Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3183

Appeal PA12-139

St. Joseph's Healthcare Hamilton

March 26, 2013

Summary: The hospital received a request for the successful proposal and the agreement entered into between it and the successful bidder for the provision of legal services to the hospital. Access to the responsive Proposal document was denied under section 17(1) (third party information), while access to the Retainer agreement was denied under section 19 (solicitor-client privilege). In this decision, the hospital's decision with respect to the application of section 17(1) to the Proposal is not upheld and the Retainer agreement is found to be exempt under the solicitor-client communication aspect of the section 19 exemption.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 19.

Orders and Investigation Reports Considered: MO-2166, PO-1714 and PO-2435.

Cases Considered: *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

OVERVIEW:

[1] St. Joseph's Healthcare Hamilton (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information in relation to a particular request for proposal (RFP) for corporate legal services:

- A copy of the successful proposal(s) in response to the RFP; and
- A copy of the subsequent agreement(s) entered into between St. Joseph's Health System and the successful vendor(s).

[2] Following notification of the successful bidder (the affected party) under section 28 of the *Act*, the hospital granted access to the RFP Proposal – Part 1 and denied access to the RFP Proposal - Part 2 and a Retainer Agreement pursuant to sections 17(1) and 19 of the *Act*, respectively.

[3] The requester, now the appellant, appealed the hospital's decision.

[4] As mediation was not possible, the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the affected party, the hospital, and the appellant. The appellant was provided with complete copies of the representations of the other parties, with the exception of a small portion of the hospital's submission which was withheld because it refers to an excerpt taken from the record itself.

[5] In this order, I uphold the hospital's decision to deny access to the Retainer on the basis that it is exempt from disclosure under the exemption in section 19. However, I do not uphold the decision to deny access to the Proposal as it does not qualify for exemption under section 17(1).

RECORDS:

[6] The records at issue in this appeal consist of 9 pages of pricing documents entitled RFP Proposal – Part 2 (the Proposal) and a 7-page retainer letter (the Retainer) which includes three appended schedules.

ISSUES:

Issue A: Does the discretionary exemption at section 19 apply to the Retainer?

Issue B: Does the mandatory exemption at section 17(1) apply to the information contained in the Proposal?

DISCUSSION:

A: Does the discretionary exemption at section 19 apply to the Retainer?

General principles

[7] Section 19 of the *Act* states, in part, as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

[8] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The institution must establish that at least one branch applies.

Branch 1: common law privilege

[9] Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[1]

Solicitor-client communication privilege

[10] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[2]

[11] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[12] The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

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[1] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[2] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

[13] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[3]

[14] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[4]

Branch 2: statutory privileges

[15] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

[16] Branch 2 applies to a record that was prepared by or for Crown counsel, or counsel for an educational institution, "for use in giving legal advice."

Analysis and findings

[17] The appellant states, without further elaboration or evidence, that the "terms of the retainer were already publicly disclosed during the course of the RFP process."

[18] The hospital submits that the Retainer represents a direct communication of a confidential nature passing between a solicitor and her client made for the purpose of obtaining or giving professional legal advice. Accordingly, it submits that the Retainer falls within the ambit of solicitor-client communication privilege and is exempt from disclosure under section 19(a).

[19] It relies on several decisions of this office, including Orders PO-1714 and MO-2166, in which an institution's decision to deny access to a retainer between a solicitor and client was upheld on the basis that it was exempt under section 19 or its equivalent provision in the municipal *Act*. In Order MO-2166, Senior Adjudicator David Goodis made the following finding with respect to the application of the solicitor-client communication privilege to a retainer agreement entered into between a municipal institution and legal counsel:

> Record 5 is the retainer agreement between the City's law firm and the affected party. It consists of a three-page letter outlining the terms of the affected party's retainer with an eight-page addendum that details the scope of the professional services to be provided by her. The affected party was retained by the law firm for her specific professional and

[3] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[4] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

> educational experience and expertise to assist the lawyer in providing legal advice to the City. The retainer is detailed in its description of what the affected party has been retained to do and outlines information that, were it disclosed, would directly or indirectly reveal communications protected by the privilege, including legal advice that was provided by the lawyer to the City.
>
> Accordingly, I find that Record 5 is a communication that is directly related to the giving of legal advice and therefore falls within branch 1 of the solicitor-client privilege, and is exempt under section 12 of the *Act*.

[20] I adopt the reasoning behind this decision for the purposes of the present appeal.

[21] The hospital goes on to submit that the retainer provides that the affected party is to provide legal services to it in exchange for the payment of its fees and represents a confidential communication passing between it and its counsel. It submits that the "Retainer was made for the purpose of obtaining and giving professional legal advice and as such is protected by solicitor-client privilege" and that it "outlines the respective roles and responsibilities of the lawyer and the client in order to appropriately formulate and provide legal services."

[22] I accept the position of the hospital and, on this basis I conclude that the Retainer falls within the ambit of the exemption in section 19. I find that the Retainer represents a confidential communication passing between a solicitor and her client which is directly related to the giving or seeking of legal advice, thereby qualifying for exemption under branch 1 of section 19.

B: Does the mandatory exemption at section 17(1) apply to the information contained in the Proposal?

[23] The affected party takes the position that both the Proposal and the Retainer contain information that qualifies for exemption under the mandatory third party exemption in section 17(1). The hospital claims the application of section 17(1) to the Proposal document only. Because I have found above that the Retainer is exempt from disclosure under section 19, it is not necessary for me to determine if it also qualifies for exemption under section 17(1).

[24] Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in 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; or
> …

[25] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

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

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

Part 1: type of information

[27] The affected party submits that the Proposal contains commercial and financial information about its "standard rates and fee arrangements" through the application of its "pricing methodology and practices," thereby satisfying the first part of the test under section 17(1). The affected party relies on the determinations made in Order PO-2010 and argues that the records relate directly to the purchase and sale of legal services and relate to money, "including a breakdown of specific and detailed amounts.

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[5] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

These records [the Proposal and the Retainer] are the basis of the commercial arrangement between [it] and the Participating Hospitals."

[28] The hospital takes the position that because the Proposal specifically describes the pricing of legal services to be provided to it by the affected party, it may be properly characterized as "financial information" within the meaning of the first part of the test under section 17(1).

[29] Based on my review of the Proposal, I find that it contains information about the provision of legal services by the affected party to the hospital, including the work to be performed and the fees to be charged for this work. I am satisfied that the record contains information that meets the criteria for both commercial and financial information under the first part of the section 17(1) test.

Part 2: supplied in confidence

Supplied

[30] 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].

[31] 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].

[32] The hospital submits that the Proposal contained information that was supplied to it by the affected party within the meaning of part two of the test under section 17(1). The affected party submits that it supplied the information contained in the Proposal to the hospital. On its face, this is clearly the case as the Proposal consists of a set of pricing documents dated October 13, 2011 which was submitted by the affected party in response to an RFP issued by the hospital for the provision of legal services. Accordingly, I find that the Proposal contains information that was "supplied" to the hospital within the meaning of the second part of the test under section 17(1).

In confidence

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

[34] 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; and
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497].

[35] The affected party relies on section 10.3.2 of the RFP issued by the hospital which provides that, subject to the provisions of the *Act,* "the Participating Hospitals will use reasonable efforts to safeguard the confidentiality of any information identified by the Vendor as confidential." The affected party also submits that because of the nature of the services which it proposed to provide to the hospital, legal services, there is an expectation of solicitor-client confidentiality that is fundamental to the relationship it has with its clients. It argues that this professional and ethical obligation to treat its relationship with its clients confidentially extends to all aspects of the retainer, including its inception.

[36] The hospital confirms that the RFP itself included a confidentiality provision limiting the disclosure of any proposals received to its evaluation team, as well as staff and advisors from the other participating hospitals involved in the RFP process.

[37] Based on my review of the circumstances surrounding the supply of the Proposal by the affected party to the hospital, I am satisfied that it was provided with a reasonably-held expectation that it would be treated in a confidential manner. The explicit language used in section 10.3.2 of the RFP and the very nature of a solicitor-client relationship lend credence to the affected party's expectation that the Proposal submitted in response to the hospital's RFP would be treated in a confidential fashion. As a result, I find that the second part of the test under section 17(1) has been satisfied with respect to the Proposal.

Part 3: harms

General principles

[38] 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.)].

[39] 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].

[40] 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) [Order PO-2435].

[41] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

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

[42] The affected party contends that the information contained in the Proposal was submitted in the context of a competitive procurement process and that "[G]iven budgetary restraints, the pricing model, including fees and billing arrangements, is a significant factor in any bid to provide services to hospitals." It also points out that it is only one of a number of law firms who specialize in the law pertaining to health and, particularly, hospitals.

[43] The affected party goes on to submit that the disclosure of the Proposal could reasonably be expected to result in:

- prejudice to it by allowing competitors to adopt pricing methodologies and practices which it has developed;
- distort competition in the market for legal services provided to hospitals; and
- result in undue loss to it in the form of revenue that would have been generated by the services and the learning that it would have acquired through providing the services.

[44] It also suggests that "it is self-evident how and why [it] would suffer harm were the requested records to be disclosed . . ." In order to ensure the integrity and fairness

of the bidding process, the affected party seeks to ensure that it, rather than a competitor "reaps the benefits of methodologies, practices and products it has developed over time, through the investment of its resources and independent effort."

[45] The hospital supports the position taken by the affected party with respect to the prospect of harms to its competitive position.

[46] The appellant's representations do not address the issue beyond stating that he is of the view that the opposing parties have failed to discharge "the burden of establishing that the harms under section 17 will occur if the records are disclosed."

Analysis and findings

[47] In evaluating the harms aspect of the test under section 17(1) as it relates to the billing rates contained in the Proposal, it is important to bear in mind that these rates were incorporated into the agreement that is reflected in the Retainer, which is also a record at issue in this appeal. It is equally important to stress that the RFP and subsequent Retainer involve the expenditure by the hospital of public money for the provision of legal services by the affected party.

[48] In Order PO-2435, Assistant Commissioner Brian Beamish examined the application of section 17(1) to certain consulting contracts entered into by the Ministry of Health and Long Term Care's Smart Systems for Health Agency. In that decision, he addressed the evidentiary requirements under section 17(1) for institutions and affected parties resisting the disclosure of contractual information involving the expenditure of public money as follows:

> 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*.

[49] In the present case, I find that I have not been provided with the kind of evidence which would enable me to link the disclosure of the information in the Proposal to the harms alleged by the hospital and affected party under section 17(1)(a). The parties resisting disclosure have not tendered evidence that satisfies the "detailed and convincing" requirement and instead, argue that the harms are self-evident. In my view, this is inadequate and does not satisfy the requirements of part three of the test under section 17(1).

[50] I find further support for this finding in the discussion from Order PO-2435 which follows that described above. Assistant Commissioner Beamish goes on to address the importance of transparency and public accountability when evaluating the application of the exemptions contained in the *Act,* including section 17(1). He found that:

> 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.

. . .

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, 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 institutions have 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.

[51] I adopt the reasoning outlined above for the purposes of the current appeal. As noted above, the hospital and the affected party have not provided me with sufficiently detailed and convincing evidence to establish a reasonable expectation of the harms in section 17(1). I further note that the terms outlined in the Proposal have been incorporated by reference into a final agreement between the hospital and the affected party. The competition process which gave rise to the submission of the Proposal is, accordingly, no longer underway. In addition, as was the case in the RFP that gave rise to the appeal in Order PO-2435, the fact that disclosure of the Proposal may result in a more competitive bidding process in the future does not result in significant prejudice to the affected party's competitive position or result in an undue loss to it.

[52] On that basis, I find that affected party and the hospital have failed to satisfy the burden of proof with respect to the harms aspect of section 17(1). As a result, I find that the exemption does not apply and the Proposal will be ordered disclosed to the appellant.

ORDER:

1. I uphold the hospital's decision to deny access to the Retainer.

2. I order the hospital to disclose the Proposal to the appellant by providing him with a copy by **May 3, 2013** but not before **April 26, 2013.**

3. In order to verify compliance with Order Provision 2, I reserve the right to require the hospital to provide me with a copy of the record which is disclosed to the appellant.

Original signed by: March 26, 2013
Donald Hale
Adjudicator