Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3380

Appeal PA12-436

Halton Healthcare Services

August 19, 2014

Summary: The appellant made a request for copies of the successful proponents' proposals with respect to an RFP. Halton Healthcare identified two responsive records and, after giving notice, withheld the information on the basis of the mandatory third party information exemption in section 17(1). During the inquiry of the appeal, one of the affected parties consented to the disclosure of its proposal. The second affected party gave its consent to the partial disclosure of some of its proposal and Halton Healthcare issued a revised decision. In this decision, the adjudicator finds that the harm in section 17(1)(a) is made out and upholds Halton Healthcare's decision to withhold the information.

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

Orders and Investigation Reports Considered: PO-3371 and MO-3058-F.

OVERVIEW:

[1] The appellant made a request for access to information to the Halton Healthcare Services (Halton Healthcare) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). Specifically, the request was for a copy of the Request for Proposal (RFP) submitted by the vendor who was granted the contract for Medication Management System and Unit Dose Equipment project RFP #09-05 in 2009.

[2] Halton Healthcare identified two responsive records and provided notice under section 28 of the *Act* to two organizations whose interests may be affected by the disclosure of the records (the affected parties). After receiving their responses, Halton Healthcare issued a decision to the appellant denying access to both records and citing the mandatory third party information exemption in section 17(1).

[3] During mediation, the mediator contacted the two affected parties. One of the affected parties reviewed its RFP and provided the mediator with consent to disclose certain portions of it. This information was provided to Halton Healthcare who then issued a second decision providing access to the identified portion. The other affected party did not consent to the disclosure of any of the information in their RFP.

[4] During my inquiry into this appeal, I sought representations from Halton Healthcare, the appellant and the two affected parties. I received representations from Halton Healthcare and one affected party only. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[5] In its representations, Halton Healthcare referred to the fact that one of the affected party has now consented to the release of its proposal in its entirety. Halton Healthcare has now provided this office with a copy of its revised decision letter to the appellant disclosing this information. Accordingly, this record is no longer within the scope of this appeal.

[6] In this order, I uphold Halton Healthcare's decision and dismiss the appeal.

RECORDS:

[7] The record at issue consists of the following:

- Remaining portions of RFP provided by Affected party #1
  - Page 3
  - Page 4
  - Page 5
  - Page 8
  - Page 9
  - Pages 10 – 12 (in full)
  - Page 15
  - Pages 17 – 23 (in full)
  - Pages 24 – 39, 40 – 56, 57 – 66, 67 – 70, 71 – 77, 78 – 79, 80 – 107, 111, 112, 113, 114, (in full)
  - Master Agreement, pricing supplements and quotes (47 pages in full)

- Specifications 2 – 11, 2 – 12, 2 – 13, 2 – 14, 2 – 15, 2 – 16, 2 – 17, 2 – 18, 2 – 19, 2 – 20, 2 – 21, 2 – 22, 2 – 23, 3 – 1 (in part)

DISCUSSION:

[8] The sole issue before me is whether the mandatory third party exemption in section 17(1) applies to the record. This section states, in part:

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

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

[10] 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.

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[1] *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.).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[11] Both Halton Healthcare and the affected party submit that disclosure of the record at issue would reveal commercial and financial information. The affected party describes the record as follows:

- Pricing and quotes for products and support services;
- Detailed specifications for, and features and functionality of, various products, such as packaging and inventory systems, carousel storage systems, medication dispensing drawers, and associated software systems and system architecture;
- Support models and servicing plan information;
- [The affected party's] sample master supply and service agreement, which includes terms relating to financing, software licensing, support services and professional services;
- Product implementation timing and strategy, including a sample Gantt chart from another [affected party] project;
- Sample system reports, such as batch reports, lot number and expiration date reports, physician transactions reports and par vs usage reports;
- Competitive advantages that set [the affected party] apart from its competitors; and
- [The affected party's] references.

[12] I accept that the affected party's proposal contains commercial information as the proposal was submitted to Halton Healthcare for the purposes of selling products and services to it. Furthermore, the proposal contains financial information as the details of pricing and payment are included in the master supply and service agreement. Commercial and financial information have been defined in past decisions and I apply those definitions to my finding here.

[13] The affected party further submits that the records contain its trade secret information. It states:

> The RFP Submission also contains trade secrets and proprietary information relating to [the affected party's] products and services, including important specifications that would be of interest to [the affected party's] competitors. The RFP Submission also explains how [the

> affected party's] products and services differ from those of its competitors. Information about [the affected party's] product and service specifications has been consistently treated by [the affected party] as a trade secret. The redacted information contained in the RFP Submission is not available from sources otherwise accessible by the public and could not be obtained by observation or independent study by a member of the public acting on his or her own.

[14] The meaning of "trade secret" information has been defined in past order as:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]

[15] The affected party submits that the specifications of its products and services are treated as trade secrets by it. Other than stating that the withheld information is kept confidential, the affected party does not provide submissions on how the specifications for its product and services qualify as a trade secret. The affected party did not provide me with evidence that its products or services are not generally known in its trade or business and that there is economic value in it not being known. I find that the affected party has not established that the records contain "trade secret" information for the purposes of section 17(1).

[16] However, as I have found that the record contains commercial and financial information, I will proceed to consider part 2 of the test for section 17(1).

[3] Order PO-2010.

Part 2: supplied in confidence

Supplied

[17] 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.[4]

[18] 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.[5]

[19] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[6]

[20] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[7]

In confidence

[21] 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.[8]

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[4] Order MO-1706.
[5] Orders PO-2020 and PO-2043.
[6] This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above; see also Orders PO-2018, MO-1706 and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).
[7] Orders MO-1706, PO-2384, PO-2435 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, cited above.
[8] Order PO-2020.

[22] 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.[9]

[23] Halton Healthcare submits that the record was supplied by the affected party to it in response to an RFP for medication management system and unit dose equipment. Halton Healthcare further notes that the terms of the affected party's response were not modified after the proposal was accepted by it and were never subject to further negotiation. Lastly, Halton Healthcare cites previous decisions of this office that have found that information contained within proposals, where they are not the product of any negotiation and remain in the form originally provided by the affected party constitute supplied information for the purposes of part 2 of the test for section 17(1).[10]

[24] Regarding the "in confidence portion" of part 2 of the test, Halton Healthcare submits that the record was supplied to it on the basis that it was confidential and would be treated as such. Halton Healthcare notes that it is normal commercial practice to treat competitive proposals as proprietary and confidential. Halton Healthcare also submits the following:

> The *Act* did not apply to public hospitals at the time that the RFP was issued. At the time of the RFP, [Halton Healthcare] was subject to the Ontario government's Broader Public Service Supply Chain Guidelines and Supply Chain Code of Ethics. These guidelines explicitly address confidentiality of information supplied as part of the procurement process.
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> ….
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> Section 10.3.2 of the RFP provided that information provided by the vendor may be reproduced by [Halton Healthcare] for the purposes of

[9] Orders PO-2043, PO-2371 and PO-2497.
[10] PO-2300 and PO-3175.

> evaluating the vendor's submission to the RFP. Further, it required that the vendor identify those portions of the proposal that are confidential.
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> In response, the vendor provided a non-disclosure notice as part of its proposal indicating that the material submitted was confidential and proprietary, must be held in confidence and only shared with persons requiring access to this information for evaluation purposes. With respect to section 10.3.2 of the RFP, the vendor identified that most attachments, all pricing, as well as feature/functionality of the system should remain confidential and never be shared with other vendors.

[25] Halton Healthcare further confirmed that the affected party communicated its concern for the protection of its confidential information.

[26] The affected party submits that the withheld portions of its proposal satisfy part 2 of the test under section 17(1) as it was supplied to Halton Healthcare with a reasonable expectation of confidence that it would not be disclosed, including with respect to any request under any freedom of information legislation. The affected party refers to section 10.3.2 of the RFP and states that as required by that provision it provided a number of legal notices to Halton Healthcare about the confidentiality requirements and confirms that its confidentiality expectation also related to the attachments, feature/functionality of its systems and pricing.

[27] The affected party also submits that the sample master supply and services agreement included in its RFP submission was also "supplied" for the purposes of section 17(1). Unlike past decisions of this office that have found that the terms of a contract developed through a process of negotiation are not considered to be supplied, the affected party states:

> In this instance, the sample master supply and service agreement was not negotiated between [the affected party] and [Halton Healthcare] but was supplied by [the affected party] to provide [Halton Healthcare] with a sample of the type of agreement that [the affected party] usually enters into with its customers. Under the "legal notices" section on page 3 of the RFP Submission, [the affected party] clearly advises [Halton Healthcare] that the contractual terms and conditions will be mutually negotiated by both parties upon acceptance of [the affected party's] proposal.

Finding

[28] As stated above, 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.

[29] Recently, in Order PO-3371, Adjudicator Cathy Hamilton, in finding that an affected party's proposal for arthroscopic supplies and equipment to a hospital was supplied, reviewed this office's approaches to the matter of RFP Submission. Specifically, she cites Senior Adjudicator Sherry Liang's finding in Order MO-3058-F which I reproduce here:

> Record 1, the winning RFP submission, was also "supplied" to the town within the meaning of section 10(1). My conclusion with respect to this record is consistent with many previous orders of this office that have considered the application of section 10(1) or its provincial equivalent to RFP proposals.[11] As this office stated, in Order MO-1706, in discussing a winning proposal:
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> > …it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution… [page 9]
>
> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.
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> I distinguish the circumstances before me from those where a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the parties, and no separate contract between the parties is created. In Order MO-2093, for instance, this office found that where a winning proposal governed the commercial relationship between a city and a proponent, and there was no separate written agreement, the terms of the winning proposal were mutually generated and not "supplied" for the purpose of section 10(1). In such a case, it is reasonable to view

[11] See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.

> the winning proposal as no longer the "informational asset" of the proponent alone but as belonging equally to both sides of the transaction.

[30] I too adopt the approach of Senior Adjudicator Liang and Adjudicator Hamilton in this present appeal. I find that the affected party's RFP submission is not a final agreement between itself and Halton Healthcare. Instead, its proposal was supplied by the affected party to Halton Healthcare for the purposes of responding to the call for submissions in the RFP. I find that the proposal was not a product of negotiation and was not mutually generated by Halton Healthcare and the affected party.

[31] Further, with respect to the "in confidence" requirement of the part 2 test for section 17(1), I find that the affected party and Halton Healthcare have established that the affected party had an explicit expectation of confidentiality with respect to the withheld portions of the record at issue. I find that the affected party clearly identified its confidentiality concerns in its proposal as well as specifically identifying particular information which it required confidentiality. I also find that Halton Healthcare confirmed that it understood its confidentiality requirements under the procurement process and in the affected party's proposal, and treated the information in the proposal accordingly with a view to limiting access to the information except for purposes of evaluation. I find that the parties have met the part 2 requirement of section 17(1).

[32] I do wish to comment on the hospital's submission that the *Act* did not apply to hospitals at the time the affected party's proposal was submitted to it. While I accept this submission as factually true, I find that it has no bearing on whether the hospital is required to fulfill its obligations under the *Act* with respect to this record which came in its custody and control on or after January 1, 2007.[12]

[33] Accordingly, I find that the parties objecting to disclosure of the record have met part 2 of the test, and I will now proceed to consider part 3.

Part 3: harms

[34] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[13]

[35] 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

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[12] Section 69 of the *Act*.

[13] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.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.[14]

[36] 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).[15]

[37] 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*.[16]

[38] The parties submit that the harms set out in sections 17(1)(a) and (c) are relevant.

[39] The affected party submits that disclosure of its proposal would significantly harm its competitive position and cause undue loss. The affected party submits that it is in the business of supplying medical management and dispensing systems and is regularly submitting proposals in response to RFP's issued by healthcare providers both in Ontario and other jurisdictions. Disclosure of its proposal would, in the affected party's submission, provide competitors with key information about its pricing and the specifications of its products and services. Furthermore, other confidential information would be "exploited by competitors" and give the affected party's competitors a significant advantage in preparing their own proposals for future RFP's. This would result in prejudice to the affected party's competitive position in future RFP's and contractual negotiations.

[40] The affected party also submits that its proposal contains detailed information about its bidding strategy and its competitive advantage over other providers. It states:

> [The affected party] would also lose the benefit of money it has invested in its product and service development should competitors attempt to undermine [the affected party] in future RFP's and/or replicate the products and services developed by [the affected party] and, accordingly, [the affected party's] competitive position would be damaged.

[41] Halton Healthcare raises similar arguments.

[42] I have considered the parties arguments and the information remaining at issue.

[43] I find that disclosure of the information remaining at issue could reasonably be expected to significantly prejudice the affected party's competitive position and interfere

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[14] Order PO-2020.
[15] Order PO-2435.
[16] Ibid.

with its contractual or other negotiations with future clients. I have carefully reviewed the information that remains at issue following the revised decision issued on May 27, 2013. The information that has not been disclosed contains pricing, product specifications and detailed information relating to the provision of services by the affected party. I also compared the information available on the affected party's website with the information in its proposal and I find that the proposal contains more detailed information with respect to the affected party's products and services. Disclosure of this information would give competitors and others information about the affected party that is not otherwise available. Accordingly, I find disclosure of this information could reasonably be expected to result in the harm set out in section 17(1)(a) of the *Act*.

[44] As I have found that Halton Healthcare and the affected party have met all three parts of the test for the application of section 17(1), the record at issue is exempt under section 17(1) and I dismiss the appeal.

ORDER:

I uphold Halton Healthcare's decision and dismiss the appeal.

Original Signed by: August 19, 2014
Stephanie Haly
Adjudicator