Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3483

Appeal PA13-434

Windsor Regional Hospital

April 28, 2015

Summary: The appellant made a request to the hospital for records relating to the RFP for pre-mixed IV solutions, including scoring information and other records related to the procurement process. The hospital notified the organization that conducted the RFP, the successful proponent, two unsuccessful proponents and a number of other affected parties. The hospital withheld information on the basis of the mandatory third party information exemption at section 17(1). The appellant raised the issue of the possible application of the public interest override in section 23 of the *Act*. In this order, the adjudicator upholds the hospital's decision in part, and orders it to disclose some of the affected parties' information. The adjudicator also finds that section 23 does not apply as the disclosure of the information subject to section 17(1) would not serve the purpose of shedding light on the public interest identified.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 23.

Orders: MO-2403, MO-2627, MO-2927, MO-3058-F, P-1173, PO-1705, PO-2435, PO-2755, PO-2853 and PO-3062-R.

OVERVIEW:

[1] After conducting a Request for Proposal (RFP) through a group procurement process, a number of hospitals, which included the Windsor Regional Hospital (the hospital), contracted with an organization to prepare intravenous solutions of two

chemotherapy drugs. As a result of this, in 2013, it was reported that due to a diluted medication error, more than 1,200 patients at five hospitals received doses of two chemotherapy drugs that were weaker than doctors had prescribed over the course of about a year. This controversy received significant media coverage.

[2] The appellant made a request to the hospital for records relating to this competitive procurement process for pre-mixed IV solutions and for contracts with suppliers of compounding ingredients. The appellant later narrowed her request as follows:

- The scores each of the three bidders received
- All other notes, emails, letters or other documentation related to the competitive procurement process – including correspondence between a named company and the hospital, the named company and the three bidders and the hospital
- Records showing the amount of supplies ordered from the compounding companies, what products/materials were compounded together in the hospital, why the compounding was done and the size of batches of compounded products made with these supplies

[3] In response to the request, the hospital gave notice under section 28 of the *Act* to several organizations whose interests may be affected by disclosure of the records (affected parties). After reviewing the affected parties' submissions, the hospital issued a decision granting the appellant partial access to the records. The hospital withheld information under the mandatory exemptions in sections 17(1) (third party information) and the 21(1) (personal privacy). The hospital also advised the parties that some portions of the records were withheld as not responsive to the request.

[4] The appellant appealed the hospital's decision to this office and raised the issue of the possible application of the public interest override in section 23 of the *Act*.

[5] During mediation, the hospital notified the affected parties, advising that it intended to revise its decision with regard to the application of the personal privacy exemption under section 21(1) of the *Act*. The hospital then issued a revised decision granting the appellant partial access to the responsive records and withdrew its application of section 21(1) to portions of the records. The hospital advised that it continued to claim the application of the section 17(1) exemption to portions of the records and identified other portions of the records as not responsive to the appellant's request. The appellant advised the mediator that she was not pursuing access to the information identified as not responsive to her request.

[6] During the inquiry into this appeal, the adjudicator sought representations from the hospital and 11 affected parties. She received representations from the hospital and two affected parties. Another affected party requested that the adjudicator consider its submissions that it made in a related appeal with this office, Appeal PA13-281. One affected party consented to the disclosure of its information. Finally, another affected party informed the adjudicator that it would not be making representations in the appeal. The adjudicator then sought and received representations from the appellant. The parties' representations were shared in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction 7*. The appeal file was then assigned to me to complete the order.

[7] For the purposes of this order, I identify the four main affected parties as follows:

- Affected party 1: the organization that conducted the RFP[1]
- Affected party 2: the winning proponent
- Affected party 3: the first losing proponent
- Affected party 4: the second losing proponent

[8] The records also contain references to other affected parties which did not provide substantial representations and did not participate in the RFP. I refer to these parties as "other affected parties".

[9] In the discussion that follows, I uphold the hospital's decision, in part.

RECORDS:

[10] The records at issue consist of the withheld portions of the following documents:

- Record 1: Scoring Participation by members for RFP WS10863 (4 pages)
- Record 2: Email dated April 22, 2013 (1 page)
- Record 5: Excerpts from Pharmacy Committee Meetings/Conference call minutes (25 pages)
- Record 8: RFP member scoring criterion (6 pages)

[1] Unlike, related appeal PA13-281 (Order PO-3479), Affected party 1 did not make submissions in this appeal.

- Record 9: Email dated March 27, 2013 – Member briefing note SPCS Award (3 pages)
- Record 10: RFP member assigned criterion (5 pages)
- Record 12: [Affected party] SPCS Price Reference List (4 pages)
- Record 13: [Affected party] Stability Spreadsheet (3 pages)[2]
- Record 18: [Affected party] Schedule G_2_ in response to RFP (3 pages)
- Record 22: [Affected party] Sterile Preparation Certification Program documentation (3 pages)

ISSUES:

A. Can an affected party claim the application of section 18(1) to the records when the hospital has not?

B. Does the mandatory exemption at section 17(1) apply to the records?

C. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption as contemplated by section 23?

DISCUSSION:

A. Can an affected party claim the application of section 18(1) to the records when the hospital has not?

[11] In its representations, Affected party 3 claimed the application of sections 18(1)(c) and (d) to the records at issue. The affected party submits that disclosure of the pricing and value-added benefit information in the records could reasonably be expected to prejudice the hospital's (and other hospitals) economic interests and could be injurious to the Government of Ontario's financial interests.

[12] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to

[2] As stated above, one of the affected parties whose information is contained in this record, consented to the disclosure of its information. Accordingly, I will not be considering the application of the exemption to this information and I will order it disclosed.

the same extent that similar information of non-governmental organizations is protected under the *Act*.

[13] I note that the hospital did not claim the application of section 18(1) to the information remaining at issue. In appeals, where a party other than the institution raises the possible application of a discretionary exemption, the adjudicator must consider the purposes of the *Act* and the circumstances in the particular appeal. Accordingly, I must consider the rationale in the finding in Order PO-1705, where former Assistant Commissioner Tom Mitchinson stated the following:

> During mediation, the third party raised the application of the sections 13(1) and 18(1) discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.
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> This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:
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> > The *Act* includes a number of discretionary exemptions within sections 13 to 22 [of the provincial *Freedom of Information and Protection of Privacy Act*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
> >
> > The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the

> integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
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> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[14] I adopt the rationale in Orders P-1173 and PO-1705. It is evident to me from the way the hospital has severed the records, that it carefully considered its decision to disclose certain information. I assume that this consideration also included an examination of the possible harms that disclosure may have on its own interests. I find that Affected party 3 has not established that this appeal is one of those unusual cases where it should be permitted to raise the issue of the application of section 18(1) when the hospital has exercised its discretion to not to claim it. Accordingly, I will not be considering the application of section 18(1)(c) and/or (d) to the information at issue.

B. Does the mandatory exemption at section 17(1) apply to the records?

[15] Section 17(1) 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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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (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.

[16] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[18] The appellant does not dispute that the records at issue contain the types of information protected under section 17(1). Based on my review of the records, I find that they contain both commercial and financial information. These terms have been defined in past orders as follows:

> *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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

[3] *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.).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[5] Order PO-2010.
[6] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[7]

[19] The information at issue relates to the RFP and purchase of pre-mixed IV solutions by the hospital from Affected party 2. The description of the goods and services to be provided by the affected parties is also contained in the information at issue. This information clearly fits within the definition of commercial and financial information as defined in past orders of this office. I find that part 1 of the test has been met for some of the information at issue.

[20] With regard to the scoring information relating to Affected parties 3 and 4 that was withheld on the pages comprising Record 8 and the scoring summary contained in Record 9, I considered whether this information was exempt under section 17(1) in Order PO-3479. In that order, I found that this information, specifically the numerical value given by Affected party 1 to the respective proponents, does not contain the affected parties' actual commercial or financial information. Instead, I found that this information reflected Affected party 1's application of the scoring criteria to the proponent's proposals to create a score for each of them. Accordingly, in the present appeal, I find that the scoring information in Records 8 and 9 do not contain the type of information protected under section 17(1) and, as such, cannot be exempt from disclosure under section 17(1). As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that this information be disclosed to the appellant.

[21] Additionally, I find that the other information comprising Record 9, with the exception of Affected party 2's label information, does not fit within one of the enumerated types of information protected under section 17(1). Affected party 1 did not claim that this information was its own third party commercial information. Record 9 consists of an email and the attached briefing note about the results of the RFP. The briefing note contains background information relating to the RFP, the scoring summary, the reason Affected party 2 was chosen as the winning proponent and Affected party 1's discussion regarding contract implementation.

[22] Based on my review of this information, I find that it does not contain any of the types of information contemplated by section 17(1). Rather, I find that these pages contain a general summary of the RFP process, the resulting award and the future contract. As all three parts of the test under section 17(1) must be satisfied, I find that these pages of Record 9 are not exempt, with the exception of Affected party 2's label information. I find that Affected party 2's label information is commercial information for the purposes of the first part of the test under section 17(1) and I will consider whether this information was supplied in confidence below. As no other exemptions

[7] Order PO-2010.

have been claimed for the remaining information and no mandatory exemptions apply to the information they contain, I will order that it be disclosed to the appellant.

Part 2: supplied in confidence

Supplied

[23] The requirement that it be shown the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[8]

[24] 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.[9]

[25] 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[10]

In confidence

[26] 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.[11]

[27] 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

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[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] See also Orders PO-2018, MO-1706, 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.).
[11] Order PO-2020.

- 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.[12]

Representations and findings

[28] The affected parties submit that their information was supplied to Affected party 1 and thus the hospital, for the purposes of section 17(1). Specifically, the affected parties submit that information was submitted to the hospital in response to the RFP.

[29] The appellant concedes that Affected parties 3 and 4 supplied their information to the hospital with a reasonable expectation of confidentiality but argues that Affected party 2 did not. The appellant states:

> Orders PO-3235, PO-2485, PO-3055, MO-2465 and MO-2403 stipulate that if the bid is successful and the information contained in the bid becomes part of the contract, it is not considered "supplied" and does not fall under the third party exemption.

[30] The appellant made the same argument in Order PO-3479 referred to above. In that order, I reviewed the jurisprudence of this office relating to the supplied portion of section 17(1) and found that Affected party 2's proposal was not a final agreement between the hospital and it. Instead, the proposal contains the contractual terms proposed solely by Affected party 2 and thus, was not a product of negotiation and not mutually generated by the hospital and the affected party. As such, I found that Affected party 2 had supplied the information to the hospital for the purposes of section 17(1).

[31] The appellant also argues that Affected party 1 did not supply the information to the hospital as "effectively" Affected party 1 is the hospital. Regarding this issue, in Order PO-3479, I reviewed the parties' representations and found that there was no evidence to support this finding.

[32] I find that the same reasoning applies in this current appeal. Based on my review of the representations and the records, I find that there is no evidence before me to demonstrate that the information contained in Affected party 2's proposal was not supplied to the hospital and, instead, forms part of the eventual contract.

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[12]Orders PO-2043, PO-2371 and PO-2497.

[33] Accordingly, with the exception of some of the information on the pages comprising Records 1, 2, and 5, I find that the affected parties supplied the information at issue to the hospital for the purposes of section 17(1). I am also satisfied by the affected parties and hospital's representations that the affected parties had a reasonably held expectation that the information they supplied would be treated in a confidential manner by the hospital.

[34] Record 1 consists of "Scoring Participation by Members" summary sheets. I find that these pages consist of generalized comments made by the scoring members about the affected parties' proposals. It is clear that this information was not supplied by the affected parties to the hospital as the comments were generated by the members conducting the review of the RFP submissions. I find that this information does not meet part 2 of the test for the application of section 17(1) and thus is not exempt on that basis.

[35] Records 2 and 5 contain information which arguably could have been supplied by Affected party 1 to the hospital. However, as stated above, Affected party 1 did not provide representations in this appeal and without submissions on the circumstances surrounding the actual "supplied in confidence" component of the withheld information, I am unable to find that these records contain information supplied by Affected party 1 to the hospital. Record 2 is an email exchange between Affected party 1 and various individuals in the purchasing group, including the hospital. I find that the withheld information does not contain information supplied by Affected party 1 or any of the affected parties to the hospital.

[36] Record 5 consists of excerpted minutes of the Pharmacy Committee Meetings. The attendees of the meetings were various member hospitals and a representative for Affected party 1. I find that much of the withheld information in these pages could not be considered as having been supplied to the hospital by the affected parties. I find that this information does not meet the part 2 test for section 17(1). As no other mandatory exemptions apply to this information and the hospital has not claimed any discretionary exemptions for this information, it should be disclosed to the appellant.

[37] For the rest of the information on these pages (in Record 5) that I have determined to be supplied by the affected parties, I am also prepared to find that the affected parties supplied it with a reasonably held expectation of confidentiality.

Part 3: harms

[38] 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]

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

[39] 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.[14]

[40] 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]

[41] Affected party 2 submits that the harms listed in paragraphs (a),(b) and (c) of section 17(1) would reasonably be expected to result from the disclosure of the information at issue. With regard to section 17(1)(a), Affected party 2 submits:

> …disclosure would reveal confidential and proprietary information to competitors, and thereby significantly harm [Affected party 2's] competitive position: specifically, the market for drug admixtures has become significantly more regulated as a direct result of the [Affected party 2]-related incident, and so competitors are naturally going to want to know what procedures [Affected party 2] employed, so as to emulate the procedures that were effective and avoid the procedures that, arguably, contributed to the controversy. Permitting competitors insight into [Affected party 2's] proprietary procedures would seriously interfere with [Affected party 2's] competitive position.

[42] As well, Affected party 2 submits that the information that remains at issue should be exempt from disclosure under section 17(1)(b) as its disclosure "would set a precedent that would clearly result in bidders not providing sensitive technical and commercial information when similar responses are solicited by [Affected party 1] in the future". Finally, Affected party 2 submits that disclosure of the information at issue would result in undue loss to it, "as it could be used to gain undue advantages by third parties – either competitors or in ongoing or contemplated litigation arising out of the provision of the services to which these documents relate."

[43] Affected party 3 also submits that sections 17(1)(a), (b) and (c) apply to the information that remains at issue. Affected party 3 submits that disclosure of this information "will be significantly detrimental to [its] business." In its representations, Affected party 3 states that it is a global medical products and services company with expertise in medical devices, pharmaceuticals and biotechnology. Affected party 3 states that its drug delivery platform admixes a range of commercially available medications for over 100 hospitals across Canada in multiple therapeutic categories,

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

including oncology. In the affidavit supporting its argument on harm, the affiant, the Director of Integrated Pharmacy solutions for Affected party 3, affirms:

> At the time of the RFP was issued, [admixing services] was not formally regulated. Accordingly [Affected party 3] developed its own quality control on a multiplicity of levels from training to toxicity levels, the latter of which is an extremely complicated process.
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> [Affected party 3's] standards are the gold standards for admixing medications. [Affected party 3's] unique and proprietary information is revealed in the Records, the disclosure of which would be significantly prejudicial to [Affected party 3's] competitive position in the market resulting in undue loss to it.
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> The information in the Records reveals [Affected party 3's] proposed pricing, rebate, discount and other value-added benefits which, in and of itself, have inherent value for [Affected party 3]. This information reveals [Affected party 3's] approach to its business relationships with hospitals and is a direct indication of its values, strengths and marketing strategies.
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> The information also discloses [Affected party 3's] operating philosophies and priorities, as well as the bargaining tools that it uses when engaging hospitals to use its services. Disclosure of this information would most certainly lead to a direct, negative impact on [Affected party 3's] ability to compete for other contracts since competitors would benefit without any effort or expense from [Affected party 3's] established business knowledge, expertise and experience to [Affected party 3's] detriment.

[44] Affected party 3 also submitted that it would be reluctant to respond to future hospital RFP's since the harm it would suffer would outweigh any benefit in engaging in the RFP process.

[45] Affected party 4 refers to its submissions made in appeal PA13-281 regarding the disclosure of its "Preparation Schedule" product information. This record is not identified as one of the responsive records in this appeal, nor is there any information at issue in the present appeal which relates to Affected party 4's product preparation schedule. Affected party 4 made submissions on the disclosure of its pricing and business information. However, based on my review, the responsive records do not contain Affected party 4's pricing information. The only information relating to Affected party 4 that is at issue are Affected party 1's summary of Affected party 4's response to the RFP including in the scoring sheets (Records 8 and 10) which I found to be commercial information. In this regard, Affected party 4 states, "We understand that the disclosing of some of the information that you list (Records #1 and 8, and possibly 2, 5, 9 and 10)

[may] give access to our pricing and business information. We do not agree to release these records."

[46] The other two affected parties whose information is included in the records at issue did not submit representations on the harm in section 17(1). The hospital also did not submit representations on the harms in section 17(1).

[47] In her representations, the appellant submits that the affected parties have failed to provide the detailed and convincing evidence to establish a reasonable expectation of harm, particularly relating to the pricing and scoring information. The appellant notes that in Order MO-2403, Adjudicator Daphne Loukidelis found that "pricing information…cannot reasonably be said to have inherent information as an information asset." As well, the appellant submits that it is up to the affected parties to decide whether to respond to future RFP's. She argues that any loss suffered by the affected party after making this decision is a result of that decision and not the disclosure of the records.

Findings

[48] In Order PO-2987, Adjudicator Loukidelis stated that the disclosure or exemption of information relating to procurement must be:

> … approached thoughtfully, with consideration of the tests developed by this office, as well as an appreciation of the commercial realities of a procurement process and the nature of the industry in which the procurement occurs (Order MO-1888). In each case, the quality and cogency of the evidence presented, including the positions taken by affected parties, the passage of time, and the nature of the records and the information at issue in them must be considered. Furthermore, the strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability (see Order MO-2496-I).

[49] Based on my review of the records and the parties representations, I find that the affected parties' representations on harm fall short of the "detailed and convincing" evidence required to support a finding that disclosure could reasonably be expected to significantly prejudice the affected parties' competitive positions or significantly interfere with contractual or other negotiations under section 17(1)(a). I further find that the harms set out in paragraphs (b) and (c) are also not established.

[50] Although the parties' representations, in particular, those submitted by Affected party 2, are lengthy and identify general concerns about the use competitors might make of their information contained in the records, I find that these parties have made

very little specific reference to the particular information at issue, particularly how its disclosure could reasonably be expected to result in the harms identified in sections 17(1)(a), (b) or (c).

[51] In its representations, Affected party 2 submits that the disclosure of the records would interfere with its competitive position as its competitors will be able to review its submission and "emulate the procedures that were effective and avoid the procedures that, arguably, contributed to the controversy". However, in Order PO-2435, Commissioner Brian Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms and found as follows:

> 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.

[52] In Order MO-2627, Senior Adjudicator Frank DeVries adopted Commissioner Beamish's findings and dismissed similar arguments, finding "that even if disclosure may provide competitors with some information which they may use in their reports in the future (of which I am not convinced), this would not, in and of itself, significantly prejudice affected party A's competitive position or result in undue loss or gain". I agree with this analysis and adopt it for the purposes of this order.

[53] Based on my review of the information at issue and Affected party 2's representations, I am not satisfied that there exists a reasonable expectation that the harms in sections 17(1)(a) and (c) would result if the information that remains at issue is disclosed. The reasons for the medication error have been publicly reported. Affected party 2 has not provided me with evidence which would establish that disclosure of the information at issue would provide further information about the under-dosing incident and that it could reasonably be expected to result in either prejudice to its competitive position or result in undue loss or gain. Accordingly, with the exception of the information identified in my discussion below, I find that most of Affected party 2's information is not exempt under section 17(1).

[54] However, based on my review of Affected party 3's representations and the records relating to it, I am satisfied that Affected party 3 has provided me with sufficiently "detailed and convincing" evidence to demonstrate a reasonable expectation that the harm in section 17(1)(a) could result from the disclosure of some of its information. Affected party 3 provided submissions regarding the reasonable possibility of all of the harms in section 17(1) resulting from the disclosure of the proposed rebates, discounts and other value-added benefits, as well as other commercial information relating to its methodology and strategies.

[55] While Affected party 2 did not provide me with detailed and convincing evidence to establish a reasonable expectation of harm in section 17(1)(a), I find that Affected party 3 has established the harm in disclosure of some of the information on Records 8 and 10 for both itself and Affected party 2. However, I also find that neither Affected party 2 or 3 established the reasonable expectation of the harm for the rest of the information that has been withheld on the pages Records 8 and 10. These pages contain information summaries of the affected parties' submissions to the RFP. The information on the scoring sheets does not, in my view, contain methodology or strategy information. Instead, I find it to be commercial information whose disclosure would not reasonably be expected to prejudice either Affected party 2 or 3's competitive position, interfere with contractual or other negotiations or result in undue loss or gain to any other person or group.

[56] Finally, only Affected party 3 has provided sufficiently persuasive evidence to establish the requisite harms respecting other information relating only to it on the scoring sheets. I find that for these pages, Affected party 2's information is dissimilar to that of Affected party 3 and therefore, the harm is not established for the exemption of its information. I have identified all of the information to be withheld on a highlighted copy of the records attached to the hospital's copy of this order.

[57] With respect to Affected party 4's information on the scoring sheets in Records 8 and 10, I find that Affected party 4 disclosed this same information to the appellant in appeal PA13-281 which I disposed of in Order PO-3479. I find that Affected party 4 has not established in this appeal that disclosure of this same information could reasonably be expected to result in any of the harms set out in section 17(1). Accordingly, I will order that this information be disclosed to the appellant.

[58] Record 12 contains Affected party 2's price reference list. As stated above, I find that this information was supplied to the hospital for the purposes of section 17(1). However, Affected party 2's representations on the harm in section 17(1) do not relate to its pricing information included in this list and instead focus on the disclosure of its processes. I am unable to find that disclosure of Affected party 2's pricing information could reasonably be expected to result in any of the harms set out in section 17(1).

[59] Record 13 is a listing of products and their various suppliers. The names of the suppliers has been withheld. One of the affected parties consented to the disclosure of its information on this listing. The other affected parties did not address the reasonable expectation of harm if their company names are disclosed on this record. Furthermore, it is not evident to me that disclosure of the affected parties' names combined with their product information could result in any of harm set out in section 17(1).

[60] Record 18 is part of Affected party 2's proposal submission that lists its products and rebate information. I found that Affected party 3 in Order PO-3479 had established the harm in the disclosure of this type of financial information and held that Affected

party 2's information should be withheld for the same reasons. Accordingly, I find that the harm for the disclosure of this information has been established, in accordance with my finding in Order PO-3479.

[61] Record 22 was withheld in full and is Affected party 2's information regarding its procedures. I find that Affected party 2 has not provided detailed and convincing evidence that disclosure of this procedure could result in any of the harms set out in section 17(1). Moreover, based on my review of this record, I am unable to discern how disclosure of this information could reasonably result in any of the harm set out in section 17(1).

[62] As I have found that some of the information in the records is exempt under section 17(1), I will now proceed to consider whether section 23 applies to it.

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption?

[63] The appellant has claimed the application of the public interest override in section 23 of the *Act*, which states:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

[64] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[65] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[16]

Compelling public interest

[66] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[17] Previous orders

[16] Order P-244
[17] Orders P-984 and PO-2607.

have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[18]

[67] A public interest does not exist where the interests being advanced are essentially private in nature.[19] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[20]

[68] Any public interest in *non*-disclosure that may exist also must be considered.[21] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[22]

[69] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[23]
- the integrity of the criminal justice system has been called into question[24]
- public safety issues relating to the operation of nuclear facilities have been raised[25]
- disclosure would shed light on the safe operation of petrochemical facilities[26] or the province's ability to prepare for a nuclear emergency[27]
- the records contain information about contributions to municipal election campaigns.[28]

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[18] Orders P-984 and PO-2556.
[19] Orders P-12, P-347 and P-1439.
[20] Order MO-1564.
[21] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[22] Orders PO-2072-F, PO-2098-R and PO-3197.
[23] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[24] Order PO-1779.
[25] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[26] Order P-1175.
[27] Order P-901.
[28] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

[70] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[29]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[30]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[31]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[32]
- the records do not respond to the applicable public interest raised by appellant. [33]

[71] The appellant submits that the events that she has reported on in March 2013 raise serious questions about where hospitals' priorities lie when it comes to making decisions about purchasing products and services. The appellant refers in her article to the opposition party health critic's skepticism with the findings of the Standing Committee on Social Policy's report on the under-doing incident.

[72] The appellant acknowledges that there have been other public inquiries into the incident, but submits that while those inquiries have shed a great deal of light on issue, they have failed to answer the question of why Affected party 1 awarded the contract to Affected party 2 instead of Affected party 3.

[73] The affected parties submit that any compelling public interest in the disclosure of the records has been satisfied by the public inquiries that have already looked into the under-dosing incident. Affected party 3 states:

> In considering whether there is a "public interest" in disclosure of the records, there must be a relationship between the Records and the *Act's* central purpose of shedding light on the operations of government. A compelling public interest has been found not to exist where, for example, another public process or forum has been established to address public interest considerations or where a significant amount of information has

[29] Orders P-123/124, P-391 and M-539.
[30] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[31] Orders M-249 and M-317.
[32] Order P-613.
[33] Orders MO-1994 and PO-2607.

> already been disclosed and is adequate to address any public interest considerations. [Affected party 3] submits that the Investigation and the Committee was a public process that has already disclosed a significant amount of information and adequately addressed public interest considerations. Moreover, the public interest in ensuring openness and accountability of the hospital for the under-dosing incidents would not be advanced by the disclosure of [Affected party 3's] confidential proprietary information in the records at issue.

[74] Affected party 2 submits that disclosure of the information at issue would shed light on its operations and not those of the government. It states:

> While the public has an interest in the provision of drugs in hospitals, it does not have an interest in the exact proprietary mechanisms by which these drugs are produced by private entities.

[75] The information that I have found exempt under section 17(1) consists of portions of Affected party 2 and 3's commercial and financial information that was provided in response to the RFP. I find that disclosure of this information would not serve the purpose of shedding light on the hospital's decision to contract with Affected party 2 over Affected party 3. The information that I have found exempt under section 17(1) relates to services being provided by Affected party 2 and 3, which do not address the public interest identified by the appellant in examining more closely the hospital's decision to contract with Affected party 2. It may be that the information which the appellant will receive as a result of this order will directly address the appellant's public interest. Accordingly, I find that section 23 does not apply to the information I have found exempt under section 17(1) as the information would not shed light on the hospital's decision.

ORDER:

1. I order the hospital to disclose the information that I have found not to be exempt under section 17(1) to the appellant by providing her with a copy of the records by **June 3, 2015** but not before **May 29, 2015**. To be clear, I have provided the hospital with a highlighted copy of the records identifying the information which should **not** be disclosed to the appellant.

2. I uphold the hospital's decision to withhold the remaining information at issue.

3. In order to verify compliance with order provision 1, I reserve the right to require the hospital to provide me with a copy of the records provided to the appellant.

Original Signed By: April 28, 2015
Stephanie Haly
Adjudicator