Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3277

Appeal PA12-195

Ontario Parks Board of Directors

November 20, 2013

Summary: The appellant made a request to the Ministry of Natural Resources (the ministry), seeking access to a copy of an RFP, a company's proposal, and the subsequent agreement between the company and the ministry, as well as all verbal and written communication in relation to the decision to enter into that agreement and any extensions to the agreement during its term. The ministry granted access to some records and denied access to others, either in whole or in part, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) and the discretionary exemptions in sections 18(1) (valuable government information) and 19 (solicitor-client privilege) of the *Act*. During the inquiry, the ministry withdrew its section 18 claim and disclosed more records to the appellant. In this order, the adjudicator upholds the ministry's decision, in part. She determines that the mandatory exemptions in sections 17 and 21 apply to portions of two records, and that the discretionary exemption in section 19 applies to another. The adjudicator also upholds the ministry's exercise of discretion. The remaining records, or portions thereof, are not exempt under section 17(1) or section 21(1) and are ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 17, 19 and 21.

Orders Considered: MO-1194, PO-2384, PO-2435 and PO-3183.

OVERVIEW:

[1] The Ministry of Natural Resources (the ministry) operates a number of provincial parks in Ontario through Ontario Parks. These parks are open to the public for a variety of activities, including camping. The Park Reservation and Registrations Service (the PRRS) is jointly managed by the Land & Resource Cluster (LRC) and Ontario Parks. The PRRS provides services relating to provincial parks including the use of an integrated reservation/accounting tool used to streamline park reservations, including:

- a staffed call centre;
- an internet reservation website;
- software to process the reservation, issue permits and account for revenues;
- computers at the call centre and park level;
- an ongoing helpdesk; and
- a telecommunications network to move data between the call centre/internet and each provincial park.

[2] The current service commenced following an RFP process. The ministry entered into an agreement with the first ranked vendor, the requester, to develop and implement the service. According to the ministry, several problems began to emerge with the service and eventually the ministry terminated its agreement with the requester and entered into another agreement with the second ranked vendor. The ministry, the requester and the second ranked vendor are currently engaged in a civil litigation in relation to the termination of the agreement.

[3] This order disposes of the issues raised as a result of a decision made by the ministry in response to an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the RFP, a company's proposal in response to the RFP and the subsequent agreement, as well as all verbal and written communication in relation to the granting of that agreement and any extensions to the agreement during its term.

[4] The ministry identified responsive records and notified several affected third parties to obtain their views regarding disclosure of the records.

[5] The second ranked vendor (one of the affected third parties) provided the ministry with submissions on which portions of the records they believed should not be disclosed.

[6] After considering the representations from the affected parties, the ministry issued a decision, granting access to some records, in whole or in part. Other records were withheld, in full. The ministry claimed the application of the mandatory exemptions in section 21(1) (personal privacy) and 17(1) (third party information), and the discretionary exemptions in sections 18(1) (economic and other interests) and 19 (solicitor client privilege) of the *Act*.

[7] The requester, now the appellant, appealed the ministry's decision to this office.

[8] During the mediation of the appeal, the appellant advised that he is not seeking access to information that is clearly an affected party's personal information, such as personal email addresses or phone numbers. Consequently, this type of personal information is no longer at issue. The appellant advised, however, that he is seeking access to information that may state when a ministry employee was on vacation, as this information may be of interest to him.

[9] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought representations from the ministry, the appellant and three affected parties. I received representations from the ministry and the appellant, but not the three affected parties. Representations were shared in accordance with this office's *Practice Direction 7*.

[10] In his representations, the appellant stated that he had no further representations to make, other than to state that I should place the ministry under the strict burden of proof with respect to the exemptions it claimed.

[11] During the inquiry, the ministry issued a supplementary decision letter to the appellant in which it revised its claim with respect to the exemption in section 18(1). At that time, further records were disclosed to the appellant and the ministry advised that it was no longer claiming the application of the discretionary exemption in section 18(1).

[12] For the reasons that follow, I uphold the ministry's decision, in part and order it to disclose certain records to the appellant either in whole, or in part. I also uphold the ministry's exercise of discretion.

RECORDS:

[13] The records consist of an email with an attachment, notes of an interview, a proposal, and an agreement with schedules.

ISSUES:

A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B: Does the mandatory exemption at section 21(1) apply to the information at issue?

C: Does the mandatory exemption at section 17(1) apply to the records?

D: Does the discretionary exemption at section 19 apply to the records?

E: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[14] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,

> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[15] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[16] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[1]

[17] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[2]

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[1] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[2] Orders P-1409, R-980015, PO-2225 and MO-2344.

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[19] The ministry submits that three records contain personal information as follows:

- the first record details the academic qualifications and employment history of a company's staff members;[4] and
- the second and third records reveal the signature of an individual who witnessed the signing of the records by a company representative.[5]

[20] I have reviewed the records and I am satisfied that record A0157697 at pages 9 to 16 consists of the resumes of various employees of the company involved in a contractual relationship with the ministry. This information, which relates to the educational and employment history of identifiable individuals, qualifies as their personal information under paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[21] I also note that, on my review of the records, portions of record A0157699 at pages 6-7, 16-18 and 27 contain information about employees' past employment positions and responsibilities. This information, which relates to the educational and employment history of identifiable individuals, qualifies as their personal information under paragraph (b) of the definition of personal information in section 2(1) of the *Act*.

[22] The second type of information to be considered is the signature of an individual who witnessed the signing of documents by a company representative. The ministry has withheld this information under section 21(1) of the *Act.* Therefore, I must first determine whether or not this individual's signature constitutes personal information for the purposes of the definition in section 2(1) of the *Act.*

[23] For assistance in this determination, I considered that previous decisions of this office have drawn a distinction between an individual's personal, and their professional or official government capacity. For example, information associated with an individual in their professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information."[6]

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[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[4] Record A0157697 at pages 9 to 16.
[5] Records A0157697 at pages 75, 77 and 78 and A0157701 at page 102.
[6] Orders P-257, P-427, P-1412, P-1621, MO-1550-F, PO-2225.

[24] In Order MO-1194, former Assistant Commissioner Tom Mitchinson discussed this office's treatment of handwriting and signatures appearing in different contexts. He stated:

> In cases **where the signature is contained on records created in a professional or official government context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition.** (See, for example, Order P-773, [1994] O.I.P.C. No. 328, which dealt with the identities of job competition interviewers, and Order P-194 where handwritten comments from trainers were found not to qualify as their personal information.) [emphasis added]
>
> In situations where identity is an issue, handwriting style has been found to qualify as personal information. (See, for example, Order P-940, [1995] O.I.P.C. No. 234, which found that even when personal identifiers of candidates in a job competition were severed, their handwriting could identify them, thereby bringing the records within the scope of the definition of personal information).
>
> Order M-585[7] involved both handwritten and typewritten versions of a by-law complaint. Former Inquiry Officer John Higgins found that the typewritten version did not qualify as personal information of the author, but that there was a reasonable expectation that the identity of the author could be determined from the handwritten version, and that it qualified as the complainant's personal information.
>
> In my view, whether or not a signature or handwriting style is personal information is dependent on context and circumstances.

[25] I agree with the approach of the former Assistant Commissioner in Order MO-1194, which was also followed by Adjudicator Daphne Loukidelis in Order PO-2632.

[26] In the circumstances of this appeal, I do not accept that disclosure of the signature of the witness would reveal something that is inherently personal in nature about the signatory. The individual's signature appears in records created in an official government context, that is, the company's response to the ministry's RFP for the provision of information technology services. Further, the ministry has not provided evidence that the individual whose signature appears in the records was signing these records in a personal capacity.

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[7] [1995] O.I.P.C. No. 321.

[27] Therefore, I find that the individual's signature contained in the records does not fall within the definition of personal information in section 2(1) of the *Act*, and cannot be exempt under the personal privacy exemption in section 21(1). Since no other exemptions were claimed for this information, I order the ministry to disclose the portions of the records containing this signature to the appellant.

Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?

[28] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[29] If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21. The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21.

[30] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[31] The personal information at issue consists of the resumes of employees of the affected party, which are contained in record A0157697 and employment history information about identifiable individuals in record A0157699 at pages 6-7, 16-18 and 27. The ministry submits that the disclosure of information such as educational or employment history is presumed to be an unjustifiable invasion of privacy under section 21(3)(d). The ministry further states that even if the presumption does not apply, balancing the factors in section 21(2) and the circumstances of the request favour non-disclosure of the information at issue.

[32] With respect to the presumption in section 21(3)(d), I am satisfied that the resumes of the company's staff members capture both their educational and employment history. Past orders of this office interpreting the meaning of the term "relates to employment history" are instructive, as they have often made a distinction between "single, discrete events" and "a narrative of events" taking place during an individual's employment. In other words, information relating to a single event has been found to be insufficient to constitute a "history," while information describing a series of events would represent a "history" and thereby satisfy the requirements of this section.[8] I find that the resumes contain the detailed employment history of the

[8] Orders M-609, P-1027.

individuals. Similarly, the information in the records that relates to the individuals' education sets out a series of educational programs completed by them, which qualifies as a "history." Consequently, I find that the presumption in section 21(3)(d) applies to the resumes.

[33] In addition, I find that the employment information contained in record A0157699 relates to and details the employment history of identifiable individuals and, therefore, the presumption in section 21(3)(d) applies to this personal information.

[34] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[9] I find that neither the exceptions in section 21(4) nor the public interest override apply in this appeal. Therefore, I find that the resumes contained in record A0157697 are exempt from disclosure under section 21(1), as well as the portions of record A0157699 containing employment history information about identifiable individuals.

Issue C: Does the mandatory exemption at section 17 apply to the records?

[35] The ministry submits that disclosure of records A0157695 to A0157700, inclusive would give rise to a reasonable expectation of the harm identified in sections 17(1)(a) and/or 17(1)(c) of the *Act*, which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[9] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[36] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[10] 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.[11]

[37] 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

[38] The ministry submits that the information at issue is the technical and/or commercial information of the affected party. These types of information listed in section 17(1) have been discussed in prior orders:

> *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.[12]
>
> *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.[13] The fact that a record

[10] *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.).
[11] Orders PO-1805, PO-2018, PO-2184, MO-1706.
[12] Order PO-2010.
[13] See note 9.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[14]

[39] According to the ministry, record A0157695 is a written summary of the ministry's interview with the affected party regarding its proposal. In addition, the ministry advises that records A0157696 to A0157700 are parts of the affected party's proposal.

[40] With respect to commercial information, the ministry states that the records relate to the affected party's offer to provide services relating to the operation of a parks reservation system, including information on the affected party's performance in providing the service. The ministry concludes that the records describe the exchange of services for consideration, which qualifies as "commercial" information.

[41] The ministry also submits that the records contain technical information, in that they contain specific information relating to the technical implementation of the services provided by the affected party. In particular, the ministry states, the records describe discussions of the affected party's software, its capabilities and its implementation.

[42] As previously stated, the affected party who submitted the proposal and subsequently entered into an agreement with the ministry did not provide any representations in this appeal.

[43] I have reviewed the records and I am satisfied that some of the records contain information that would constitute "commercial" information for the purposes of section 17(1) as it relates to the buying, selling or exchange of merchandise or services. In this case, there is information in the records about the affected party's proposed provision of services to the ministry.

[44] Similarly, I find that some of the records contain "technical" information, as described above. In particular, some of the records describe technical problems and how they were proposed to be resolved, as well as implementation plans, validation protocols and functionality. This type of information qualifies as technical information for purposes of section 17(1), as it describes the operation or maintenance of a process, specifically the processing of customers' on-line booking of campsites.

[45] As all of the records for which this exemption was claimed contain either "commercial" or "technical" information, part one of the three-part test under section 17(1) has been met and I will go on to determine whether the information was supplied in confidence to the ministry by the affected party.

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[14] P-1621.

[46] On my review of the records, I note that portions of record A0157701 were withheld under section 17(1), although the ministry did not provide any representations in regard to this record, which is the agreement between the ministry and the affected party. However, as section 17(1) is a mandatory exemption, I will include this record in my section 17(1) analysis. I find that this record contains both "commercial" and "technical" information, as it relates to the buying and selling of the affected party's services and also contains information about the technical implementation and testing of the on-line reservation service.

Part 2: Supplied in confidence

[47] 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.[15]

[48] 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.[16]

[49] 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.[17]

[50] 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.[18]

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[15] Order MO-1706.
[16] Orders PO-2020, PO-2043.
[17] Order PO-2020.
[18] Orders PO-2043, PO-2371, PO-2497.

[51] The ministry submits that the information at issue was supplied to it in confidence and states:

> The nature of the services provided to the PRRS would suggest that the information was supplied in confidence. There is a significant degree of confidentiality implicit in the process of developing and implementing the reservation system, particularly the technical aspects of it which is part of competitive industry. An examination of the records makes it clear by the candour of the discussion and the information provided that it was communicated in confidence. Consequently, within the context of the exchange of records, there is an objective basis as required by past orders[19] for an expectation of confidentiality with respect to the affected party's information.

[52] The ministry also advises that the affected party provided representations in response to the ministry's notification of the request under section 28 of the *Act*. The affected party stated at that time that it provided the information at issue on an implicit understanding that the information was to be treated as confidential. The ministry further advises that, in keeping with the norm for this type of service provider, it accepted the information in confidence. The ministry argues that given the nature of the business sector in which the affected party operates, its implicit understanding of confidentiality was reasonable.

[53] Further, the ministry submits that the proposal submitted by the affected party contains a section on confidentiality. In particular, Part One of the proposal at page 5 states:

> Should the Ministry of Natural Resources be called upon under the Freedom of Information and Protection of Privacy Act, or for any other reason, to disclose any part of this proposal, [the affected party] considers any disclosure of the following items to infringe upon its intellectual property rights, trade secrets, or competitive advantage:
>
> 1. Any description of how data is stored, the format it is stored in, or how data is transmitted over a network;
>
> 2. Any description of software functionality not apparent in the software user interface, software manuals, or other public software description;
>
> 3. Any description of software or data exchange algorithms;

[19] Orders P-582, P-607, P-610, M-258, P-765 and P-788.

> 4. Any pricing or cost information which would prejudice [the affected party's] ability to bid on equal terms with other entities on future projects of similar nature;
>
> 5. Any system design work such as plans or specifications prepared by the company or its sub-contractors or consultants.
>
> [The affected party] considers that disclosure of any part or all of this proposal in such a way that any entity could be competing against [it] in similar projects in the future, would materially prejudice [the affected party's] competitive position.

[54] Having reviewed the records and the representations from the ministry, I am satisfied that they have provided sufficient evidence to demonstrate that the commercial and technical information contained in records A0157695 (summary of the affected party's interview), and A0157696 to A0157700 (the proposal) was supplied by the affected party to the ministry with a reasonable expectation of confidentiality. It is clear that the information in these records was generated by the affected party and supplied by it to the ministry. I am also satisfied that, given the confidentiality terms of the proposal and the history of this type of information being treated as confidential, the affected party had a reasonably-held expectation that this information would be kept confidential.

[55] Consequently, records A0157695 through A0157700 have met the requirements of the second part of the three part test in section 17(1). I will determine whether the third part of the test has been satisfied with respect to these records, below.

[56] Conversely, I find that most of the withheld portions of record A0157701 were not supplied by the affected party to the ministry. As previously stated, record A0157701 is the agreement entered into between the ministry and the affected party. The withheld portions of the agreement consist of schedules, which form part of the agreement and are incorporated into it. These schedules are also contained in the affected party's proposal submitted to the ministry in response to the RFP.

[57] In Order PO-2384, Adjudicator Steven Faughnan found that a proposal that was incorporated by reference as a schedule to a contract was not "supplied" by the third party, but rather was the result of negotiation between the parties to the contract. In coming to this conclusion, he stated:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual

> circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
>
> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.
>
> As set out in the section of the Finalized Contract dated April 17, 2002 entitled "Background", the tender bid that was submitted by the affected party is wholly incorporated into the contract by reference. Found at schedule VII to the contract is the version of the pricing sheet that accompanied the affected party's tender that it objects to disclosing. On the pricing sheet an option is crossed through and a handwritten asterisk appears next to another, supporting, in my view, that a negotiation process occurred. . .

[58] I agree with and adopt Adjudicator Faughnan's approach and apply it to the facts of this appeal. I am satisfied that the information contained in the agreement between the affected party and the ministry consists of agreed upon essential terms that I consider to be the product of a negotiation process. Therefore, in the circumstances of this appeal, I do not consider that the information in the agreement, including the portions of the proposal that are incorporated by reference as schedules, was "supplied" by the affected party for the purposes of this part of the section 17(1) test. I conclude that the presence of the schedules in the agreement signifies that the parties agreed to its terms.

[59] In the circumstances of this appeal, I accept that at the time that the successful proponent's proposal was provided to the ministry, it may well have been "supplied" in confidence for the purpose of section 17(1). However, the parties subsequently chose to incorporate part of the proposal into the agreement entered into between them. The agreement clearly indicates that the schedules were incorporated into the agreement, and by having it form part of that agreement, barring the application of one of the two exceptions, the schedules cannot, in this context, be considered to have been "supplied" by the successful proponent, but rather forms part of the negotiated and executed agreement.

[60] On my review of the schedules, I find that the majority of the information does not fit within either of the "inferred disclosure" or "immutability" exceptions as it cannot be described as information in which the disclosure would reveal underlying non-negotiated confidential information supplied by the proponent, or information that is not susceptible to change, such as the operating philosophy of a business or a sample of its products.

[61] Accordingly, as I find that this information does not meet either of the two exceptions to the generally accepted principles that the contents of a contract are not normally considered to have been "supplied in confidence" within the meaning of the section 17(1) test, I find that it has not been "supplied in confidence" to the ministry by the affected party. As all three parts of the three-part test must be met for the exemption to apply, I find that this information does not qualify for exemption under section 17(1). It is, therefore, not necessary for me to determine whether the harms component in part three of the test has been met for this information. I order the ministry to disclose the schedules to the appellant, with two exceptions, which I will evaluate in detail below.

[62] I find that Schedule 1.1 (ggggg) and the Training Manual contain information that falls within either the "inferred disclosure" or "immutability" exceptions because its disclosure would reveal underlying non-negotiated confidential information supplied by the affected party or information that is not susceptible to change such as the operating philosophy of a business or a sample of its products.

[63] These pages include information that if disclosed would reveal underlying non-negotiated confidential technical information supplied by the affected party regarding software capabilities and other technical deliverables.

[64] I also find, because of the nature of the information in these pages and based on the representations of the ministry that describe how the information was treated, that both parties were under the assumption that this information was supplied in confidence. I find, therefore, that this information meets part two of the section 17(1) test and I will go on to consider whether any of the harms contemplated in part three of the test might apply to it.

[65] Other portions of record A0157701 were withheld under section 19, which I will consider below. With respect to the remainder of the record, as no other exemptions were claimed by the ministry, I order it to disclose the portions of record A0157701 that were withheld under section 17(1) to the appellant, with the exception of Schedule 1.1 (ggggg) and the Training Manual, which I will consider in my determination of the application of part three of the section 17(1) three-part test.

Part 3: harms

[66] I will now determine whether the third part of the three-part test applies to records A0157695, A0157696, A0157698 and A0157700, in whole and records A0157697, A0157699 and A0157701, in part. The relevant subsections of section 17(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[67] To meet this part of the test, the party claiming the exemption must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[20]

[68] 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.[21]

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[20] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[21] Order PO-2020.

[69] 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).[22] 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*.[23]

[70] The ministry states that the affected party is in the best position to present argumentative evidence on whether disclosure of the information would prejudice an affected party's competitive position resulting in undue loss or gain. However, the ministry notes that the affected party is in a very competitive business. The ministry argues that disclosure of the records could cause considerable harm to the affected party, as competitors could use the technical and commercial information contained in the records to their advantage. In particular, the ministry submits that the disclosure of the records would provide insight into the affected party's provision of service, which could then be used by competitors to address issues with their system or to undermine the affected party in competing for other work.

[71] I gave the affected party the opportunity to provide representations on this exemption, but it did not submit representations. However, when notified of the request by the ministry under section 28, it responded that the proposal discloses much trade, commercial and technical proprietary information that is still relevant, despite the fact that proposal was made approximately 15 years ago. In addition, the affected party advised the ministry that disclosure of the proposal has the potential to significantly prejudice its competitive position in current or future procurement processes. With respect to the interview notes (record A0157695), the affected party advised the ministry that its disclosure would expose business relationships that existed at that time, discussion of business processes and description of application design. With respect to the agreement (record A0157701), the affected party advised the ministry that it had no objection to its release.

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

[73] 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 comments to the ministry have not demonstrated that a "reasonable expectation of harm" exists if the information in the records is disclosed, nor is such harm apparent on the face of the records themselves, with the following exceptions:

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[22] Order PO-2435.
[23] Order PO-2435.

- tax, payroll and other account numbers;[24]
- client lists;[25] and
- financial statements of a privately-held company that is a sub-contractor of the affected party.[26]

[74] In my view, there would be a reasonable expectation of harm to the affected party should the above information be disclosed, as it could be used by a competitor to cause undue loss to the affected party. Therefore, the information listed above has met part 3 of the section 17(1) test and I uphold the application of the exemption with respect to this information.

[75] With regard to the remaining information at issue, 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. (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

[24] Page 14 of record A0157697, and pages 171 and 173 of record A0157699.
[25] Pages 15-16 of record A0157697 and page 169 of record A0157699.
[26] Pages 50-108 of record A0157699.

> 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.

[76] In Order PO-3183, Adjudicator Donald Hale, relying on Order PO-2435, came to a similar conclusion with respect to a proposal submitted in response to an 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."

[77] 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 with respect to the remaining information for which this exemption was claimed. As a result, the information at issue is not exempt with the exceptions of pages 14-16 of record A0157697 and pages 50-108, 169, 171 and 173 of record A0157699. Consequently, I order the ministry to disclose records A0157695, A0157696, A0157697, A0157699, A0157700 and A0157701, with the exception of the portions of records A0157697 and A0157699 that I have found to be exempt under sections 17(1) and 21(1), and the portions of record A0157701 for which the ministry has claimed the application of the discretionary exemption in section 19, which I will consider below.

Issue D: Does the discretionary exemption at section 19 apply to the records?

[78] The ministry is claiming the application of section 19 to record A0157694, which is an email and an attachment, on the basis that it is subject to solicitor-client privilege. I also note that portions of record A0157701 were withheld under section 19. However, the ministry did not provide any representations on the application of the exemption to this record.

[79] Section 19 of the *Act* states, in part:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;

[80] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a).

[81] 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.[27]

[82] 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.[28]

[83] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[29]

[84] 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.[30]

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[27] 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).
[28] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[29] Orders PO-2441, MO-2166 and MO-1925.
[30] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[85] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[31]

[86] 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.[32]

[87] The ministry states that it applied the discretionary exemption in section 19 to all communications between ministry staff and counsel, as they fall within the ambit of the common law definition of solicitor client privilege. This privilege, the ministry argues, includes all verbal and written communications between solicitor and client related to the seeking, formulating or giving of legal advice or assistance.

[88] In addition, the ministry submits that factual information may be subject to solicitor client privilege to the extent that it is provided to legal counsel for the purpose of receiving a legal opinion or advice, including all working papers directly relating to the advice or assistance.

[89] The ministry states:

> Solicitor-client privilege may extend to communications on a fairly wide range of subjects, even where communications between a solicitor and client may be made on an on-going and protracted basis. Any one particular aspect of this communication may not seem, at first glance, to be subject to solicitor-client privilege. However, when it is considered in light of the "continuum" concept of legal advice, as set out in *Balabel v. Air India,*[33] it becomes apparent that such communications falls within the scope of the privilege. This type of continuum or protracted nature of legal advice is particularly prevalent in the case of "in-house" legal advisors such as government Crown Counsel. The privilege remains permanent until it has been waived by the client.

[90] In this case, the ministry states that the email and attachment consist of the work product of the ministry's legal counsel, because they contain suggested wording to be included in a legal document. The ministry goes on to argue that this work product reflects communication between legal counsel and its client, and is therefore exempt from disclosure under section 19 of the *Act*.

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[31] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[32] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
[33] [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

[91] Having reviewed the record A0157694 for which this exemption is claimed, I uphold the ministry's decision with respect to section 19, subject to my findings on the ministry's exercise of discretion.

[92] With respect to the email and the attachment, I am satisfied that they are exempt under section 19, because they are subject to the common law solicitor-client communication privilege. The email and the attachment contain legal counsel's revisions made in reviewing written materials drafted in conjunction with ministry staff and, therefore, form part of the "continuum of communications," as they reflect confidential communications between a solicitor and his client.

[93] As previously stated, on my review of the records, I note that portions of record A0157701 were withheld under section 19. However, the ministry did not provide any representations on the application of this exemption to this record. Accordingly, I have no evidence before me to support the application of section 19 to this record, nor is it apparent on the face of the record itself. I will order the ministry to disclose those portions of this record to the appellant.

Issue E: Did the institution exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[94] The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[95] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations.

[96] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] This office may not, however, substitute its own discretion for that of the institution.[35]

[97] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[36]

[34] Order MO-1573.
[35] Section 54(2) of the *Act*.
[36] Orders P-344, MO-1573.

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected;

- the wording of the exemption and the interests it seeks to protect;

- whether the requester is seeking his or her own personal information;

- whether the requester has a sympathetic or compelling need to receive the information;

- whether the requester is an individual or an organization;

- the relationship between the requester and any affected persons;

- whether disclosure will increase public confidence in the operation of the institution;

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;

- the age of the information; and

- the historic practice of the institution with respect to similar information.

[98] The ministry submits that, in exercising its discretion, it attempted to balance the purpose of the exemptions with all other relevant interests and considerations, including the facts and circumstances of this request. The ministry states that its exercise of discretion involved two steps. The first step involved a determination by the head on whether the exemption applied. The second step involved the head evaluating all relevant interests, including the public interest in the disclosure of the information and concluding that disclosure should not be made. In this case, the ministry states, the interest in disclosure was of a private nature, that is, to advance the appellant's interests in litigation, rather than holding the ministry to greater scrutiny on a public issue. In addition, the ministry submits that it severed the records in order to disclose as much information as possible.

[99] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. I note that the ministry only withheld one email and attachment under section 19 of the *Act*.

[100] I am satisfied that that ministry weighed the appellant's interest in obtaining access to the requested information against the protection of sensitive government information that is subject to solicitor-client privilege. Accordingly, I am satisfied that the ministry did not err in the exercise of its discretion in applying the exemptions in section 19 to the records for which I upheld the ministry's decision.

[101] In conclusion, I uphold the ministry's decision, in part. I uphold the application of the mandatory exemption in section 21(1) with respect to portions of records A0157697 and A0157699. I uphold the application of the mandatory exemption in section 17(1) with respect to portions of records A0157697 and A0157699. I also uphold the application of the discretionary exemption in section 19 with respect to record A0157694. Lastly, I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose records A0157695, A0157696, A0157698, A0157700 and A0157701 in their entirety to the appellant by **December 30, 2013** but not before **December 20, 2013**.

2. I order the ministry to disclose records A0157697 and A0157699, in part, to the appellant by **December 30, 2013** but not before **December 20, 2013**. Pages 9-16 of record A0157697 are to be withheld. Employment history contained in pages 6-7, 16-18 and 27 of record A0157699 are to be withheld. Pages 50-108, 169, 171 and 173 of record A0157699 are to be withheld.

3. In order to verify compliance with order provisions 1 and 2, I reserve the right to require that the ministry provide me with a copy of the records sent to the appellant.

Original Signed by: November 20, 2013
Cathy Hamilton
Adjudicator