

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3202

Appeals PA12-181 and PA12-390

St. Joseph's Health Care London and London Health Sciences Centre

May 16, 2013

**Summary:** St. Joseph's Health Care London and the London Health Sciences Centre received separate requests for access to information with respect to the successful bids received in response to tenders of outdoor maintenance work at the hospitals. Access was denied pursuant to the mandatory third party information exemption in section 17(1). In this order, the hospitals' decision to deny access to the records is not upheld. The affected party and the hospitals did not provide sufficient evidence to establish the third part of the test under section 17(1).

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

### OVERVIEW:

[1] St. Joseph's Health Care London (SJHC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Bid results for Tender HMMSO1145 - City Wide Grounds Maintenance, LHSC and SJHC. Specifically, list of bidders and amount of tenders for each bidder, broken down by individual site and also including the LHSC site total and SJHC site total, as per Schedule 9 (Financial) in the tender

documents. Include Year 1, Year 2, Year 3, Option Year 1, Option Year 2 totals.

[2] Prior to issuing its access decision, SJHC notified three companies who submitted bids in response to the tender pursuant to section 28 of the *Act*, seeking their views regarding disclosure. One company consented to disclosure, one did not respond and the other, who was the successful bidder (the affected party), objected to disclosure, claiming that the information in the responsive record is exempt under the mandatory third party information exemption in section 17(1) of the *Act*.

[3] SJHC subsequently issued an access decision, granting partial access to the requested records, including the pricing information contained in Schedule 9 of the tender documents submitted by the two unsuccessful bidders. However, it withheld Schedule 9 of the tender document submitted by the affected party who was the successful bidder on the basis that it qualified for exemption under section 17(1).

[4] The appellant appealed SJHC's decision. During mediation, the appellant confirmed that he is interested in all the information contained in Schedule 9 relating to the affected party. The appellant confirmed that he is interested in the pricing breakdown for each of the individual sites contained in Schedule 9. During the mediation process, the affected party confirmed that it objects to the disclosure of the information sought.

[5] Also during mediation, the mediator was advised that there had been a joint tender issued by St. Joseph's Health Care and London Health Sciences Centre (the LHSC). The appellant submitted a separate request for the same information to the London Health Sciences Center (LHSC) and received a decision from it, denying access to the responsive information for the same reasons as those relied upon by the SJHC. The appellant then submitted an appeal to this office regarding the LHSC's decision.

[6] As further mediation was not possible, the two appeals were moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

[7] I initially sought and received the representations of the two hospitals, the SJHC and the LHSC, and the affected party. All of these parties submitted representations in response to the Notice. I note that the representations submitted by the SJHC and LHSC are nearly identical in every respect. I shared the representations of the affected party and the two hospitals, in their entirety, with the appellant, who also provided representations. I then invited the affected party and the SJHC to provide further representations by way of reply, and the SJHC did so.

[8] In this order, I do not uphold the decisions by both the SJHC and the LHSC to deny access to the information contained in the records on the basis that it is not exempt from disclosure under the mandatory exemption in section 17(1).

## **RECORDS:**

[9] The information at issue is contained in Schedule 9 to the tender submission made by the affected party in response to Tender HMMS01145 and relates only to St. Joseph's Health Care and the London Health Sciences Centre. It consists of 2 pages and is entitled "HMMSO1145 RFP – Grounds Maintenance - Schedule 9 – Financial 40%".

## **DISCUSSION:**

[10] The sole issue to be determined in these appeals is whether the pricing information contained in the record is exempt under the mandatory exemption at section 17(1) of the *Act*, which reads, 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

[11] 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.), leave to appeal dismissed, Doc. M32858 (C.A.)]. 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].

[12] 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.

### **Part 1: type of information**

[13] The affected party and the institutions submit that the pricing information contained in the record qualifies as "commercial" or "financial" information within the meaning of section 17(1). 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].

[14] The institutions and the affected party submit that the information contained in this part of the tender documents qualifies as commercial information under section 17(1) as it relates directly to the buying, selling or exchange of merchandise or services, in this case the provision of grounds keeping services to the hospitals by the affected party. In addition, they submit that because the information clearly describes the pricing schedules over a number of years for each hospital location, it qualifies as financial information within the meaning of section 17(1).

[15] The appellant does not appear to take issue with the characterization of the information at issue as "commercial" or "financial" information for the purposes of section 17(1). As a result, I find that the first part of the test under this exemption has been met.

## **Part 2: supplied in confidence**

### ***Supplied***

[16] 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].

[17] 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].

[18] The affected party and the hospitals submit that the information contained in Schedule 9 was provided to the hospitals by the affected party in response to an RFP for the provision of grounds keeping services.

[19] The appellant relies on the reasoning of the adjudicator in Order PO-2435 where it was held that information provided in response to an RFP that finds its way into the final contract between a bidder and an institution was not “supplied” for the purposes of the second part of the test under section 17(1). He argues that the information contained in the record “reflects the negotiated agreement between [the affected party] and [the hospital] for the provision of grounds keeping services.”

[20] In reply, the SJHC points out that the contents of the record at issue, Schedule 9 to the bid submission made by the affected party in response to the RFP, “was not included in the Service Agreement with the successful bidder, therefore it was clearly not ‘negotiated’, but rather supplied.”

[21] In my view, it is important to differentiate the bid information submitted by the affected party in response to the RFP from any service agreement which may have been entered into between the parties. The sole record at issue in this appeal is Schedule 9 to the bid which was submitted by the affected party, and not the actual agreement which it entered into with the institutions. The information contained in the record at issue was not the result of negotiation but rather reflects simply the affected party’s proposal with respect to carrying out the work described in the RFP. I find that the information contained in the record was “supplied” by the affected party within the meaning of that term in section 17(1) and that this aspect of the second part of the test has been met.

***In confidence***

[22] 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].

[23] 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 [Orders PO-2043, PO-2371, PO-2497].

[24] In addressing this aspect of the test under section 17(1), the hospitals rely on the confidentiality provisions contained in the Request for Proposals which were issued to solicit bids for the work to be performed. Sections 5.6.1 and 5.6.3 of the RFP set out the confidentiality requirements and expectations of the hospitals with respect to any proposals submitted to them. The hospitals also indicate that any proposals received by them were treated in a confidential manner and were securely kept. The hospitals add that while RFP information is made available through its BIDDINGO website, submissions made by bidders in response to an RFP are never made available publicly.

[25] The affected party reiterates these submissions and adds that its tender documents were submitted in a sealed envelope in accordance with the RFP’s requirements.

[26] The appellant simply submits that, in his view, the information was not supplied by the affected party in confidence, without any further elaboration.

[27] Based on the submissions of the affected party, the hospitals and the wording of the RFP itself, I find that the information contained in the record at issue was supplied to the institutions by the affected party with a reasonably-held expectation that it would be treated confidentially. The RFP clearly indicates that any proposals submitted by

proponents would be treated confidentially and the hospitals' practices regarding the safe-keeping of the bids bear this out. Accordingly, I am satisfied that both aspects of the second part of the test under section 17(1) has been satisfied.

### **Part 3: harms**

[28] 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.<sup>1</sup>

[29] 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].

[30] 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].

[31] 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].

[32] In the representations submitted to this office in response to the Notice of Inquiry, the affected party argues that it has "developed systems and processes that we use for estimating that if disclosed we feel we could lose competitive advantage when quoting properties of all sizes throughout the city of London." It submits that disclosing its "site-by-site pricing breakdown will affect our ability to competitively quote many various jobs throughout the London area as our quoting methods will be disclosed by providing site-by-site pricing."

[33] In response to the notification under section 28 of the *Act* at the request stage, the affected party advised the hospitals of the position outlined above, and further submitted that it would suffer harm to its business interests in the following ways:

- it will lose its competitive position when this tender comes due in 2016 as other contractors will know what its current pricing structure is and undercut the affected party because of their knowledge of its pricing structure;
- its estimating and quoting methods will become a matter of public knowledge which will make it more difficult for it to provide bids for work of this sort; and

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<sup>1</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

- its relationship with the hospitals will be harmed if it is no longer the successful bidder in tenders with these institutions.

[34] I must point out that the information at issue in this appeal consists solely of the dollar amounts provided with the tender submitted by the affected party in response to the hospital's RFP. It does not include information about the manner in which the affected party arrived at its tender prices, nor does it include information about how it prepares its estimates or its quoting methods. As a result, I find that the concerns raised by the affected party in this area are unfounded.

[35] The hospitals' representations quote directly from the submissions which they received from the affected party in response to the section 28 notification. The hospitals also express concerns that it would receive fewer bids in response to its RFPs if it was known that they are no longer going to be treated as confidential. They also have doubts about whether other contractors would provide the same level of safety to their visitors, but fail to provide an evidentiary link between this argument and the disclosure of the dollar amounts that remain at issue in the record.

[36] The appellant questions whether the disclosure of the information sought in the record would reveal anything relating to the "business model or methodologies" of the affected party and disputes that the harms alleged would result.

[37] I have carefully reviewed the submissions of the affected party, the hospitals and the appellant, as well as the information remaining at issue in the record. I find that I have not been provided with evidence that is sufficiently detailed and convincing to demonstrate that the harms alleged by the affected party could reasonably be expected to result from the disclosure of the information. As noted above, the information in the record consists only of the dollar amounts quoted for the performance of the work set out in the RFP at the various hospital locations. It does not include reference to the affected party's methods for preparing its bid or its estimating practices.

[38] Further, I note that the contract currently awarded to the affected party by the hospitals does not expire until 2016. The closing date for the receipt of bids on this RFP was September 23, 2011, meaning that the information in the record will be as much as five years old when the contract expires. I find that the value of this information to a competitor will be significantly diminished as a result. The affected party and the hospitals have not provided me with any explanation as to how the harms alleged could be reasonably expected to result from disclosure beyond those addressed above.

[39] In the absence of the kind of detailed and convincing evidence required to establish the harms in part three of the test under section 17(1), I find that it has no application to the information contained in the record and I will order the hospitals to disclose it to the appellant.



**ORDER:**

1. I order each of the hospitals to disclose the information in the record which relates solely to each of their respective sites to the appellant by providing him with a copy by **June 21, 2013**, but not before **June 17, 2013**.
2. In order to verify compliance with Order Provision 1, I reserve the right to require the hospitals to provide me with a copy of the record which is disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ May 16, 2013