

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-3235

Appeal PA11-548

Infrastructure Ontario

August 2, 2013

**Summary:** The requester sought access to information relating to proposals submitted to Infrastructure Ontario in response to an RFP for consulting services. IO decided to disclose the information and that decision was appealed by the party who submitted the proposal. In this order, IO's decision to disclose is upheld on the basis that the third party information exemption in section 17(1) does not apply to the information.

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

### OVERVIEW:

[1] Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about a request for proposal (RFP) for the provision of consulting services during the construction of its 401/Keele Provincial Campus complex. Specifically, the requester sought access to the:

- Winning submission for the above RFP
- all scorecards, minutes of meetings, evaluation notes, interview notes, etc. pertaining to the decision of award.

[2] Following third party notification pursuant to section 28 of the *Act*, IO decided to grant partial access to the responsive records with severances made pursuant to

sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. One of the parties (the appellant) who were notified objected to the disclosure of the information which IO was prepared to disclose and appealed the decision.

[3] During the course of the mediation stage of the appeal process, the appellant confirmed that it objected to IO's decision to disclose the financial information relating to it included in page 2 of the record at issue. The appellant relies on the application of the mandatory third party information exemption in section 17(1) as the basis for its objection.

[4] As mediation was not successful in resolving the issues in the appeal, it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator originally assigned to this appeal sought and received representations from the party resisting disclosure, in this case the appellant. He then solicited representations from the original requester and IO, and received submissions from IO only. The appellant declined the opportunity to submit further representations by way of reply. The file was then transferred to me to complete the inquiry.

[5] In this order, I uphold IO's decision to disclose the commercial and financial information relating to the appellant contained in page 2 of the record and order that it be disclosed to the original requester.

## **RECORDS:**

[6] There is one record at issue in this appeal, comprised of the evaluation score sheet for the RFP process (2 pages). The only information at issue in this appeal consists of the appellant's financial information located on page 2 of the record.

## **DISCUSSION:**

[7] The sole issue for determination in this appeal is whether the information on page 2 of the record that relates to the appellant qualifies for exemption under the mandatory exemption in section 17(1), which 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

[8] 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>

[9] For section 17(1) to apply, the institution and/or the appellant 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**

[10] Based on my review of the record, it appears to contain information that may be characterized as “commercial” or “financial” information within the meaning of those terms in section 17(1). The appellant has not addressed this part of the test in its representations. IO submits that the information qualifies as “financial information”, as contemplated by section 17(1). These types of information 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

---

<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.

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].

[11] Page 2 of the record consists of an Evaluation Summary listing the dollar amounts for work to be performed by each of the proponents for the project which is the subject of the RFP. The appellant was not the successful bidder and no contract was ever entered into with IO for its services. In my view, the information qualifies as both commercial and financial information as it relates to the provision of certain professional services to IO by the appellant and describes the price quoted in the bid which it submitted. Accordingly, I am satisfied that the first part of the test under section 17(1) has been satisfied.

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

### ***Supplied***

[12] 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].

[13] 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].

[14] There is no dispute that the information at issue on page 2 of the record was supplied by the appellant to IO in its response to the RFP and this aspect of the second part of the test has been met.

### ***In confidence***

[15] 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].

[16] 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.<sup>3</sup>

[17] The appellant submits that:

At the time of our submission, we were not made aware of the potential that such sensitive information could be shared with 3<sup>rd</sup> parties especially those in the construction and consulting businesses.

[18] IO agrees that given the circumstances surrounding the submission of the appellant's proposal, it "may have been supplied in confidence as required by section 17". Despite the dearth of information regarding the circumstances surrounding the submission of the appellant's proposal, particularly with respect to its expectations around confidentiality, I am prepared to accept that the document was provided to IO by the appellant with a reasonably-held expectation that it would be treated confidentially. Accordingly, I find that the second part of the test under section 17(1) has been met.

### **Part 3: harms**

#### ***General principles***

[19] To meet this part of the test, the party resisting disclosure, in this case the appellant, must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.<sup>4</sup>

[20] 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].

---

<sup>3</sup> Orders PO-2043, PO-2371 and PO-2497.

<sup>4</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[21] 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].

[22] In its representations, the appellant contends that disclosure of the information at issue in page 2 of the record "would jeopardize [its] competitive position." It points out the competitive nature of the industry in which it operates and the importance of maintaining its relationships with its clients and other consultants. The appellant has not, however, provided any evidence to demonstrate the necessary connection between the disclosure of the information at issue and the harms which it alleges will result to its competitive position or business relationships. The appellant's submissions do not provide such evidence beyond the simple statement that harm will occur.

[23] IO argues that the appellant has failed to provide the kind of detailed and convincing evidence required to establish the third part of the test under section 17(1).

[24] I agree with the position of taken by IO and find that the appellant has not provided me with sufficiently detailed and convincing evidence to demonstrate that the disclosure of the information at issue could reasonably be expected to result in the types of harms contemplated by section 17(1). In addition, I find that the records themselves do not provide a *prima facie* evidentiary basis for a finding that the exemption applies to the information. As a result, I find that the exemption does not apply and I will order that the information be disclosed to the requester.

## **ORDER:**

1. I uphold IO's decision to disclose the information at issue in page 2 of the record.
2. I order IO to disclose the information at issue on page 2 of the record to the requester by providing him with a copy by **September 10, 2013** but not before **September 3, 2013**.
3. I reserve the right to require IO to provide me with a copy of the record that is provided to the requester.

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

\_\_\_\_\_ August 2, 2013