

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3310

Appeal PA13-20

Hamilton Health Sciences

February 25, 2014

Summary: The appellant sought access to a copy of the winning proposal and scoring records relating to the request for proposal (RFP) for project management services issued by the hospital. The hospital denied the appellant access to the winning proposal, in full, claiming the application of the exemption in section 17(1) (third party information) of the *Act*. The appellant appealed the hospital's decision. In this order, the adjudicator finds that the exemption in section 17(1)(a) applies to part of the proposal, but that the other information remaining at issue does not qualify for exemption under section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) and 17(1)(a), (b) and (c).

Orders and Investigation Reports Considered: Orders MO-2151, MO-2176 and PO-2478.

Cases Considered: *Bell ExpressVu Limited Partnership v. Rex.*, [2002] 2 S.C.R. 559.

OVERVIEW:

[1] Hamilton Health Services (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records regarding a specified submission made in response to a Request for Proposal (RFP) for the provision of Project Manager Services for a new centre for the hospital (the centre). Specifically, the requester sought access to a complete copy of the winning submission and "all

scorecards, minutes of meetings, evaluation notes, interview notes, etc. pertaining to the decision of this award.”

[2] The hospital identified two records as responsive to the request: the winning submission and a related scorecard. The hospital then notified the winning bidder (the affected party) pursuant to section 28(1) of the *Act*. After reviewing the affected party’s representations, the hospital issued a decision in which it denied the requester access to the winning submission, in full. The hospital advised the requester that it withheld the winning submission from disclosure under section 17(1) (third party information) of the *Act*. The hospital also advised the requester that access was granted to the scoring information relating to the affected party, but that the information in the scorecard relating to the unsuccessful proponents was denied as it is not responsive to her request.

[3] The requester, now the appellant, appealed the hospital’s decision to this office. In her appeal letter, the appellant indicated that she felt that “the public has the right to know that the award of contract was fair”, thereby raising the possible application of the public interest override in section 23 of the *Act*.

[4] During mediation, the appellant advised the mediator that she sought access to all of the information in the scorecard, not just the information relating to the winning proponent. In response, the hospital notified the unsuccessful proponents identified on the scorecard and subsequently issued a revised decision, granting the appellant full access to it. Accordingly, the scorecard is no longer at issue in this appeal.

[5] In addition, during mediation, the appellant confirmed that she continues to seek access to the winning submission. However, she advised that she does not “need to view any personal information pertaining to individuals (names on resumes, contact/client information, and company’s financial information)”, but continues to seek access to “the other relevant information of the winning submission provided for this project.”

[6] The appellant also advised the mediator that she no longer wishes to rely upon the possible application of the public interest override in section 23 of the *Act*. As a result, this section is no longer at issue in the appeal.

[7] As mediation did not resolve all of the issues in this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[8] Initially, I invited the hospital and the affected party to make representations in response to the issues raised in a Notice of Inquiry. As the appellant indicated that she did not seek access to any personal information, I invited the hospital and the affected party to identify which information contained in the record qualifies as “personal

information”, as defined in section 2(1) of the *Act* and, therefore, outside the scope of the request, as amended. Both the hospital and the affected party made representations. I then invited the appellant to make submissions in response to the issues raised in the Notice of Inquiry, the hospital’s representations and the non-confidential portions of the affected party’s submissions, which were shared in accordance with section 7 of this office’s *Code of Procedure and Practice Direction* number 7. The appellant did not make representations.

[9] In the discussion that follows, I find that portions of the record are outside the scope of this appeal, as they contain “personal information”, as that term is defined in section 2(1), and the appellant advised that she does not seek access to personal information. In addition, I uphold the hospital’s decision to withhold portions of the record, namely Attachment 3: Sample Documentation, from disclosure under section 17(1)(a). However, I find that the exemption in section 17(1) of the *Act* does not apply to the remaining information at issue and order the hospital to disclose it to the appellant.

RECORD:

[10] The record at issue is the winning submission for the RFP.

ISSUES:

- A. Does the record contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 17 apply to the record?

DISCUSSION:

A. Does the record contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[11] During this appeal, the appellant confirmed that she does not seek access to “personal information” contained in the record.

[12] As a result, I invited all parties to provide representations on what information contained in the record constitutes “personal information”.

[13] Personal information is defined in section (2)(1), in part, as follows:

“personal information” means recorded information about an identifiable individual, including,

- (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,
- (g) the views or opinions of another individual about the individual

[14] Section 2(3) of the *Act* also relates to the definition of personal information. It states:

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.

[15] 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

[16] However, 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

[17] In its representations, the hospital submits that the record contains personal information as defined in section 2(1) of the *Act*. The hospital submits that the record contains the educational and employment history of the affected party's employees and reveals more than just business or professional information. The hospital also notes that a number of this office's orders³ have found that the information contained in resumes and work histories qualifies as personal information and qualifies for exemption under the mandatory privacy exemption in section 21(1) of the *Act*.

[18] In addition, the hospital submits that the personal information cannot be severed from the record. The hospital submits that, in Order MO-2856, Adjudicator Daphne Loukidelis found that the personal information at issue could not be severed from the record because it is "inextricably intertwined" with the business information and if disclosed would constitute an unjustified invasion of personal privacy. The hospital submits that the personal information contained in the record goes beyond the scope of identifying an individual in a business capacity and, if released, would be an unjustified invasion of their personal privacy. Although the hospital submits that the entire record contains the personal information of more than one identifiable individual, it submits

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.

³ The hospital refers to Orders M-7, M-319, M-1084 and MO-2856.

that the personal information is included on page 4, 22-25, Appendix E, Attachment 1 and Attachment 2 of the record.

[19] The affected party submits that the record contains the educational history (for example, degree or diploma acronyms) and the employment history (for example, other employers worked for, duties held on various projects including the current one) of the individuals in the record. The affected party also submits that it is not sufficient to redact the name of the individuals where it is connected to their educational and employment history. The affected party submits that even without the individual's name, the remaining information would reveal who the individual is. The affected party requests that none of the personal information contained in the record be revealed, with or without the names redacted.

[20] Although invited to do so, the appellant did not provide representations on what information contained in the records constitutes "personal information". The appellant confirmed in both her appeal letter and during mediation that she does not seek "any personal information pertaining to individuals (names on resumes, contact/client information, and company's financial information)".

[21] I have reviewed the record and I find that the names, job titles, signature information and business contact information of identifiable individuals do not qualify as their "personal information" within the meaning of the definition of that term in section 2(1). I find that this information simply identifies these individuals in their professional or business capacities and would, therefore, reveal nothing of a personal nature about them.⁴

[22] However, based on my review of the record, I find that it also contains information relating to the employment or educational history of certain identifiable individuals and, therefore, contains their personal information, as that term is defined in section 2(1) of the *Act*. Previous orders of this office have interpreted the phrase "employment history" in the context of appeals where an individual's resume is under consideration. These decisions have determined that in order for the information to qualify as "employment history", and therefore be characterized as "personal information" as defined in section 2(1), the record must include more than just the individual's name and job title. In Order MO-2176, Adjudicator Diane Smith made the following finding with respect to a request for certain information contained in a tender which referred to the qualifications of the tenderer's employees:

... the records also contain information relating to the employment or educational history of certain identifiable individuals within the meaning of the definition of that term. I find that this information constitute their personal information as defined in paragraph (b) of "personal

⁴ See Orders MO-1194, MO-2151 and MO-2176.

information". In addition, I find that the names of the individuals and details about their work on previous projects for the affected party represent the employment history of these individuals for the purpose of paragraph (b) of the definition in section 2(1).

Finally, as identified above, Record 9 contains the resumes of a number of individuals who are employees of the affected party. I find the resumes contain the personal information of the individuals. They contain each individual's name along with information relating to their education or employment history, as contemplated by paragraph (b) of the "personal information" definition of section 2(1). Previous orders issued by this office have found that resumes typically include personal information as that term is defined in section 2(1) [see for example Orders P-727, P-766, MO-1444 and MO-2151].

[23] I adopt the findings of Adjudicator Smith for the purposes of this analysis. Based on my review of the representations of the affected party and the hospital, as well as a review of the record at issue, I find that the resume and professional certificate which appear in the record qualify as "personal information" as that term is defined in section 2(1). In addition, I find that detailed information about an identified individual's work on previous projects for the affected party represents their employment history for the purpose of paragraph (b) of the definition in section 2(1).

[24] In addition, I find that the record contains the views or opinions of the author of the proposal about an identified individual and therefore, this information contains the "personal information" of the identified individual for the purpose of paragraph (g) of the definition in section 2(1). For example, in its proposal, the author of the proposal describes an identified individual's personal qualities and explains how these qualities would benefit the proposed project.

[25] The affected party also submits that the duties which identified individuals would perform on the current project constitutes their employment history and therefore contains their personal information. I disagree with this suggestion. Based on my review of the record, I find that the information that the affected party refers to as the identified individuals' "current" duties are, in fact, their proposed duties and is not information that relates to these individuals' employment histories. *The Concise Oxford Dictionary*⁵ defines "history", in part, as follows:

(a) the study of past events, especially human affairs

⁵ 8th ed., s.v. "history".

(b) the total accumulation of past events, especially relating to human affairs or to the accumulation of developments connected with a particular nation, person, thing, etc.

[26] The modern rule of statutory interpretation requires that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.”⁶ The term “employment history” appears in both the definition of “personal information” in section 2(1) and again as one of the types of personal information whose disclosure is presumed to constitute an unjustified invasion of personal privacy in section 21(3)(d).

[27] Adopting this rule of statutory interpretation as well as the definition of the word “history” above, I find that the term “employment history” in the *Act* does not encompass current, future or proposed duties performed by an employee. Rather, I find that the term “employment history” requires that the information relates to the identifiable individual’s past duties or employment.⁷

[28] Accordingly, I find that the information in the proposal that describes the proposed duties for the affected party’s employees is not “employment history” within the meaning of paragraph (b) of the definition of “personal information” in section 2(1) of the *Act*. Reviewing this information in conjunction with the entire definition of “personal information” in section 2(1) of the *Act*, I find that the information that describes the affected party’s employees’ proposed duties does not contain “personal information” within the definition of that term.

[29] Based on my review of the records, I find that the information that describes an identified individuals’ employment history and qualifications, including their resume and the description of previous work with the affected party, as well as the descriptions of an identified individuals personal quality traits to constitute “personal information” within the meaning of that term in section 2(1) of the *Act*. As the appellant advised that she does not seek access to any personal information, I will remove this information from the scope of this appeal.

B. Does the mandatory exemption at section 17 apply to the record?

[30] As identified above, the hospital denied access to the responsive record on the basis of section 17(1) of the *Act*. In their representations, the hospital and the affected party claim that sections 17(1)(a), (b) and (c) apply to withhold the entire record from disclosure. These sections state:

⁶ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para 25, citing Elmer A. Drieger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87.

⁷ See Order MO-2176.

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

[31] Section 17(1) is designed to protect the confidential "informational assets" of business or other organizations that provide information to government institutions.⁸

[32] 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.⁹

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

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

[34] I will now review the record at issue and the representations of the hospital and the affected party to determine if the three-part test under section 17(1) has been established.

⁸ *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.).

⁹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[35] The hospital submits that the record contains the affected party's technical information as it describes its unique methodology and approach to project management services. The hospital also submits that the record contains the confidential financial information of the affected party. Specifically, the hospital submits that the affected party's pricing structure on page 7 of Appendix C of the record contains the financial information of the affected party. Further, the hospital submits that the record contains specific pricing information for the project as well as the affected party's operating budget to carry out the project.

[36] The affected party submits that the record contains its commercial, technical and labour relations information. The affected party states that the record was prepared by professionals with expertise in structuring proposals and it contains the affected party's ideas, processes and procedures for performing the services required pursuant to the project management services at the centre. The affected party submits that the record contains a detailed description of its business. In addition, the affected party submits that the record discloses the approach it takes to compete in a very competitive project management market, including the specialized proposal drafting techniques used to prepare professional proposals and processes and procedures used in the actual construction of the project. The affected party submits that the ideas, processes and procedures found in the record and the structure of the record itself are the result of its experience, expertise and the investment of a significant amount of its time, money and effort.

[37] The affected party also submits that the record contains sensitive commercial information concerning the price quoted for the services provided to the hospital.

[38] In addition to commercial information, the affected party submits that the record contains its technical information. Specifically, the affected party submits that the record contains the following technical information: information relating to its corporate structure, the proposed working relationship with the hospital, its support resources, the tools and technology to be used in performing its obligations, its particular approach to delivering the services, its references and sample documentation.

[39] Finally, the affected party submits that the record contains labour relations information in the form of the names, duties and qualifications of its employees.

[40] Previous orders of this office have defined financial, commercial, technical and labour relations information as follows:

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical art. 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.¹⁰

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.¹¹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹²

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.¹³

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute¹⁴
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees¹⁵

but not to include:

- names, duties and qualifications of individual employees¹⁶

[41] On my review of the record, I am satisfied that the remaining information at issue constitutes commercial information for the purposes of section 17(1) of the *Act*. The record, as the successful RFP submission, contains some of the elements of a proposed commercial services arrangement between the hospital and the affected

¹⁰ Order PO-2010.

¹¹ *Ibid.*

¹² Order P-1621.

¹³ Order PO-2010.

¹⁴ Order P-1540.

¹⁵ Order PO-2010.

¹⁶ Order MO-2164.

party. Accordingly, I find that the record contains commercial information for the purpose of part 1 of section 17(1).

[42] In addition, I am satisfied that the record contains financial information. As the hospital identified in its representations, Appendix C is a Pricing Form and includes fee and rate information.

[43] However, based on the definition of labour relations information set out above, I am not satisfied that the record contains such information for the purpose of section 17(1). Previous orders of this office have found that the names, duties and qualifications of individual employees are not "labour relations information" under section 17(1).¹⁷ Based on my review of the record, I find that it does not contain information relating to labour disputes, labour negotiations, or any other labour relations information.

[44] In addition, I am not satisfied that the record contains technical information for the purpose of section 17(1). Based on my review of the definition set out above and the affected party's representations, I find that the affected party's corporate structure, proposed working relationship with the hospital, support resources, the tools and technology proposed for this project, its approach to delivering the services, its references and sample documentation are not "technical information" under section 17(1). Based on my review of the record, I find that it does not involve information prepared by a professional in a technical field and does not describe the construction, operation or maintenance of a structure, process, equipment or thing. Rather, the records relate to the technical and project management services that individual employees will provide, if the affected party's proposal is accepted.

Part 2: supplied in confidence

[45] 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.¹⁸

[46] 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.¹⁹

[47] 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

¹⁷ See Order MO-2164.

¹⁸ Order MO-1706.

¹⁹ Orders PO-2020 and PO-2043.

confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.²⁰

[48] 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.²¹

[49] Based on my review of the proposal, I am satisfied that it was provided by the affected party to the hospital in response to the hospital's RFP. And that it was accordingly, supplied to the hospital by the affected party within the meaning of section 17(1) of the *Act*.

[50] It is the hospital and the affected party's position that the record was supplied to the hospital in confidence. The hospital submits that all proposals submitted in response to its RFP's are supplied with an implicit expectation of confidentiality. The hospital also submits that the very nature of the RFP process is confidential due to the competitive nature of the project management industry. In addition, the hospital refers to the confidentiality clause in Appendix B of the record, which demonstrates that the hospital treated the RFP with utmost confidence and it was not released to any third party, other than for evaluation purposes.

[51] The affected party submits that it has treated the record consistently as confidential and has not revealed it to anyone outside of the hospital and the affected party's organization. The affected party asserts that the record is not available to the public. Further, the affected party submits that, in the normal course, it would not expect the record to be made public because the very nature of the RFP process requires that proposals be sealed and confidential, lest competitors steal ideas from each other to win the right to tender the services. The affected party also submits that the maintenance of confidentiality is particularly important in the construction industry, which is highly competitive.

²⁰ Order PO-2020.

²¹ Order PO-2043.

[52] Based on my review of the record and the parties' representations, I am satisfied that the record was supplied by the affected party in confidence and that there was a reasonable expectation that the record would be treated in a confidential manner by the hospital.

[53] Therefore, I find that the record was supplied in confidence for the purpose of part 2 of the test for exemption under section 17(1) of the *Act*.

Part 3: harms

[54] To meet this part of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.²²

[55] 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.²³

[56] 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).²⁴

[57] 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*.²⁵

Section 17(1)(a)

[58] The hospital submits that the record is exempt under section 17(1)(a), as its disclosure could reasonably be expected to significantly prejudice the competitive position of the affected party, as well as provide advantageous information to competing project management companies. The hospital submits that the record is the intellectual property of the affected party and it contains crucial business information that allows the affected party to be successful in the field of project management.

[59] In addition, the hospital submits that, if the record is disclosed, competing companies would gain knowledge of the affected party's format, ideas, procedures and methodologies which have been built over many years and developed by highly

²² *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

²³ Order PO-2020.

²⁴ Order PO-2435.

²⁵ Order PO-2435.

specialized and trained staff. The hospital submits that this would then result in the affected party losing out on future bids as competing companies will be able to modify their own proposals for future projects, effectively using the affected party's confidential information. Further, the hospital submits that releasing the financial information of the affected party would allow competitors to effectively underbid the affected party on future projects.

[60] In addition, the hospital submits that the record contains information regarding the corporate structure of the affected party, its proposed working relationship with the hospital, the tools and technology they will use, their approach to deliver the services and sample documentation. The hospital submits that these sections of the record contain confidential business information that has been cultivated and refined over many years by the affected party. As such, the hospital submits that if competitors are provided access to this information, they would gain an advantage over the affected party and pilfer its winning ideas and methodologies.

[61] In its representations, the affected party submits that its competitive position will be significantly prejudiced and the competitive advantage that its proposal structures, processes and procedures for completing construction have given it will be eliminated. The affected party submits that the project management industry is extremely competitive and it is more than merely the price that distinguishes it from its competitors, but also the proposal format and other information related to providing the services that is revealed in those proposals. The affected party claims that, if disclosed, the record will be used as a template by others because it was the winning submission.

[62] With regard to the price quoted for the services to be provided, the affected party submits that, if it is disclosed, the affected party's competitive position would be prejudiced as its competitors would be allowed to simply offer their services at a lower price. As well, the affected party submits that the disclosure of the price would interfere with its ability to negotiate the cost of the services with other customers. The affected party states that the prices quoted depend on a number of factors and the knowledge of the price quoted to the hospital may cause confusion or discontent with its current or future customers, despite the fact that services provided to them may be very different.

[63] In addition, the affected party states that it has invested considerable time, money and resources into the development, cultivation and acquisition of the various methods, procedures, forms, corporate structures, employee mix, manpower estimates, risk registers, working relationship, support resources, service delivery methods, project plans, master schedules and cost tracking logs that it uses to provide project management services. The affected party submits that the disclosure of these confidential documents, methods and procedures to its competitors would prejudice its competitive position in an extremely unfair manner. The affected party also states that

it will not respond to future RFPs from the hospital if the record is disclosed, as it cannot afford for this information to be made public.

[64] Finally, the affected party states that its employees are its most valuable asset and if the record is disclosed, it would give its competitors a shopping list of its employees. The affected party states that while the movement of employees amongst firms is a reality of business, the manner in which its employees are listed and described in the record makes it easy for competitors to target them for hiring. The affected party submits that the loss of employees to competitors would not only prejudice its competitive position because of their loss, but doubly prejudice because of its competitors' gain. Further, the affected party submits that even if its employees are not hired by its competitors, its competitive position is prejudiced because the record reveals its formula for the type of employees and skill sets necessary to produce and execute winning proposals and build successful construction projects.

[65] Based on my review of the record and the parties' representations, I am satisfied that the disclosure of the sample documentation in Attachment 3 of the record could reasonably be expected to result in the harms identified in section 17(1)(a). I find that the affected party and the hospital have provided me with sufficient evidence to demonstrate that disclosure of this sample documentation could reasonably be expected to prejudice significantly its competitive position or interfere significantly with the contractual or other negotiations of the affected parties.

[66] I make this finding on the basis of the specific information contained in Attachment 3, which consists of specific samples of the types of reporting records used by the affected party in carrying out the proposed project. The sample documentation contained in Attachment 3 includes the affected party's proposed preliminary executive project milestone plan and various logs relating to the project, budget and costs. I find that the disclosure of these samples of the affected party's reporting records and the specific manner in which this information is recorded could reasonably be expected to prejudice significantly the competitive position of the affected party, as Attachment 3 includes specific templates of those types of documents. Accordingly, I am satisfied that Attachment 3 qualifies for exemption under section 17(1)(a).

[67] However, I am not satisfied that the other portions of the record qualify for exemption under section 17(1)(a). In Order MO-2151, Adjudicator Frank DeVries considered the application of the municipal equivalent of section 17(1) (section 10(1)(a) in the municipal *Act*) to the winning proposal for the RFP for an identified community centre expansion project. In that order, Adjudicator DeVries considered substantially similar arguments as those made by the affected party in this appeal and found as follows:

In my view, the remaining portions of the record do not contain information which, if disclosed, could reasonably be expected to prejudice

significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I find that I have not been provided with sufficiently persuasive representations which satisfy me that the information contained in these portions of the record qualify for exemption under section 10(1)(a). Some of the information is information about the affected party and its history, experience and qualifications. This information appears to be of a public nature, and I have not been provided with sufficiently detailed and convincing evidence supporting the position that the disclosure of this information could reasonably be expected to result in the harms set out in section 10(1)(a).

The other information contained in the proposal (which is also described in less detail in the slide show), contains information about the manner in which the affected party proposes to meet the requirements of the RFP. The affected party has made general representations with respect to the concern that disclosure of the proposal would result in the identified harms. The affected party also identifies its concern that the disclosure of the form and structure of the proposal will allow others to use their successful proposal as a "template". I recently reviewed a similar argument in Order PO-2478. In that case the arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry, and in which the exemption in section 17(1)(a) and (c) of the [provincial *Act*] was raised. After reviewing the argument, I stated:

In general, I do not accept the position of the Ministry and affected party concerning how the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the disclosure of the "form and structure" of bid would result in the identified harms under sections 17(1)(a) and (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent Order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms. In Order PO-2435, Assistant Commissioner Beamish made the following statement:

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 accept the position taken by the Assistant Commissioner. In my view the arguments put forward by the Ministry and affected party regarding their concerns that disclosure of the "form and structure" of the bid, or its general format or layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself result in the harms identified in either section 17(1)(a) or (c).

[68] I adopt the approach taken by Adjudicator DeVries in Orders MO-2151 and PO-2478 and apply it to the circumstances of this appeal. Reviewing the record before me, I find that, with the exception of the sample documentation in Attachment 3, the information at issue consists of general information about the affected party and its history, experience and qualifications. This information appears to be of a public nature (for example, the general descriptions of previous projects, as well as information relating to the proposed services) and I have not been provided with sufficiently detailed and convincing evidence to support the hospital and the affected party's position that the disclosure of this information could reasonably be expected to result in the harms set out in section 17(1)(a). Furthermore, I am not satisfied that the disclosure of information relating to the "form and structure" of the proposal could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organizations.

[69] Finally, with regard to the affected party's submission that it will not respond to future RFPs from the hospital if the record is disclosed, I do not find this claim to be convincing. As the affected party and the hospital submit, the project management market is very competitive, and it seems unlikely that the affected party, as a project management service provider, would refuse to submit further proposals in response to RFPs if the record is disclosed. In any case, I find that this argument does not demonstrate that the disclosure of the information at issue could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organizations, rather it applies more aptly to the affected party's arguments under section 17(1)(b).

[70] In conclusion, I find that I have not been provided with sufficiently detailed and convincing evidence to demonstrate that the disclosure of the remaining information at issue could reasonably be expected to result in the harms set out in section 17(1)(a). Accordingly, I find that the record, with the exception of Attachment 3, is not exempt under that section.

Section 17(1)(b)

[71] The hospital takes the position that the record is also exempt under section 17(1)(b), as its disclosure could reasonably be expected to result in similar information no longer being supplied to it, where it is in the public interest that similar information continue to be so supplied. In its representations, the hospital submits that the release of the record could result in companies no longer submitting proposals for future contracts because of the negative impact the possible disclosure of proposals would have on them. By releasing this proposal, the hospital submits that it would be setting a precedent that this could easily happen with future proposals.

[72] In addition, the hospital submits that its goal is to receive proposals that are unique, innovative and well-planned and if winning proposals are released to the public, future proponents could tailor their proposals to reflect what the hospital was seeking in the past. The hospital submits that proponents would no longer supply original and innovative solutions for identified issues. Rather, the hospital submits that it would receive standardized proposals that follow a prescribed path which the bidder would believe would lead them to success. As a result, the hospital claims that it would receive fewer bids from reputable firms and more bids which follow the format of the winning proponent. The hospital submits that it is in the public interest that it continues to receive competitive bids that are innovative and cost efficient.

[73] The affected party's representations reflect those of the hospital. It submits that if the record is disclosed, the hospital will receive fewer proposals from quality firms in response to its RFPs. The affected party claims that companies will be reluctant to respond to the hospital's future requests due to the disadvantages of disclosure, such as prejudice to its competitive position and undue gains to competitors. The hospital submits that it is in the public interest that as many firms as possible respond to every RFP, to ensure that the firm that offers the best combination of price and quality is selected for the project.

[74] Based on my review of the record and the parties' representations, I am not persuaded that the disclosure of the information which I have found does not qualify for exemption under section 17(1)(a) could reasonably be expected to result in similar information no longer being supplied to the hospital in the future, as contemplated by section 17(1)(b). I have found that certain information in the record, which could prejudice the competitive position of the affected party, qualifies for exemption under section 17(1)(a). With respect to the remaining information at issue, I agree with Adjudicator DeVries' comment in Order MO-2151 that "companies doing business with public institutions... understand that certain information regarding how it plans to carry out its obligations will be public". Reviewing the information that remains at issue, which is general in nature and describes the services the affected party proposes to provide, I do not accept that the prospect of the release of this type of information

could reasonably be expected to result in reluctance on the part of companies to participate in future projects.

[75] Accordingly, I am not satisfied that it is reasonable to expect that the disclosure of this information will have the effect that companies will no longer supply similar information to the hospital. Therefore, I find that the information that remains at issue is not exempt under section 17(1)(b) of the *Act*.

Section 17(1)(c)

[76] The hospital submits that the disclosure of the record would result in competitors gaining insight to the strategies, methodologies and procedures of the affected party. The hospital submits that this insight would not be gained otherwise and would result in the affected party losing the type of competitive business ideas that contributed to them being chosen as the winning vendor. In addition, the hospital makes specific representations on the application of section 17(1)(c) to Attachment 3 of the record. However, as I have found that information exempt from disclosure under section 17(1)(a), I do not need to consider the application of section 17(1)(c) to Attachment 3.

[77] The affected party makes the following submissions on the application of section 17(1)(c) to the record:

We are not in the business of training other companies to prepare proposals or training other companies on how to efficiently manage projects. We have incurred the expense and invested an enormous amount of time required to plan and prepare winning proposals and develop the project management procedures contained in the Record. If the Record is disclosed, then our competitors would have a gain to which they are not entitled because they would simply copy the format of the proposal and the procedures contained in the Record.

....

The ability of our competitors to offer the services at a lower price will be assisted by the fact that they will not have had to put the same time, effort or resources into preparing a proposal or planning how to best provide the services that we have had to, because of the fact that they were able to obtain, at no cost to themselves, a template for winning proposals and the plans for how to provide the proposed services.... By discovering the pricing for the project to which the requested confidential information pertains, our competitors will be able to determine how we will price future projects.

....

Finding, recruiting and retaining key employees of the calibre that we have and that are needed to produce winning proposals and build successful construction projects is a time consuming and costly enterprise. If the Record is disclosed, our competitors will not have any expenses related to the search for these types of employees, as they will be listed for them in the Record. Consequently, our competitors will be able to use the money they save in the search for these employees, on salaries for them.

[78] In the circumstances of this appeal, I am not satisfied that the information which I have found does not qualify for exemption under section 17(1)(a) qualifies for exemption under section 17(1)(c). As identified above, I have found that certain specific information to be exempt under section 17(1)(a). However, as discussed above, the information remaining at issue includes other information about the affected party and its history, experience and qualifications, as well as information that I find to be fairly general about the manner in which the affected party proposes to meet the requirements of the RFP. In my view, the disclosure of information of this nature could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

[79] With regard to the information regarding the affected party's employees, I note that I have found most of the information relating to its employees' qualifications and work history to be outside the scope of this appeal. The information remaining at issue that relates to the affected party's employees concerns the duties that will be performed by the employees. I am not satisfied that the disclosure of this information would reasonably be expected to result in the harms listed in section 17(1)(c). Nor am I satisfied that the disclosure of the names of the affected party's employees would result in these harms, as it is reasonable to expect that the names of employees working on a particular project is information that is publicly available.

[80] With respect to the affected party's concerns that competitors will use the proposal as a template for future proposals, as identified in the discussion under section 17(1)(a), I adopt the approach taken by Adjudicator DeVries in MO-2151 and PO-2478 and apply it to section 17(1)(c) in the circumstances of this appeal. I am not satisfied that the disclosure of general information contained in the proposal which discloses the "form and structure" of the proposal could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

[81] In conclusion, I find that Attachment 3: Sample Documentation of the proposal qualifies for exemption under section 17(1)(a). However, I find that the disclosure of the remaining portions of the record will not result in the harms identified in sections 17(1)(a), (b) or (c). As all three parts of the test under section 17(1) must be met, the remaining information contained in the record does not qualify for exemption under section 17(1).

ORDER:

1. I uphold the application of the exemption in section 17(1)(a) to Attachment 3: Sample Documentation.
2. I order the hospital to provide the appellant with a copy of the remainder of the record, with the exception of the personal information contained therein, by **March 31, 2014** but not before **March 26, 2014**. For greater certainty, I have highlighted the information that I have found to contain "personal information", as that term is defined in section 2(1), and are therefore outside the scope of the appellant's request.
3. In order to verify compliance with this order, I reserve the right to require the hospital to provide me with a copy of the portions of the record which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Justine Wai
Adjudicator

_____ February 25, 2014