject of the email exchange on page 2 [of the record]." The Ministry submits that the only portion of this page that is responsive is the "handwritten sentence at the very bottom of the sheet."

In response, the appellant states that the Ministry "should have 'carefully reviewed' the document at the appropriate time and that it is too late to withdraw it now."

While I acknowledge the appellant's point regarding the Ministry's late discovery of this issue, the issue for me to decide is whether the information at issue in Record 5 "reasonably relates" to the request [Order P-880].

On my review of the parties' representations and the contents of Record 5 I find that the first three pages of this record are not responsive to the appellant's request. I am satisfied that these pages set out generic internal Ministry information that is not reasonably related to the appellant's request. However, with regard to page 4 of the record I am satisfied that this entire page is responsive to the appellant's request.

Previous decisions of this office have determined that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act* and, generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Applying this reasoning to the circumstances of this case, I view page four of Record 5 as a stand-alone document that is on its face reasonably related to the appellant's request. It addresses the approval of the contractual relationship between the Ministry and the affected party, as evidenced by the title of the document, "Submission Review/Approval" form. It references the affected party's name in its "title/subject". It contains information that the Ministry has acknowledged as being responsive to the appellant's request. Accordingly, I find page 4 of Record 5 responsive to the appellant's request.

Late raising of a discretionary exemption

As stated above, in its representations, the Ministry raised for the first time the application of the discretionary section 13(1) exemption to information at issue in Record 5.

This raises an issue of the late raising of a discretionary exemption.

This office's *Code of Procedure* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims after an appeal has been filed. Section 11.01 of the *Code* is relevant to this issue and reads:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

These guidelines for the late raising of discretionary exemptions were found to be reasonable by the Divisional Court in the judicial review of Order P-883 (*Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)**.**

This appeal arises from a deemed refusal appeal. Therefore, the 35-day policy does not apply. The Confirmation of Appeal that was issued for this appeal on November 28, 2003 and sent to the Ministry states

> Since this is an appeal of a decision arising from a deemed refusal appeal, you are not permitted to claim any new exemptions.

A Confirmation of Appeal was also sent to the appellant on the same date, which sets out the above message.

The Ministry makes representations on the late raising of the section 13(1) exemption. The Ministry "acknowledges that it is out of time for raising this exemption, and that it should have raised it much earlier in the inquiry process." The Ministry states further that the exemption "applies to the [record], and that the appellant is "not prejudiced by the late raising of this exemption."

The appellant states in response that he strongly opposes the late raising of this exemption. He suggests that if "the shoe was on the other foot, and it was the requester asking for a last-minute

change of rules, the Ministry would be arguing in the strongest possible terms that the rules must be followed and no deviation allowed."

Having carefully considered the parties' views, I have decided not to allow the Ministry to raise the section 13(1) exemption in respect of information at issue in Record 5. I acknowledge the Ministry's view that section 13(1) may apply to Record 5 and its argument that the appellant will not be prejudiced by the late raising of this exemption. Perhaps if the circumstances in this case had involved the breach of the 35-day policy I may have been more inclined to allow the Ministry to raise section 13(1) late in the appeal process. However, this is not the situation in this case.

This appeal arises out of a deemed refusal appeal, which means that the Ministry had initially failed to meet its statutory obligations to issue a decision letter and raise the exemptions upon which it was relying in a timely fashion. This failure on the part of the Ministry changes the complexion of the matter considerably. Both the Ministry and the appellant were made aware through the Confirmation of Appeal that the Ministry would not be able to raise any new discretionary exemptions after the appeal was commenced. Therefore, both parties had clear expectations as to the prohibition against the raising of new discretionary exemptions during the course of the appeal process. In addition, the Ministry is an institution with considerable experience under the *Act*. It is engaged in the processing of access to information requests on a regular basis. The section 13(1) exemption is intended to protect an *institution's* interests rather those of an outside party, and I would expect the Ministry to be mindful of protecting its own interests and familiar with the circumstances in which the section 13(1) exemption might apply.

In Order P-658, Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeal process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

In weighing all of the above circumstances, I find that the integrity of the appeal process would be compromised if I were to allow the Ministry to rely on section 13(1) in regard to information at issue in Record 5.

CABINET RECORDS

The Ministry has claimed the application of the section 12(1) mandatory exemption to deny access to the information in Record 3. In its representations, the Ministry indicates that it is relying on the opening words of section 12(1) and the wording in section 12(1)(b) to deny access to this information.

General principles

The relevant portions of section 12(1) read:

> 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,
>
> …
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

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].

Section 12(2) sets out two exceptions to the application of the exemption in section 12(1). Section 12(2) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> (a) the record is more than twenty years old; or
>
> (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

Parties' representations

The Ministry states that it prepared Record 3 "for submission to Management Board of Cabinet, which is a committee of Cabinet, and was actually submitted to this committee, for its approval..." The Ministry submits that while this record is "not a formal 'Cabinet Submission'", it qualifies for exemption under section 12(1)(b) because it contains "clear policy options and recommendations" that were submitted to a committee of Cabinet for approval. In support of its submissions, the Ministry draws a comparison to the records in Order PO-1907.

The Ministry also submits that the contents of Record 3 would, if disclosed, "reveal the substance of a Cabinet committee's deliberations" in respect of the subject matter of the record and that, as a result, the record is exempt in its entirety under the opening words of section 12(1). In support of its position the Ministry refers to the principles discussed in Order PO-1917.

With regard to seeking Cabinet's consent to the disclosure of the contents of Record 3 under section 12(2)(b), the Ministry indicates that this is not possible since the Cabinet in existence when this record was prepared is no longer in power. Consequently, the Ministry states that it has no discretion under section 12(2)(b) to disclose the information at issue in this record.

In response to the Ministry's characterization of Record 3 as a cabinet record, the appellant argues that it is "impossible to argue meaningfully without better knowledge of the document's contents." However, the appellant adds that since the Ministry "admits the record is not a formal cabinet submission" it should not be permitted to "broaden the exemption rules when it sees fit."

With regard to the application of the section 12(2)(b) exception, the appellant asserts that since the Cabinet that allegedly reviewed this record no longer exists, he questions whether anyone's "privacy or legislative rights" would be harmed by its release. The appellant submits that the record is responsive to "an emergency that no longer exists by a government that no longer exists." As a result, the appellant states that he cannot "imagine a better reason for disclosure."

Analysis and findings

Having reviewed the parties' representations and the contents of Record 3, I am satisfied that portions of this record qualify for exemption under section 12(1)(b).

The Ministry has referred to Order PO-1917. In that decision, Adjudicator Dora Nipp found two records concerned with funding for the Ontario government's "Superbuild" project exempt under the introductory wording in section 12(1). In making this finding, she stated:

> Although record 23(a) is not identified as a Cabinet submission, it is obvious from the contents, and the surrounding circumstances, that the document formed the substance of Cabinet deliberations. This record concerns the funding of various projects and sets out issues that are to be decided by a Cabinet Committee. I am satisfied that disclosure of record 23(a) would reveal the substance of deliberations of a Cabinet Committee and, therefore, find that it is exempt under the introductory wording of section 12(1).
>
> Record 23(b) consists of a chart (4 pages) on which information concerning each of the institutions discussed in record 23(a), is recorded. I am satisfied that the information contained in this document is directly derived from record 23(a), and accept the Ministry's position that disclosure would reveal the substance of deliberations of a Cabinet Committee. I find that record 23(b) is also exempt pursuant to the introductory wording at section 12(1).

I agree with and adopt the reasoning applied by Adjudicator Nipp in Order PO-1917, which follows this office's long-standing approach to the introductory wording of section 12(1) [see Orders P-11, P-22 and P-331 referenced above].

Record 3 is comprised of the following three component parts: "Submission Review/Approval" forms (4 pages), "Business Case" document (4 pages) and "Contract Management and Reporting System (CMAR)" document (1 page). On my review, I am satisfied that both the Business Case and CMAR documents qualify for exemption under the introductory wording in section 12(1).

Although Record 3 is not a formal Cabinet Submission, I am satisfied the Business Case document was submitted to Management Board of Cabinet for review and approval and formed the substance of its deliberations with respect to the proposed provision of supplementary essential healthcare services by the affected party during the SARS crisis. The CMAR document sets out the financial terms of a contract between the Ministry and the affected party for the provision of essential healthcare services by the affected party during the SARS crisis. It also sets out the method of acquiring this contract, budget information and the signed approvals of senior Ministry staff. In my view, disclosure of these two documents would reveal the substance of deliberations of Management Board of Cabinet and, accordingly, I find them both exempt under the introductory wording in section 12(1).

I do not find the Submission Review/Approval forms exempt under section 12(1). In my view, these four pages merely confirm the names of senior Ministry staff who appear to have reviewed the Business Case and CMAR documents at some point during the review and approval process. They do not reveal the substance of any deliberations of the Executive Council or its committees and they do not contain policy options or recommendations. Accordingly, I do not find the Submission/Review Approval forms exempt under either the introductory wording in section 12(1) or under section 12(1)(b).

Regarding the application of the section 12(2)(b) exception, the Ministry has indicated that it did not ask Cabinet whether or not it consents to disclosure of this record since the Cabinet in power at the time Record 3 was prepared no longer exists. Section 12(2)(b) grants the institution discretion to ask Cabinet whether or not it consents to disclosure [Orders P-771 and P-1146]. In this case, the Ministry did not exercise its discretion, therefore, the section 12(2)(b) exception does not apply.

ADVICE TO GOVERNMENT

The Ministry has claimed the application of section 13(1) to the information at issue in Record 3. I have found most of the information in Record 3 exempt under section 12(1). However, I will consider whether section 13(1) applies to the remaining information (Submission Review/Approval forms).

General principles

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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224].

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 (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224]

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224; Order PO-2115; Order 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.); Order PO-2028, 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226]

The Ministry's representations do not specifically address the application of section 13(1) to the Submission/Review Approval forms. The Ministry submits that the entire record is exempt under section 13(1) because "the disclosure of any potion of it would allow a reader to draw an accurate inference about the advice and proposed recommendation it contains."

The appellant does not provide representations that assist me with my review of this issue.

Consistent with my analysis regarding the application of section 12(1) to this information, I find that the Submission Review/Approval forms neither consist of advice or recommendations nor do they contain information that if disclosed, would permit one to accurately infer the advice or recommendations given. Accordingly, I find that section 13(1) does not apply to exempt the Submission/Review Approval forms.

THIRD PARTY INFORMATION

Initially, the Ministry took the position that all of the records at issue were exempt under section 17(1). This position is reflected in the records index set out above. However, the Ministry's representations under section 17(1) only address records 1, 2, 6 and 7. The Ministry indicates that it is relying upon sections 17(1)(a) and (c) to deny access to the information in these records. I will nevertheless consider the application of both sections 17(1) and 18(1) for the remaining portions of Record 3 and Records 4 and 5 since the Ministry has raised these exemptions in respect of these records in its index.

Sections 17(1)(a) and (c) read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other 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; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 institution 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), (c) and/or (d) of section 17(1) will occur.

The Ministry's representations address all three parts of the section 17(1) test in regard to Records 1, 2, 6 and 7. The affected party provided brief representations that address the application of section 17(1) to Records 1, 2, 3, 4, 6 and 7. The appellant responded to the representations submitted by the Ministry and affected party with submissions on all three parts of the section 17(1) test.

Part 1: type of information

Parties' representations

The Ministry submits that Records 1, 6 and 7 and portions of Record 2 contain the affected party's commercial or financial information.

The Ministry describes Record 1 as "an invoice containing information about the services [the affected party] provided to specific hospitals" during the time periods specified in the record. The Ministry states that the record "describes the volume of work performed by particular [affected party] staff during a particular time period." The Ministry adds that if this information was disclosed in conjunction with Records 6 and 7 it would reveal information about the affected party's "unit price". The Ministry submits that this information qualifies as the affected party's commercial and financial information as it "relates to the 'sale' of services".

The Ministry states that Record 2 is a document that describes the "health care resources challenges that led to the Ministry's relationship with [the affected party]." The Ministry submits that the portions of this record contain information about the affected party's "past commercial relationship with another party, the services it provided to that party, and under what terms." The Ministry also states that Record 2 contains information about how the affected party "performed its services under its agreement with the Ministry, and information about [the

affected party's] unit pricing. The Ministry submits that this information is proprietary financial or commercial information of the affected party.

The Ministry submits that Record 6 consists of two letters sent by the affected party to the Ministry that contain information related to the "services it was providing to particular hospitals." In particular, the Ministry states that the two letters contain the affected party's "unit price information" and describe "aspects of the services it was and would be providing to a specified hospital. The Ministry submits that this information constitutes the affected party's commercial and financial information.

The Ministry states that Record 7 is a proposal that was submitted by the affected party to the Ministry to provide "acute care services to hospitals" during the SARS crisis. The Ministry submits that it contains information about the affected party's "business, its proposed strategy for providing health care services during the SARS emergency, its fee structure and recruiting information." The Ministry also indicates that "Appendix A" contains the affected party's "unit price" information that details how much the affected party "charges, and on what basis, for health care services."

The affected party's representations on this issue are brief. It states that the records in question "contain information, particularly financial that would not be made available to competitors or to the general public."

The appellant acknowledges that Record 7 "contains information about a government expenditure and details of government expenditures, including the amounts and names of the companies providing goods or services." However, beyond that statement, the appellant's representations do not directly address the characterization of the records in question in regard to the first part of the test under section 17(1).

Analysis and findings

The types of information listed in section 17(1) 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].

Having carefully considered the parties' representations and the contents of Records 1, 2, 6 and 7, I find that all of these records contain commercial and/or financial information. All of these records contain information relating to the terms of commercial relationship regarding the delivery of services by the affected party to the Ministry. In addition, I am satisfied that these records contain financial information, including information about the affected party's pricing practices.

I turn now to Records 4 and 5 and the remaining portions of Record 3. As stated above, the Ministry originally cited the application of section 17(1) to these records but none of the parties have offered representations that address these records specifically. Therefore, I am left to review the contents of these records alone to determine whether they meet the first part of the test under section 17(1).

On my review, I find that the remaining portions of Record 3 consist of internal Ministry documents that are strictly administrative in nature. In my view, these documents do not reveal information that qualifies as a trade secret or scientific, technical, commercial, financial or labour relations information under section 17(1). Accordingly, I find that the remaining portions of Record 3 do not meet part 1 of the test under section 17(1).

Record 4 is an email from a Ministry staff person to a senior representative of the affected party. It addresses matters relating to the services being provided by the affected party to the Ministry. Accordingly, I find that this record does contain commercial information in accordance with part 1 of the test under section 17(1).

Turning to Record 5, I have found that that the first three pages of this record are not responsive to the appellant's request. Page 4 of Record 5 is a "Submission Review/Approval" form that addresses the approval of the contractual relationship between the Ministry and the affected party. While the information in this record refers to financial matters it does not contain or refer to specific data. Accordingly, I find that this record does not contain financial information. However, I am prepared to accept that this record does contain commercial information, within the meaning of section 17(1), since it addresses issues relating to the contractual relationship between the affected party and the Ministry. As a result, I find that page 4 of Record 5 does meet part 1 of the test under section 17(1).

Part 2: supplied in confidence

Having found that Records 1, 2, 4, 6 and 7 and page 4 of Record 5 meet the first part of the test under section 17(1), I now turn to part 2 of the test under this section.

In order to satisfy part 2 of the test, the affected party and/or the Ministry must show that the information at issue 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 or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. The Divisional Court recently upheld as "reasonable" this office's approach on this issue, finding that information in a negotiated contract had not been "supplied" to the institution in question [*Boeing v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851, leave to appeal refused (November 7, 2005), Doc. M32858 (C.A.)].

Parties' representations

The Ministry makes representations on the "supplied" requirement for Records 1, 2, 6 and 7.

With regard to Record 1, the Ministry states that while this record was not created by the affected party, it is "based on information actually supplied by the [affected party] to the Ministry, regarding an aspect of the services it provided to particular hospitals over a given period of time."

The Ministry submits that the portions of Record 2 at issue under section 17(1) reflect information "provided to the Ministry by [the affected party] and incorporated into a Ministry generated document." The Ministry submits that while the document was not supplied by the affected party, it contains information that was "actually supplied" by the affected party. The Ministry states that "some of the information" is also contained in Record 7.

The Ministry states that Records 6 and 7 were prepared by the affected party on its letterhead. The Ministry submits that although Record 7 consists of a proposal submitted by the affected party to the Ministry that it "accepted" and "signed back" to the affected party, this "does not change the characterization of the record as having been supplied" since the record was "created and written by [the affected party], and contains its proprietary information." As noted above, the Ministry has also described Records 6 and 7 as containing the affected party's "unit pricing".

The Ministry does not provide any representations regarding the application of part 2 of the test to Records 4 or 5.

The affected party provides a general statement submitting that it "concurs with" and "defers to and agrees with" the Ministry's representations.

With reference to the Ministry's submissions on Records 6 and 7, the appellant states that a document "signed by both parties […] is an agreement" and cannot be considered to have been supplied. With reference to Records 1 and 2, the appellant submits that these are "government documents" and no amount of "verbal wiggling will make them otherwise."

Analysis and findings

Record 1

This record consists of a summary of nursing hours provided by the affected party to the Ministry at three hospitals and one other institution between April 9, 2003 and June 16, 2003. The record documents the number of hours billed in relation to specific dated invoices that were charged to the Ministry by the affected party within this time frame. The total number of nursing hours billed is also provided. The Ministry acknowledges that this document was not created by the affected party but argues that the figures relate to information that it supplied to the Ministry.

I accept the Ministry's position that while the document itself was not supplied by the affected party to the Ministry, the information contained in it was supplied by the affected party to the Ministry. Accordingly, I am satisfied that the information contained in Record 1 meets the supplied element of part 2 of the test under section 17(1).

Record 2

This record consists of a narrative summary, prepared by a medical official connected with the Ministry, which details the events and circumstances leading up to the Ministry's decision to retain the services of the affected party during the SARS crisis. The Ministry has identified two discrete paragraphs of this record that it states were supplied by the affected party to the Ministry. Having reviewed these paragraphs in conjunction with the Ministry's representations, I find that some of this information was supplied by the affected party to the Ministry within the meaning of part 2 of the test under section 17(1).

The first paragraph sets out anecdotal information regarding the thought process behind and justification for the recommendation of the affected party as the best option for meeting the Ministry's emergency response strategy during the SARS crisis. In the first sentence of this paragraph, the author makes reference to another contract that the affected party had won for the delivery of emergency services, as a means of demonstrating the affected party's suitability as an option. On my reading of this sentence, I am satisfied that this information was supplied by the affected party to the Ministry within the meaning of part 2 of the test. However, in my view, the remaining portions of this paragraph refer only to the Ministry's decision-making process in the

retention of the affected party and do not contain information that could be construed as having been "supplied" within the meaning of part 2 of the test under section 17(1).

The second paragraph sets out anecdotal information regarding changes in the relationship between the affected party and the Ministry in the later stages of the SARS crisis. It documents the Ministry's thought process in the deployment of the affected party during this phase of the SARS crisis. In my view, this is not information that was "supplied" by the affected party to the Ministry within the meaning of part 2 of the test under section 17(1).

Record 4

This record is a one-page email from a senior official with the Ministry to a principal with the affected party. Without identifying the contents of the record, it can be described as a note of thanks to the affected party for its services in addition to an identification of the type of services and support the Ministry would be seeking from affected party going forward on a long term basis. As stated above, the parties have not specifically addressed this record in its representations under section 17(1). Consequently, I am left to consider the contents of the record itself. On my review, there is no information that could be construed as having been "supplied" within the meaning of part 2 of the test under section 17(1).

Record 5

Page 4 of Record 5 is an internal Ministry form that addresses the approval of the contractual relationship between the Ministry and the affected party. The document contains the names of Ministry officials involved in the approval process and, in some cases, includes their signatures and the dates they signed to signify their approval. At the bottom of the form is a handwritten note that sets out a recommended term for inclusion in the contract between the affected party and the Ministry. On my review, all of the information on this form was created by the Ministry. In my view, there is no information that could be construed as having been "supplied" within the meaning of part 2 of the test under section 17(1).

Records 6 and 7

While I acknowledge that these records were prepared on the affected party's letterhead, they consist of contracts between the affected party and the Ministry for the delivery of emergency health services during the SARS crisis.

The Ministry characterizes Record 7 as a "proposal", but acknowledges that this proposal was "signed back" and "accepted" by the Ministry. Therefore, upon acceptance by the Ministry, this record became a binding contract (the Main Agreement). The Main Agreement contains the following sections: Introduction, Company's Background, Proposal – The Rapid Response SARS Support Team, Cost and Appendix A (containing the affected parties' service provider rates).

Record 6 consists of two letter agreements, each of which is described as a "contract addendum", presumably to the Main Agreement. It is clear from my review of these documents that one (Addendum 1) was delivered to the Ministry and subsequently retracted and replaced by the second (Addendum 2). Addendum 2 is a signed agreement while Addendum 1 is a draft agreement. They both set out contractual terms, including staffing rates, for the provision of services by the affected party to the Ministry at two Toronto hospitals. They are identical with two exceptions. Addendum 2 includes two additional terms, one concerning a staffing rate and the other dealing with insurance coverage. Since Addendum 1 is not an enforceable contract, I accept that it was supplied by the affected party to the Ministry within the meaning of part 2 of the test under section 17(1).

As stated above, this office has been clear in past decisions regarding the treatment of contracts. While there may have been little or no negotiation prior to the creation of the Main Agreement and Addendum 2, and it may be the case that some of the information in them reflects information that originated from the affected party, this does not negate the application of the "supplied" versus "mutually generated" principle [see Orders PO-2018, MO-1706 and the *Boeing* case].

Orders MO-1706 and PO-2371 discuss two exceptions to this approach.

In Order MO-1706, I found that an exception may exist where an affected party or the institution has provided convincing evidence that disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution. This is what British Columbia Information and Privacy Commissioner David Loukidelis coined the "inferred disclosure" exception [see British Columbia Order 01-20].

A second exception can arise where information in a negotiated contract is relatively "immutable" or not susceptible of change, such as the operating philosophy of a business, or a sample of its products [see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); applied in Orders PO-2371 and PO-2433]. In Order PO-2371, Adjudicator Steven Faughnan dealt with an attachment to a contract described as a "Design Intent Drawing Sample" that had been provided by an affected party. Adjudicator Faughnan found that the attachment had been "supplied" within the meaning of section 17(1).

In this case, the parties' representations are not particularly helpful on this issue. The Ministry has simply stated that Records 6 and 7 contain the affected party's "proprietary information". The affected party has not addressed this issue at all. Therefore, I am left to determine whether the information at issue in these records is contractual information that does not meet the supplied test, or information that falls within the inferred disclosure or immutable exception and does meet the supplied test.

In my view, the Main Agreement, with the exception of the section marked "Company's Background", sets out the agreed upon contractual terms that govern the relationship between the Ministry and the affected party in regard to the implementation of the affected party's proposal, including the scope of service provision and fee structure. In my view, none of this information qualifies as the affected party's proprietary information or informational assets. Accordingly, I find that it was not supplied within the meaning of part 2 of the test under section 17(1).

Appendix A of the Main Agreement contains the affected party's pricing information, specifically the chargeable rates for listed service providers. In my view, the information contained in Appendix A sets out agreed upon contractual terms that govern the relationship between the Ministry and the affected party with regard to the implementation of the affected party's proposal. It is clear that this document establishes clear contractual expectations regarding costing and funding and that these figures comprise agreement upon terms of the Main Agreement. This conclusion is consistent with this office's recent approach to pricing information [see Orders MO-1706 and PO-2435]. In Order PO-2435, Assistant Commissioner Brian Beamish addressed the status of "per diem information" that was found in the appendices of service level agreements between the Ministry and a consultant relating to the province's e-Physician Project, including the Smart Systems for Health Agency (SSHA). In finding that this information did not meet the supplied test, Assistant Commissioner Beamish stated that "the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services."

Applying this reasoning to the information in Appendix A, I find that the information contained in this document does not represent a fixed underlying cost, but rather the amount being charged by the affected party to the Ministry on an hourly basis for services delivered by various service providers. The fact that the Ministry may label this information as proprietary information or unit pricing information is irrelevant. If the rates submitted by the affected party had been found to be too high, or otherwise unacceptable, the Ministry had the option of rejecting the proposal and not entering into a contract with the affected party. The acceptance or rejection of an affected party's rates is a form of negotiation and, in this case, the Ministry accepted the affected party's rates and a contract was concluded that included those rates. This information constitutes key terms of that contract that does not fall into the "inferred disclosure" or "immutability" exceptions. Accordingly, I find that the information contained in Appendix A was not "supplied" in accordance with part 2 of the test under section 17(1).

The section marked "Company's Background" sets out the affected party's philosophy and methodology. In my view, following the reasoning in Orders PO-2371 and PO-2433, this background information was not a product of negotiation, nor can it be considered an agreed upon term. It is relatively immutable. Therefore, I find that it was "supplied" within the meaning of section 17(1).

Turning to Addendum 2, as stated above, this document is an enforceable contract between the Ministry and affected party. Like Record 7 it contains the terms of a contractual relationship between the affected party and the Ministry, including staffing or provider rates. For the reasons

I found the information in Record 7 was not supplied in accordance with section 17(1) (with the exception of the section marked "Company's Background"), I also that find the information in Addendum 2 was not supplied by the affected party to the Ministry within the meaning of that section.

To summarize, I have found that the information in Record 1 meets the supplied test under section 17(1). However, I have also found that all of the information at issue in Records 4 and 5 and most of the information in Records 2, 6 and 7 (with the exception of a sentence in Record 2, Addendum 1 in Record 6 and the section marked "Company's Background" in Record 7) do not meet the supplied requirement under section 17(1).

In confidence

I will now consider the "in confidence" element of part 2 of the test under section 17(1) with respect to all of Record 1, the one sentence in Record 2, Addendum 1 in Record 6 and the section marked "Company's Background" in Record 7.

In order to satisfy the "in confidence" component of part 2 of the test under section 17(1), 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]

Parties' representations

The Ministry's representations on this issue are brief. The Ministry submits that the information at issue was supplied by the affected party in confidence. The Ministry states that the affected party had a "reasonable expectation that the information about its business and pricing practices" would be kept confidential by the Ministry. The Ministry argues that this expectation is

evidenced by the affected party's "refusal to consent to the disclosure of the information." The Ministry also asserts that it did in fact "treat this information as confidential."

The affected party's representations on this issue are also brief. The affected party simply states that its "communications" with the Ministry were "confidential by implication given the need to bring expedient solutions to the crises in light of mounting public concerns."

In response, the appellant states that the affected party's refusal to consent to the release of this information now does not reveal anything about its expectations regarding confidentiality at the time the contracts with the Ministry were signed.

Analysis and findings

On my review of the parties' representations and the information at issue, I am satisfied that Record 1 and the portions of Records 2 and 7 under consideration were supplied in confidence by the affected party to the Ministry.

The information in Record 1 is directly related to invoices submitted by the affected party to the Ministry for services rendered. I am satisfied that the affected party had an implicit expectation that information drawn from its invoices would be received in confidence by the Ministry.

In my view, the information at issue in Records 2 and 7 constitutes background information that the affected party provided to the Ministry with the principle purpose of establishing its suitability and qualifications for delivering the services required by the Ministry during the SARS crisis. I am satisfied that this information is objectively different in substance from the contractual terms agreed to by the affected party and the Ministry, which I have found was not supplied within the meaning of section 17(1). On my review of these portions of Records 2 and 7, I am satisfied that the affected party had an implicit expectation that this background information would be received in confidence for the purpose of establishing its credentials and not disclosed to the outside world.

I view Addendum 1 of Record 6 differently. Both the Ministry and the affected party have made general representations regarding the "in confidence" element of part 2 of the test under section 17(1). However, neither has specifically addressed the "in confidence" aspect to Addendum 1 of Record 6. Generally, the Ministry asserts that the affected party had a reasonable expectation of confidentiality but only unsubstantiated statements to justify its actions and those of the affected party. The affected party suggests an implicit expectation of confidentiality due to the need for expedient solutions and mounting public concerns regarding the SARS crisis. However, I fail to see a co-relation between the need for expedient action and confidentiality. In my view, neither the Ministry nor the affected party has established an implicitly reasonable expectation of confidentiality.

Turning then to the record itself, there is no indication on the face of Addendum 1 that it was submitted in confidence. I also find that there is nothing implicit in Addendum 1 or any other

portion of Record 6 that would give rise to a reasonably held expectation of confidentiality at the time this information was provided to the Ministry.

In summary, I have found that Record 1, a portion of Record 2 and the section marked "Company's Background" in Record 7 meet both the "supplied" and "in confidence" elements of part 2 of the test under section 17(1). Having made this finding I will consider the part 3 harms test in respect of this information. For the sake of completeness I will also consider the harms component in part 3 for the remaining information at issue in Records 2 and 7, along with the information at issue in Records 4, 5 and 6.

Part 3: harms

General principles

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 case, the Ministry has raised the application of sections 17(1)(a) (prejudice to competitive position) and (c) (undue loss or gain) to the information at issue. The affected party has not specified the sub-sections under section 17(1) upon which it is relying. The affected party states that it defers and agrees with the submissions of the Ministry. In my view, the only other provision under section 17(1) that could apply is section 17(1)(b), which applies to institutions. However, since the institution has not raised it and its application is not apparent to me following my review, I will not address it. Accordingly, I will restrict my analysis to the application of sections 17(1)(a) and (c).

Parties' representations

Once again, the Ministry's representations are restricted to Records 1, 2, 6 and 7. The Ministry does not address Records 4 and 5 in its representations on harms.

The Ministry states that disclosure of Records 1, 6 and 7 and portions of Record 2 could "reasonably be expected to prejudice significantly" the affected party's "competitive position or interfere with its future contractual negotiations." The Ministry submits that to the extent the records "reveal information about the affected party's business practices and methodologies, how it compensates staff, and its unit price information", this information could be used by its

competitors in "developing their own business plans, practices and proposals." The Ministry states further that disclosure of its pricing information could "interfere with the affected party's future negotiations with other parties who may use the information to negotiate lower rates when dealing the affected party." The Ministry also suggests that this pricing information could be used by the affected party's competitors to "undercut the affected party in the future, when bidding for the same contracts…"

Citing Order PO-1818, the Ministry states that information in Records 2 and 7 that "identifies [the affected party's] previous clients is exempt under section 17(1)(a) where it could be used by competitors to gain a "significant competitive advantage in seeking future work."

Finally, with reference to Order PO-1860, the Ministry states that this office has recognized a "fruits of labour principle" under section 17(1)(c) that would apply in this case. The Ministry states that disclosure of Records 1, 2, 6 and 7 could reasonably lead to undue loss to the affected party, and undue gain to its competitors, as its competitors will have access to "business information that the affected party spent time and resources to develop, without having to spend any of its own resources to acquire this competitively useful proprietary information."

The affected party's representations on this issue are brief. It states that this information is "inherent to its business" and it "concurs" with the Ministry's original denial of access. The affected party adds that it "defers to and agrees with" with the submissions made by the Ministry. In representations offered in reply later in the inquiry, the affected party states if confidential business information is made public suppliers of services would be discouraged from dealing with the government in the future.

The appellant states in response that the "onus is on the Ministry and [the affected party] to show in detail" how disclosure of this information could reasonably cause the harms set out in sections 17(1)(a) and (c) and he submits that they have "fail[ed] that test."

The appellant states that in conversations with the affected party's Chief Executive Officer following the SARS crisis he was told that the affected party had "no secrets and would be happy to divulge the contract information but that it was the province's information to divulge…"

The appellant submits that the SARS crisis was an "extraordinary event" and arguments that information about the fees paid to the affected party would put it at a competitive disadvantage in the future are "false and unsubstantiated." The appellant states that the public has a "right to know how much [the Government] spent, and in what manner, for health professionals in an extraordinary event such as the SARS crisis – a crisis that is long over and involved decisions by a government that no longer exists" in circumstances that have "radically changed due to lessons learned."

Analysis and findings

Having carefully reviewed the parties' representations and the contents of records 1, 2, 4, 5, 6 and 7, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms outlined in sections 17(1)(a) or (c) of the *Act*, with two notable exceptions that I address below.

The affected party and the Ministry bear the onus of proving that disclosure could reasonably be expected to produce the harms set out in sections 17(1)(a) and (c). The affected party should be in the best position to express how disclosure would affect its interests since these sections are intended to protect its interests. However, the affected party's comments are confined to stating that it defers to the submissions of the Ministry. Regarding the Ministry's submissions, I find its position on the "harms" test to be vague and self-serving. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means to "undercut" or "gain a significant competitive advantage" in future bidding on contracts. In addition, nothing in the records or the representations convinces me that disclosure of the information at issue would provide a competitor with access to the "fruits" of affected party's labour.

The recent comments of Assistant Commissioner Beamish in Order PO-2435 are instructive in understanding this office's approach to the harms issue, particularly with regard to government contracts in which the expenditure of public funds is at issue. He states:

> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act*

identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In Public Government for Private People, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

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

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are

> responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP [(Ontario's e-Physician Project)], there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

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

In my view, the analysis and findings of Assistant Commissioner Beamish in Order PO-2435 are directly on point in this case. The representations of the Ministry and the affected party are general in nature and lack particularity in describing how the harms identified in the component parts of section 17(1) could reasonably be expected to result from disclosure in this case. The need for public accountability in the expenditure of taxpayer money is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section

17(1). This is particularly relevant when taxpayer money is used to address a public health event on the scale of the SARS crisis, which I hasten to add occurred three years ago. I do not accept that today the harms suggested under section 17(1) outweigh the need for public accountability and transparency. In my view, neither the Ministry nor the affected party has provided the kind of detailed and convincing evidence required to support non-disclosure under these circumstances. For this reason and for the reasons set out above, I find that the part 3 harms test has not been met with regard to the information at issue in Records 1, 2, 4, 5, 6 and 7, with the following two exceptions.

A portion of Record 7 marked "Company's Background" and one sentence in Record 2 provide historical information about the affected party's experience and credentials, including references to past clients and the general nature of work provided by the affected party to these clients. In my view, these documents contain insight into the affected party's approach and methodology along with information about past client relationships. I further find that if this information was disclosed, it could prejudice significantly the competitive position of the affected party with its competitors or interfere significantly with future contractual negotiations with existing clients, as contemplated by section 17(1)(a) of the *Act*. Accordingly, I find this information exempt under section 17(1) of the *Act*.

ECONOMIC AND OTHER INTERESTS

Introduction

Prior to the commencement of my inquiry the Ministry had not indicated the sections under section 18(1) upon which it is relying. However, in its representations the Ministry confirms that it claims the application of the discretionary exemption in section 18(1)(c) to all of the records at issue in this appeal. I will, therefore, consider the application of this single exemption to the information remaining at issue in Records 1, 2, 4, 5, 6 and 7 only.

Section 18(1)(c) states:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

Section 18(1)(c): prejudice to economic interests

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

Parties' representations

With regard to Records 1, 6 and 7, the Ministry reiterates that these records contain information about the affected party's "pricing practices and unit price information". The Ministry states that given the fact that it paid these rates, disclosure could reasonably be expected to prejudice its own economic interests. The Ministry suggests that "physicians (or the organizations representing them) could use this information in future negotiations with the Ministry as a 'bargaining chip' to obtain higher fees for physicians" providing similar services. Similarly, the Ministry suggests that hospital staff could take the same approach to negotiate higher rates with hospitals in future crises. The Ministry submits that using these rates as a "norm" could allow physicians and hospital staff to exert pressure during negotiations and "result in significantly higher costs to the Ministry, and the government as a whole."

With respect to the information at issue in Records 2 and 4 the Ministry states that the information is exempt under section 18(1)(c) as it discloses "details of the negotiations and specific arrangements provided for under [its] agreement with the affected party." The Ministry states that the information at issue in Record 2 describes the rationale for paying staff at the rates

agreed to with the affected party. The Ministry reiterates that, if disclosed, this information could be used by physicians, nurses and other hospital staff to apply pressure on the Ministry to pay higher fees in the future in similar circumstances.

The Ministry does not provide any representations on the application of section 18(1)(c) to the information in Record 5.

In response, the appellant labels the Ministry's suggestions regarding the establishment of a "new norm" for emergency relief rates as "outlandish", or that physicians could use the staffing rates as a "bargaining chip" in future negotiations as "patently absurd". The appellant reiterates that the SARS crisis was an "extraordinary event" and that the Ministry should not be able to "withhold public information by using dramatic hypothetical situations with no basis in reality."

Analysis and findings

I find that the Ministry has not provided me with detailed and convincing evidence that disclosure of the information at issue in Records 1, 2, 4, 5, 6 and 7 could reasonably be expected to prejudice the economic interests or the competitive position of the Ministry. As with section 17(1), I find that the Ministry has offered vague assertions and hypothetical scenarios to suggest that if the information at issue is disclosed it could be used as a bargaining lever in negotiations with health care providers regarding their rates in future health emergencies. I agree with the appellant that the SARS crisis was an extraordinary event that is long over and that there is no rational basis for the Ministry's assertions. In the unfortunate event of a similar crisis in the future, I am satisfied that economic and societal conditions at the time, including government readiness, staff availability and competitive market forces will determine staffing rates, not the rates paid during the SARS crisis.

Accordingly, I find that the information at issue in records 1, 2, 4, 5, 6 and 7 does not qualify for exemption under section 18(1)(c) of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant has raised the application of the section 23 "public interest override" as a basis for requiring the disclosure of the records at issue in this appeal.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I have found portions of Record 3 exempt under section 12(1). However, as section 23 does not apply to records exempt under sections 12, I am precluded from considering its application to this information.

I have found discrete portions of Records 2 and 7 exempt under section 17(1). As mentioned above, this exempt information sets out historical information about the affected party's experience and credentials, including references to past clients and the general nature of work provided by the affected party to these clients. I will consider the application of section 23 to this information.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

In addition, the existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

As alluded to in his representations above under the harms test in section 17(1), the appellant takes the position that the public has a right to know how much and where the Government spent taxpayer money for health care professionals during the SARS crisis. Commenting specifically on the application of the public interest override, the appellant emphasizes that there is a "compelling public interest in the payments made to [the affected party]." Regarding public interest in the deployment of health care professionals, the appellant states:

> Vital to understanding the efficacy of the Ministry's initial response to SARS are issues of manpower – how many staff were in the hospitals, their training levels and their movement. This cannot be understood entirely without full knowledge of [the affected party's] role in the provincial SARS response.

The appellant emphasizes that he has no "private interest" in the details of the contract with the affected party. He describes himself as a "veteran journalist" who has "reported widely on provincial affairs" with the sole interest of "bringing to the public the full details of the province's response to the SARS crisis, including the unprecedented mass hiring of medical professions through a private company."

In response, the Ministry states that to the extent that third party financial and commercial information in the records could be used by the affected party's competitors, the appellant's interest may be more in the nature of a "private, rather than a public interest."

I acknowledge the appellant's views. However, I note that as a result of this inquiry the appellant stands to gain access to most of the information requested and, most significantly, the information that interests him – information regarding the provision of staff and the cost of doing so. The only information remaining at issue under section 23 is the affected party's background and client information in Records 2 and 7. In my view, any compelling interest in disclosure that may exist is satisfied by the degree of disclosure required under this order. The evidence before me, including the remaining withheld information in Records 2 and 7, does not support a finding that there is a compelling interest in the disclosure of that particular information. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I order the Ministry to disclose Records 1, 4, 5 and 6 in their entirety to the appellant by **May 29, 2006**.

2. I order the Ministry to disclose portions of Records 2, 3 and 7 to the appellant by **June 2, 2006** but not before **May 29, 2006**, in accordance with the highlighted version 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. With respect to provision 2 of this order, I reserve the right to require the Ministry to provide me with severed copies of the records ordered disclosed to the appellant.

Original signed by: April 27, 2006
Bernard Morrow
Adjudicator