

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3430

Appeal PA13-165

Brock University

November 28, 2014

Summary: The appellant sought access to records related to a specified request for proposal tendered by the university. The university located records responsive to the request and granted the appellant partial access to them. The university relied on the mandatory third party information exemption in sections 17(1)(a) and (c) to deny access to a one-page record relating to the previous incarnation of the RFP and to the undisclosed portions of a 14-page evaluation record. The decision of the university is upheld in part.

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

Orders and Investigation Reports Considered: MO-3058-F, Interim Order MO-3080-I and PO-3113.

OVERVIEW:

[1] Brock University (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information regarding a request for proposal (RFP) entitled "Proposal for Hazardous Materials Management: On Campus Service, Disposal of Hazardous Waste, Spill Response & Training":

[T]the results of the evaluations for each of the qualified bidders including the successful bidder.

[A]ll the documents provided to the University by all consulting organizations, particularly [named company], that was involved in the development of RFP #EG11-03.

[A]ll of the documents provided to the University by all consulting organizations, particularly [named company], that was involved in the analysis and evaluation of all of the bidders' responses of RFP #EG11-03.

[2] The university located records responsive to the request. In accordance with section 28 of the *Act*, the university notified three companies whose interests could be affected by the disclosure of the records and sought their position on disclosure. One company consented to disclosure of its information, while another consented to disclosure of most of its information with the exception of its financial information. The final company did not provide submissions to the university. The university then issued a decision granting the appellant access to 81 pages of responsive records.

[3] Following his receipt of the 81 pages of disclosed records, the requester contacted the university and indicated that he believed the university had not identified all of the responsive records. In response, the university conducted an additional search and located an additional responsive record entitled "Final Evaluation of RFP EG11-03". The university then issued a supplementary decision disclosing to the appellant, in the form of a newly created record, the scoring summary information for the RFP proponents that was contained in the Final Evaluation record. The disclosed record excluded the names of the companies that submitted RFP submissions (the proponents) identifying them instead by the order in which they were ranked. The university relied on the mandatory exemption in section 17(1) (third party information) to deny access to the names of the proponents in the Final Evaluation of RFP EG11-03.

[4] The requester, now the appellant, appealed the decision of the university to this office.

[5] During mediation of the appeal, the appellant confirmed that he was not interested in pursuing access to the names of the individual proponents in the RFP. Accordingly, the names of the proponents are not at issue in this appeal. He also indicated that he believed additional records should exist; specifically, documents related to the evaluation of the RFP. The university conducted a further search and identified an additional responsive record, a 14-page evaluation of RFP EG11-03 which included the Final Evaluation of RFP EG11-03 as its first page.

[6] Pursuant to section 28 of the *Act*, the university again notified the proponents whose interests could be affected by disclosure of this record. One of the proponents objected to any disclosure of its information. The university then issued a second supplementary decision in which it granted partial access to the record relying on the mandatory exemption in section 17(1) to withhold portions of the record. The university then disclosed all the information in the record that related to the proponent that had consented to complete disclosure at the time that the request was made.

[7] The appellant subsequently sought access to a cancelled request for proposal (RFP EG100-02) that preceded RFP EG11-03 and was referenced in the disclosed records. He also sought information pertaining to the reasons for the cancellation of this RFP. In response, the university issued a third supplemental decision in which it stated that although it considered the appellant's request for information on RFP EG100-02 to be beyond the scope of the initial request, it would nonetheless address it in the current appeal. In its third supplemental decision, the university explained that RFP EG100-02 was cancelled in accordance with its policies on the basis that the bids received were non-compliant. It also explained that there were no evaluation records related to RFP EG100-02 because of the cancellation. Finally, the university denied access to a single responsive record which it created in response to the appellant's question about non-compliance regarding RFP EG100-02. It relied on section 17(1) of the *Act* to withhold this record.

[8] The appellant then confirmed that he no longer questioned the reasonableness of the university's search. He also confirmed that he wished to pursue access to the withheld parts of the 14-page evaluation of RFP EG11-03 and to the single record regarding RFP EG100-02 that was withheld in its entirety. As a mediated resolution of the appeal was not possible, the appeal was moved to the adjudication stage for an inquiry under the *Act*.

[9] I sought and received representations from the university and the appellant, and shared these in accordance with section 7 of this office's *Code of Procedure*. I also invited the representations of the proponents and received representations from only one of them. The proponent that participated in my inquiry asked that its representations be kept confidential. I was satisfied that portions of the proponent's representations satisfied the confidentiality criteria set out in *Practice Direction Number 7* of this office's *Code of Procedure* and I provided the appellant with a paraphrased synopsis of the proponent's representations. In this order, I will similarly paraphrase the proponent's representations to preserve their confidentiality. Although the proponent that had consented to the disclosure of all but its financial information did not provide representations during the inquiry, I will take its consent into account in my analysis below.

[10] In this order, I uphold the university's decision in part, but order some of the withheld information disclosed.

RECORDS:

[11] The records at issue in this appeal are:

- the one-page letter regarding RFP EG100-02 that the university withheld in its entirety which does not identify any proponents by name; and
- the severed portions of the 14-page evaluation excluding the names of the remaining proponents which the appellant removed from the scope of the appeal during mediation.

DISCUSSION:

[12] The sole issue in this appeal is whether the mandatory exemptions at sections 17(1)(a) and/or (c) of the *Act* apply to the portions of the records the university has decided to withhold. Sections 17(1)(a) and (c) 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; or

[13] 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

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.

[14] 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.

[15] To meet the third part of the section 17(1) test, the university and/or the proponents must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Previous orders of this office have repeatedly held that evidence amounting to speculation of possible harm is not sufficient.³ 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.⁴ 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).⁵ 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.⁶

Representations

[16] The university submits that the withheld information belongs to the proponents and qualifies as technical, commercial and financial information for the purposes of section 17(1). The university states that the financial information contained in the records was taken from the proponents' RFP submissions. It also submits that disclosure of the commercial information in the records would reveal or permit the drawing of accurate inferences with respect to information supplied by the proponents. The university asserts that the proponents supplied the information with the expectation of confidentiality; a reasonable expectation that is supported by items 7.19 and 7.20 of the RFP, which state:

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

⁴ Order PO-2020.

⁵ Order PO-2435.

⁶ Order PO-2435.

Item 7.19

Proponents acknowledge the University is subject to the Ontario Freedom of Information and Protection of Privacy Act. Proponents shall clearly mark "Confidential" all information regarding trade secrets, commercial, financial, labour relations, technical or other aspects of the Proponent's proposal, which in the Proponent's opinion are of a proprietary or confidential nature and are significant enough to be injurious to the Proponent should this information be provided under a request of information.

Item 7.20

The University shall use all reasonable efforts to hold all information marked "Confidential" by the Proponent in strict confidence where required or permitted by law and shall not be liable for any disclosure or non-disclosure made in respect of a request under the Act.

[17] The university continues that disclosure of the pricing information in the records would reveal the financial details of the proponents' proposals, including unit prices, which have proprietary value to the proponents. It asserts that disclosure of the pricing information would enable a competitor to gain an advantage over the proponents by adjusting a bid and underbidding in future RFPs. The university states that the hazardous waste disposal services market is competitive and price sensitive. The university relies on the findings in Order PO-1791 to support its submissions. It also asserts that previous orders of this office have found a reasonable expectation of prejudice to a proponent's competitive position exists in situations where the records contain proponents' pricing information and bid breakdown.

[18] The proponent echoes the university and submits that the records reveal technical and financial information in satisfaction of the first part of the test. It asserts that it supplied its proprietary technical information detailing its operating expertise, as well as financial information in the form of a detailed pricing solution for the university's RFP needs, with an implicit expectation of confidentiality. It also cites items 7.19 and 7.20 of the RFP relied on by the university as a basis for its expectation that its submission would be kept confidential. The proponent argues that disclosure of its technical and financial information would irreparably prejudice its position in the highly specialized and competitive hazardous waste management industry, and would allow its competitors to unfairly compete with it by adopting its pricing approach and modifying their future RFP pricing.

[19] In his representations, the appellant disagrees with the university's position that the information at issue was supplied in confidence. The appellant argues that the technical information typically provided by proponents in this type of RFP is non-scientific and non-proprietary. He adds that relevant financial information such as

pricing is strictly based on specific on-site inventories and does not reveal confidential pricing practices or any other confidential information. The appellant concludes by asserting that the harms claimed by the university and the proponent are not realistic. He states that a common aspect of a competitive marketplace is flexible pricing which constantly changes. For this reason, he argues that disclosure of the records would not severely prejudice any proponent.

Analysis and findings

[20] I have considered the parties' representations and the application of the three-part test in section 17(1) to the appeal before me, bearing in mind the nature of the records and the actual information contained in them. I note at the outset that although the proponent's representations focus on the information contained in its RFP submission, the proponents' RFP submissions are not before me; nor is the contract ultimately entered into by the university and the successful proponent. Therefore, Order PO-1791 relied on by the university which dealt only with a contract, is neither helpful nor applicable to this appeal. At issue is a one page letter prepared by the university that identifies the proponents of RFP EG100-02 by number and not by company name, and a final evaluation record prepared by the university based on its assessment of the proponents' submissions in response to RFP EG11-03. The names of the proponents in the evaluation record are not before me and are not at issue.

[21] Previous orders of this office have discussed the types of information listed in section 17(1), and the relevant ones in this appeal are the following:

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.⁷ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁸

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.⁹

[22] I adopt these definitions for the purposes of this appeal. I find that the withheld information contains information relating to the purchase and sale of services which qualifies as commercial information under section 17(1). I also find that the last page of the evaluation record contains pricing information taken from the proponents' RFP

⁷ Order PO-2010.

⁸ Order P-1621.

⁹ Order PO-2010.

submissions that qualifies as financial information under section 17(1). Accordingly, I find that the first part of the three-part test is satisfied in this appeal.

[23] Turning to the second part of the test, I agree with the university and the proponent that the financial information under the "Pricing" category on the last page of the evaluation record was supplied in confidence by the proponents to the university. My conclusion is consistent with many previous orders of this office that have found detailed pricing information contained in evaluation records to have been supplied in confidence.¹⁰

[24] The pricing information contained in the last page of the evaluation record reveals the details of the winning proponent's pricing for the project, as well as the pricing details from the submissions of the other proponents. I note that the winning proponent that consents to disclosure of most of its information in the records objects only to the disclosure of its pricing information. I accept the arguments of the university and the proponent that the harms in section 17(1)(a) and (c) could reasonably be expected to result from disclosure of the proponents' detailed pricing information. I find that disclosure of this pricing information could reasonably be expected to significantly prejudice the competitive position of the winning proponent, which can be identified even without its name being revealed in the records, or result in undue loss or gain to it. I also find that disclosure of the detailed pricing information of the other proponents could similarly result in the harms set out in sections 17(1)(a) and (c), because even though the proponents' names are not revealed, their identities can be deduced due to the small number of proponents involved and the specialized nature of their industry. My finding accords with the approach I took in my recent Interim Order MO-3080-I in which I also considered the application of the section 17(1) exemption to evaluation records. In Interim Order MO-3080-I, I found that disclosure of detailed pricing information provided by the proponents that is not publicly known and is incorporated into an institution's RFP evaluation records, could reasonably be expected to significantly prejudice the competitive position of the winning proponent or result in undue loss or gain. I adopt the same approach in this appeal. I find that the pricing information contained in the last page of the evaluation record satisfies all three parts of the section 17(1) test, and qualifies for exemption under section 17(1)(a) and (c).

[25] Conversely, I find that the remaining withheld information in the records does not qualify for exemption as neither the university nor the proponent has provided me with detailed and convincing evidence that it would be reasonable to expect that disclosure of this information would significantly prejudice the proponents' competitive position or result in any undue loss or gain.

[26] The records at issue in this appeal are both records that were created by the university. In fact, the record regarding RFP EG100-02 was created by the university

¹⁰ MO-3058-F and MO-3080-I.

during the mediation of this appeal. Although the university had no obligation to create a record in response to the appellant's request, or to the expanded request the appellant made during mediation, it nonetheless created this record to respond to the appellant's questions about the outcome of RFP EG100-02 and the reasons the bids received for that RFP were deemed non-compliant. The commercial information contained in this record is minimal and relates to the reasons the submissions of four proponents in RFP EG100-02 did not comply with the requirements of that RFP. While it is based on information provided by the proponents to the university, the commercial information is neither sensitive nor proprietary, nor does it identify by name the proponent to whom it applies.

[27] Because the proponents of RFP EG100-02 are anonymized in this record and it is not possible to know which proponent originally supplied the commercial information therein, I am not satisfied that any harm could result from its disclosure. Even if the proponents were identified by name, I would still find that the university and the proponent have not provided me with sufficient evidence to establish that the harms in sections 17(1)(a) or (c) could reasonably be expected to result from disclosure of the information. The information, while commercial, is innocuous and relates to the proponents' insurance status.

[28] The evaluation record contains information assessing the proponents' compliance with the RFP requirements under the categories: Business Profile, Logistics and Waste Processing, Training, Emergency Response, and Performance and Pricing. While the assessment information in this record is based on the commercial, financial and technical information found in the proponents' submissions, it does not for the most part reveal the actual information it is based on. Rather, the assessment information states whether the proponent provided adequate information in response to the specific RFP category requirement and, if so, where in the submission this information is located. In the Logistics and Waste Processing category for example, the assessment information does not reveal proprietary information relating to the proponents' expertise and methods for disposing, transporting and managing hazardous waste, nor does it describe the proponents' operational procedures; it simply states whether an adequate description was provided by the proponents in satisfaction of the RFP requirements.

[29] In the case of the Emergency Response and Pricing categories, there does appear to be at least some information that was directly taken from the proponents' submissions; specifically, the time guarantee for responding to an emergency and the overall price submitted by the proponents. However, I find that even these pieces of information taken directly from the proponents' submissions do not qualify for exemption under section 17(1)(a) and/or (c), as I am not persuaded by the university's and the proponent's submissions that harms could reasonably be expected to result from their disclosure. I accept that the hazardous waste management industry, like many other industries, is highly specialized and competitive. However, I find that disclosure of the emergency response information in this appeal, could not reasonably

be expected to result in the harms contemplated by section 17(1)(a) and/or (c), particularly in the absence of information identifying the proponents. I similarly find that disclosure of the overall price, without disclosure of any of the detailed pricing information that I have found exempt above, could not reveal the proponents' pricing model or approach, and therefore, could not reasonably be expected to result in the harms asserted.¹¹

[30] As I have not been provided with detailed and convincing evidence from either the university or the proponent that would lead me to conclude that disclosure of the remaining withheld information in the evaluation record, and disclosure of the first record regarding RFPEG100-02 could reasonably be expected to result in the harms in section 17(1)(a) and/or (c), I find that this information does not qualify for exemption and I will order it disclosed.

ORDER:

1. I order the university to disclose the first record regarding RFP EG100-02 in its entirety, and the evaluation record, excluding the names of the proponents and the pricing information I have found exempt, to the appellant by **January 6, 2015**, but not before **December 31, 2014**.
2. For certainty, I am providing the university with a copy of the evaluation record highlighting the information that is **not** to be disclosed.
3. To verify compliance with this order, I reserve the right to require the university to provide me with a copy of the records disclosed to the appellant in accordance with provision 2 above.

Original signed by: _____
Stella Ball
Adjudicator

November 28, 2014

¹¹ Order PO-3113.