

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-3264

Appeal PA12-526

Ministry of Transportation

October 16, 2013

**Summary:** The appellant sought access to a copy of the successful proposal made in response to a Request for Proposals for a transportation planning jurisdictional review. The ministry denied access, citing the mandatory third party information exemption in section 17(1). This order does not uphold the ministry's decision and orders the record disclosed.

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

**Orders and Investigation Reports Considered:** Orders MO-2786, MO-2801, PO-2435, and PO-3183.

### OVERVIEW:

[1] The Ministry of Transportation (the ministry) received a request for the following information under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

A copy of the successful proposal in response to RFP [Request for Proposals] for [the] 2015 Pan/Para Pan American Games Transportation Planning Jurisdiction Review ...

[2] The ministry identified the responsive record related to the request. Before making an access decision, the ministry notified an affected party whose interests may be affected by the outcome of the request to obtain its views regarding disclosure of the record.

[3] The affected party objected to the disclosure of the record on the basis that it contained confidential third party information.

[4] After considering the representations from the affected party, the ministry issued a decision denying access to the record, in its entirety. The complete document was withheld in accordance with section 17(1) (third party information) and portions of the record were withheld in accordance with section 21(1) (personal information).

[5] The requester, now the appellant, appealed that decision.

[6] During mediation, the appellant advised that it is not seeking access to information that is clearly an affected party's personal information, such as their education and experience. Accordingly, the information withheld in accordance with section 21(1) of the *Act* is not an issue under appeal.

[7] As mediation did not resolve this appeal, the file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I do not uphold the ministry's decision and order the record disclosed, except for the personal information and resumes in the record.

## **RECORD:**

[9] The record at issue is the affected party's proposal in response to the RFP entitled, "Transportation Planning Jurisdiction Review 2015 Pan/ParaPan American Games," (the proposal).

[10] In order to refer to specific pages in the record, I have numbered each page beginning with the front cover page, page 1, and ending with the back cover page, page 74.

[11] In its representations, the appellant states that it does:

...not need information on individuals, so copies of resumes and personal biographies are not required.

[12] Accordingly, the resumes and personal biographical information in the record are not at issue. The resumes are found at pages 34 to 64 of the record and other personal biographical information has been identified by the ministry and is located at pages 25 and 26.

## **DISCUSSION:**

### **Does the mandatory third party exemption at section 17(1) apply to the record?**

[13] 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;

[14] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>1</sup> 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.<sup>2</sup>

[15] 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

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<sup>1</sup> *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.).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184, and MO-1706.

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***

[16] The ministry states that the record is a proposal submitted in response to an RFP and contains the methodologies to be applied and the individuals identified as having the expertise to carry out the proposed project. It relies on Orders PO-1818 and PO-2637 and states that information provided as part of a request for proposals (RFP) to secure business from a ministry has been recognized in numerous orders as being commercial or technical information. The ministry also states that where the names of the affected party's staff appear in a context where their role in the project and qualifications are described, this also has been recognized as commercial information.

[17] The affected party states that the proposal it submitted contains trade secrets as it contains:

- our technical approach to undertaking major multi-sport games, such as the Olympics;
- the skill sets, strengths and experience of the firm and its key individuals in undertaking this type of specialized work;
- our understanding of the key challenges and critical success factors;
- the strategies used by [the affected party] to package its proposal; and,
- our unique strengths that make us most suited for this assignment.

All of the above information is unique and proprietary to [the affected party], and is not generally known to industry participants other than [the affected party]. [The affected party] developed this information at significant cost, and derives continuing significant value from the fact that it is not generally known to our competitors...

[18] The appellant did not provide representations on this issue.

*Analysis/Findings*

[19] The types of information in section 17(1) listed by the ministry and the affected party in their representations have been discussed in prior orders, as follows:

*Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>3</sup>

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.<sup>4</sup>

*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.<sup>5</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>6</sup>

[20] The record is the affected party's proposal in response to the RFP for a jurisdictional review of transportation planning for the Pan/ParaPan American Games

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<sup>3</sup> Order PO-2020.

<sup>4</sup> Order PO-2020.

<sup>5</sup> Order PO-2020.

<sup>6</sup> Order P-1621.

(the games). Based on my review of the record, I find that it reveals commercial information about the selling of the affected party's services to the ministry.

[21] I find that I do not have sufficient evidence that the record contains technical or trade secret information. Neither the ministry nor the affected party have directed me to any particular information in the record that comes within the definition of these terms as set out above;<sup>7</sup> nor can I ascertain from my review of the record that any of the information therein is either technical or trade secret information.

[22] However, as I have found that the record reveals commercial information, part 1 of the test under section 17(1) has been met.

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

### *Supplied*

[23] 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.<sup>8</sup>

[24] 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.<sup>9</sup>

[25] 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.<sup>10</sup>

[26] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where 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. The "immutability"

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<sup>7</sup> See Order PO-2010.

<sup>8</sup> Order MO-1706.

<sup>9</sup> Orders PO-2020 and PO-2043.

<sup>10</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.<sup>11</sup>

[27] The ministry relies on a number of orders to submit that the record, a proposal made in response to an RFP, was supplied to it by the affected party.<sup>12</sup> The affected party also states that the record was supplied by it to the ministry.

[28] The appellant did not provide representations on this issue.

Analysis/Findings: supplied

[29] The record is the affected party's proposal made in response to an RFP issued by the ministry. The proposal was the successful bid and a contract was entered into between the ministry and the affected party. I obtained a copy of both the contract and the RFP from the ministry.

[30] I have reviewed the contract entered into between the ministry and the affected party and I note that all of the information in the record at pages 14 to 29 and the first paragraph on page 30, except for one paragraph on page 21, have been reproduced verbatim at pages 20 to 34 of the contract. This one paragraph on page 21 of the record reflects the information contained at the bottom of page 17 and the top of page 18 of the contract.

[31] As stated above, the provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by a 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. None of the information in pages 14 to 29 and the first paragraph on page 30 of the record, in my opinion, comes within the immutability or implied disclosure exceptions described above.

[32] As pages 14 to 29 and the first paragraph on page 30 of the record are reproduced in the contract, I find that this information was not supplied and that part 2 of the test under section 17(1) has not been met for this information. Accordingly, I will order this information disclosed.

[33] In addition, pages 4, 9, 11 and 13 are title sheets containing only the title for the information that follows. These titles were provided to the affected party by the ministry in the RFP form. I find, therefore, that these pages were not supplied by the affected party to the ministry for the purposes of section 17(1).

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<sup>11</sup> Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).

<sup>12</sup> See, for example Orders PO-2467, PO-2371 and PO-2433.

[34] Pages 5 to 8, 10, 12 and 33 are forms that were provided by the ministry to the affected party in the RFP. Other than the information added by the affected party in filling out these forms, I find that these pages were not supplied by the affected party to the ministry.

Conclusion re: supplied

[35] I have found that the all information in pages 4, 9, 11, 13 and 14 to 29, and the first paragraph on page 30, have not been supplied to the ministry by the affected party as they are included as forming part of the contract. As well, I have found that the ministry forms at pages 5 to 8, 10, 12 and 33, other than the information added by the affected party in filling out these forms, was also not supplied by the affected party to the ministry. Accordingly, I find that part 2 of the test under section 17(1) has not been met with respect to this information and I will order this information disclosed.

[36] The remaining information at issue in the record is found at pages 1 to 3, page 30 (except for the first paragraph) and pages 31 to 32 and 65 to 74, as well as the information added by the affected party to the ministry forms in pages 5 to 8, 10, 12 and 33. I find that this information was supplied by the affected party to the ministry. I will now consider whether this information was supplied in confidence.

*In confidence*

[37] 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.<sup>13</sup>

[38] 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

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<sup>13</sup> Order PO-2020.



- prepared for a purpose that would not entail disclosure<sup>14</sup>

[39] The ministry submits that the affected party had a reasonable expectation of confidentiality in the submission of its proposals and that these proposals were supplied explicitly in confidence. It states that proponents were advised as follows on page 20 of the RFP that:

4.5,4 Freedom of Information and Protection of Privacy Act

The Freedom of information and Protection of Privacy Act, R.S.O. 1990, c.F.31, as amended, applies to information provided to the Ministry by a proponent. A proponent should identify any information in its proposal or any accompanying documentation supplied, in confidence for which confidentiality is to be maintained by the Ministry. The confidentiality of such information will be maintained by the Ministry, except as otherwise required by law or by order of a court or tribunal. Proponents are advised that their proposals will, as necessary, be disclosed on a confidential basis, to the Ministry's advisers retained for the purpose of evaluating or participating in the evaluation of their proposals. [Emphasis added]

[40] The ministry further states that:

The fact that proponents are advised that their proposals are subject to the provisions of the Act does not have the effect of removing the expectation of confidentiality on the part of the affected parties, as has been recognized in a number of orders issued by Commissioner's Office (see Orders PO-1957, PO-1818 and PO-1753). Further, where proposals are prepared for the purpose of obtaining a government contract for services, and the information contained in them is not available to the public from other sources, the Commissioner's Office has held that such information is supplied in confidence (see Order PO-1957).

[41] The affected party states that the record was supplied in confidence as it had been internally treated as confidential before, during and after its submission to the ministry. It further states that to its knowledge the record has never been widely disclosed in a meaningful way in any public forum or medium.

[42] The affected party further states that:

The integrity of an RFP process and competitive procurements rests on confidentiality in order to ensure fairness among bidding firms. This practice is accepted in the transportation planning field, including the Ministry of Transportation and other clients which we deal with. Debriefing

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<sup>14</sup> Orders PO-2043, PO-2371, and PO-2497.

of unsuccessful firms is the practice of the Ministry, but these debriefs do not provide information on individual firms and respect the confidential nature of the proposals.

[43] The appellant did not provide representations on this issue.

Analysis/Findings: in confidence

[44] As stated above, the ministry asked proponents to "...identify any information in its proposal or any accompanying documentation supplied, in confidence for which confidentiality is to be maintained by the ministry..." Neither the ministry nor the affected party provided evidence that the affected party identified any specific confidential information in the record. Nor did either of these parties provide representations on the individual components of the record.

[45] I will review each type of information remaining at issue in the record to determine where they meet the "in confidence" component of part 2 of the test under section 17(1).

Pages 1 and 74

[46] These two pages are the front and back cover pages to the proposal. These pages contain the name of the project, the RFP # and the name and contact information of the appellant. I find that these two pages contain information available from sources to which the public has. Accordingly, I find that pages 1 and 74 were not supplied with a reasonable expectation of confidentiality to the ministry.

Page 2

[47] This page is the cover letter that accompanied the proposal. It is not marked confidential. In addition to the contact information for the affected party, this letter contains information about the number of copies of the proposal it was submitting and a three sentence paragraph containing general information about the affected party's proposal.

[48] The three sentence paragraph in the cover letter contains a very brief summary of how the affected party plans to fulfill its bid. Much more detailed information is found in the pages ordered disclosed above which found its way into part of the contract. Based on my review of this page of the record, I find that the information in the cover letter is not information that was communicated to the institution on the basis that it was reasonably expected to be kept confidential. Accordingly, I find that page 2 was not supplied in confidence to the ministry.

Page 3

[49] This page is the index page to the affected party's proposal. The index reflects the information in the contract from the RFP that I have ordered disclosed as not being supplied, and is information that was required to be included in the proposal by the terms of the RFP. Based on my review of the index, I find that the index does not contain information that was communicated to the institution on the basis that it was confidential and that it was intended to be kept confidential. Accordingly, I find that page 3 was not supplied in confidence to the ministry.

[50] The information added by the affected party to the ministry forms in pages 5 to 8, 10, 12 and 33

[51] These pages consist of four ministry forms.

[52] The first form (form 1) is signed by the affected party's representative and is found at pages 5 to 8. The affected party has added information in this form that includes its name, contact information, corporate structure, and lists the mandatory ministry forms it has completed.

[53] The second form (form 2) is also signed by the affected party and is found at page 10 of the proposal. All that was added to this form was the affected party's name and contact information.

[54] The third form (form 3) is found at page 12 and is entitled Reference Form. This form lists the names of three projects and contact information of past clients who have obtained similar goods or services from the affected party.

[55] The fourth form (form 4) is also signed by the affected party and is found at page 33 and all that has been added by the affected party is contact information.

[56] The information at issue in all four forms is contact information, references and company profile information. Concerning this information, I adopt the reasoning in Order MO-2786 of Senior Adjudicator Sherry Liang, where she stated that:

I also find that there can be no reasonable expectation of confidentiality with respect to the total bid price, which has been disclosed at a public meeting, the appellant's references, which are based on contracts referred to in its website, (Section 7), its Company Profile (Section 3), which again is similar to information published on its website, and Section 8 (Vendor Contact Information). I will, therefore, order this information to be disclosed.

[57] The affected party lists details of its contact and company profile information, as well as numerous projects it has completed on its website. I find that I do not have sufficient evidence to find that the information at issue in the four forms found at pages 5 to 8, 10, 12 and 33 of the record was 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 or that this information is not otherwise disclosed or available from sources to which the public has access.

[58] Accordingly, I find that the information filled out by the affected party in the four ministry forms at pages 5 to 8, 10, 12 and 33 of the record was not supplied in confidence and I will order it disclosed.

Page 30 (except for the first paragraph) and pages 31 to 32

[59] This information is about the affected party's related experience and lists a number of projects it has completed. As this information is the type of information found on the affected party's website, relying on Order MO-2786 and the reasoning immediately above, I find that it was not supplied in confidence.

Pages 65 to 74

[60] These pages contain one of the affected party's brochures advertising its services and containing details of projects it has completed. In Order MO-2801, I found that a brochure which formed part of a proposal made in response to an RFP was not supplied in confidence to the institution. In that order, I stated:

Pages 352-355 consist of a brochure advertising the affected party's product to potential customers. It is not addressed to Peel [the institution] nor does it mention Peel or the affected party's RFP response. I find that this brochure was for a purpose that would entail disclosure to potential customers of the affected party to seek their commitment to purchase the affected party's product.

[61] I adopt the reasoning in both Orders MO-2786 and MO-2801 and find that the brochure at pages 65 to 74 of the record was not supplied in confidence.

*Conclusion: part 2*

[62] In conclusion, I find none of the information at issue in the record was supplied in confidence and part two of the test has not been met. Therefore, I will order the information at issue in the record disclosed. However, for the sake of completeness, I will also consider whether part 3 of the test has also been met for this information.

**Part 3: harms**

[63] 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>15</sup>

[64] 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.<sup>16</sup>

[65] 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).<sup>17</sup>

[66] 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*.<sup>18</sup>

[67] The ministry states that the affected party is in the best position to assess the harms that might reasonably be expected to result upon disclosure of the record and defers to the affected party’s view on this point. The ministry notes, however, that it is concerned that the effect of requiring the disclosure of these records will have a negative effect on the affected party and other future proponents for government projects, causing them to be less willing to set out their proposals in sufficient detail, for fear of their being disclosed to competitors.

[68] The affected party submits that the exemptions in sections 17(1)(a), (b) and (c) apply.

[69] Concerning section 17(1)(a), the affected party states that:

It is well known in the industry that several major RFPs will be released in the near term regarding the 2015 Pan/Parapan American Games. Knowledge of how competing firms will approach a future RFP by having a competitor’s proposal on a similar topic undermines the fairness of the process, and a major reason why proposals are considered confidential.

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<sup>15</sup> *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

<sup>16</sup> Order PO-2020.

<sup>17</sup> Order PO-2435.

<sup>18</sup> Order PO-2435.

In the case regarding the current appeal, the request to obtain a copy of [its] proposal is felt to be for "business intelligence" reasons and a means of circumventing the confidentiality provided to proposals. This is particularly noteworthy given that upcoming 2015 Pan/Parapan American Games RFPs are expected to have significant budgets and which will be very competitive and hotly contested in this challenging economy. We do not believe this represents only a speculative harm, as our approach toward and our understanding of these sorts of projects constitute [our] actual work product..., toward the development of which we expended considerable investment. The disclosure of the details of such proprietary information to our competitors would immediately erode our ability to compete.

[70] Concerning section 17(1)(b), the affected party states that:

The submission of proposals in response to RFPs will obviously continue. However, failure to protect the confidentiality of proposals and allowing competitors to use the freedom of information process for business intelligence purposes can have other undesired implications. For instance, firms could start requesting their competitor's proposals on a frequent basis to "level the playing field". This could in turn induce firms to issue proposals that are less robust in their content, ultimately harming the public interest, by way of a reduced ability on the part of institutions to evaluate proposals.

[71] Concerning section 17(1)(c), the affected party states that:

As noted above, upcoming work for the 2015 Pan/Parapan American Games will be through a competitive bid process. The livelihood of our firm and all consulting firms depend on winning these competitions. [The affected party] has made significant investment to develop this practice area, which is very specialized and with limited Olympic, Pan/Parapan American, or other multi-sport games to apply these skills. There would also [be] an undue and concomitant gain to competitors that can freeload off of the efforts of other firms simply by requesting those firms' proposals.

[72] The appellant states that the ministry has its own unique evaluation system for proposals. It states that without disclosure of successful proposals, other proponents cannot ascertain how to write a successful proposal to the ministry and, therefore, would not be prepared to bid on ministry projects.

*Analysis/Findings*

[73] Based on my review of the ministry and the affected party's representations, I find that I have not been provided with sufficient evidence to link the disclosure of the information in the record to the harms alleged under section 17(1)(a), (b) or (c).

[74] In its representations, the affected party did not provide representations on the specific components of its proposal. Its representations on part 3 of the test focus generally on the reduced ability of it and its competitors to compete for future Ontario government RFPs.

[75] I find that the affected party has not provided the kind of "detailed and convincing" evidence required to satisfy part 3 of the section 17(1) test. The allegations of harm in its representations have not demonstrated that a "reasonable expectation of harm" exists if the information in the record is disclosed.

[76] The affected party's argument that disclosure of the record could reduce competitiveness in future RFPs has been rejected in previous orders of this office. In Order PO-2435, Assistant Commissioner Beamish commented as follows on the argument that the ability of competitors to prepare more competitive proposals constitutes "harm" under section 17(1):

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. (4<sup>th</sup>) 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 [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 [Service Level Agreement] 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 [Ministry of Health and Long-Term Care] and SSHA's [Smart Systems for Health Agency] 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.

I also accept that the disclosure of this information could provide the competitors of the contractors with details of the contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs . . . 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.

[77] In Order PO-3183, Adjudicator Donald Hale, relying on Order PO-2435, came to a similar conclusion in respect of a proposal submitted in response to a RFP for the provision of legal services to a hospital. In ordering the proposal disclosed, Adjudicator Hale found that "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."

[78] I agree with and adopt this reasoning of Assistant Commissioner Beamish and Adjudicator Hale and find that part 3 of the test under section 17(1) has not been met. As both parts 2 and part 3 of the test under section 17(1) have not been met, the information at issue in the record is not exempt under section 17(1). Accordingly, I will order the record disclosed, other than the resumes at pages 34 to 64 and the identified personal information at pages 25 and 26 of the record.

**ORDER:**

1. I order the record disclosed to the appellant by **November 22, 2013** not before **November 18, 2013**, except for the resumes at pages 34 to 64 and the identified personal information in pages 25 and 26 of the record.
2. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellant.

Original Signed By: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ October 16, 2013