Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3479

Appeal PA13-281

London Health Sciences Centre

April 14, 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 relating to the procurement process. The hospital notified the organization that conducted the RFP, the successful proponent and the two unsuccessful proponents. The hospital withheld information on the basis of the mandatory third party information exemption in 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 the hospital to disclose some of the information relating to the affected parties. The adjudicator also finds that section 23 does not apply as the disclosure of the records 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 and Investigation Reports Considered: 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 London Health Services Centre (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

chemotherapy 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 has received significant media coverage.

[2] The appellant made a request to the hospital under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the competitive procurement process for pre-mixed IV solutions and contracts with suppliers of compounding ingredients, referred to above. Subsequently, the appellant received a number of records responsive to her request from another source and amended her request accordingly.

[3] The hospital split the original request into two parts. The second part of the request for contracts with suppliers of the compounding ingredients was treated as a separate request and appeal and will not be considered in this order, with the concurrence of the appellant.

[4] The request that is the subject of this order was worded as follows:

- The scores for each of the three bids 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 three bidders and the three bidders and the Hospital.

[5] After locating records responsive to the request, the hospital notified the named company and three bidders (collectively, the affected parties) pursuant to section 28 of the *Act*.

[6] Upon review of the affected parties' submissions in response to the notification, the hospital issued a decision to the appellant, granting her partial access to the responsive records. The hospital advised the appellant that portions of the records were withheld from disclosure under the mandatory exemption in section 17(1)(c) (third party information) and the discretionary exemption in section 19(a) (solicitor client privilege).

[7] After further consultation with one of the affected parties, the hospital issued a supplementary decision letter to the appellant, disclosing further information. The hospital confirmed its application of the exemptions in sections 17(1)(c) and 19(a) to the remaining severed information.

[8] The appellant appealed the hospital's decision, citing the possible application of the public interest override in section 23 of the *Act* to the information at issue.

[9] During the inquiry into this appeal, the adjudicator sought and received representations from the hospital and all four affected parties. For the purposes of this order, the four affected parties are identified as follows:

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

[10] During the inquiry, the hospital advised that it reconsidered its decision to apply the exemption in section 19 of the *Act* to some of the records. The portions of the records withheld under section 19 relate only to Affected Party 2. In its representations, Affected Party 2 does not dispute the hospital's revised decision and submits that the issue of whether section 19 applies to these records "is now moot, as the hospital has reconsidered its position on solicitor-client privilege." As the hospital no longer claims the exemption in section 19 to withhold portions of the record, I will not consider its application in this order. However, I will consider whether the mandatory exemption in section 17(1) applies to them.

[11] The adjudicator also 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.

[12] In the discussion that follows, I uphold the hospital's decision to withhold some of the information. I order the hospital to disclose some of the information relating to the affected parties. Lastly, I find that the public interest override does not apply to the information I have found exempt under section 17(1).

RECORDS:

[13] The information at issue consists of the withheld portions of various documents relating to the RFPs and bids for Central IV (Intravenous) Admixtures 2011 and WS10863 Sterile Preparation Compounding Service 2012.

[14] For the purposes of clarity, I will refer to the records by the page numbers used in the hospital's indices. Furthermore, I have included the indices of records in the appendix to this order.

[15] The appellant confirmed with our office that she does not wish to pursue access to page 69 of Index 1, and I have removed it from the scope of the appeal.

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 at issue?

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

DISCUSSION:

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

[16] 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 interest and could be injurious to the Government of Ontario's financial interests.

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

[18] 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 issue of 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:

> 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.
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> 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.
>
> 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*.

[19] 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 interest. I find

that Affected party 3 has not established that this appeal, is one of those most unusual of 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 at issue?

[20] The hospital claims that section 17(1)(c) applies to exempt the information at issue in this appeal. The affected parties submit that paragraphs (a) and (b) of the section 17 also apply to the information at issue. The relevant portions of section 17(1) state:

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

[21] 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 to third parties that could be exploited by a competitor in the marketplace.[2]

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

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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.

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

[23] Based on my review of the records, I am satisfied that the majority of the records contain commercial and financial information for the purpose of the first part of the test for exemption under section 17(1) of the *Act*. The affected parties submit that the records contain their technical and trade secret information as well. The meaning and scope of these types of information have been discussed in past orders of this office, 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 (Order PO-2010). The fact that a record might have monetary or potential monetary value does not necessarily mean that the record itself contains commercial information (P-1621).
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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 type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs (Order PO-2010).
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[3]

[3] Order PO-2010.

> *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.[4]

[24] I adopt these definitions for the purposes of this appeal.

[25] Affected Party 2 submits that the withheld information in the responsive records relates to its response to the RFP and as such is not a pre-existing body of commercial information that was publicly available elsewhere. Furthermore, Affected Party 2 states:

> The information describes, in detail, [Affected Party 2's] plans for its Sterile Compounding system (for example, disclosing the identities of [its] suppliers of drugs, drug delivery systems, proprietary labelling systems, production and QA/QC protocols, methodologies, etc.).
>
> Such information is, by definition, a "trade secret" as it is information used in [Affected Party 2's] business that is not generally known, has economic value, and is the subject of secrecy.
>
> The subject information is also "technical information" as it [is] information prepared by and for healthcare professionals describing [Affected Party 2's] techniques for implementing its system.

[26] I have reviewed the records and find that the third party information contained therein is not trade secret or technical information for the purposes of section 17(1). The affected parties refer to the processes set out in their RFP responses as technical information. I find that the information describing the third parties' processes and systems is indistinguishable from, what is in my view, commercial information about the services being offered by the affected parties to the hospital. This information does not

[4] Order PO-2010.

have the quality of belonging to an organized field of knowledge nor does it qualify as a mechanical art.

[27] Moreover, I find that Affected Party 2's submissions do not establish that its Sterile Compounding System is a trade secret for the purposes of section 17(1). It is not evident to me that the systems and processes set out in the records is not generally known or used in the affected parties' businesses and that there is economic value from this information not being known. Included in this finding is any of Affected Party 2's labelling that is in the records. It is not evident to me that Affected Party 2's labelling meets the criteria for "trade secret".

[28] Regarding the other records, I find that the information on pages 4 through 9 of the records, identified on Index# 1 as the scoring information[5], does not contain the type of information contemplated by section 17(1) of the *Act*.

[29] In Order PO-2853, Adjudicator Donald Hale considered whether RFP scoring information prepared by the OLGC represented an affected party's trade secret, commercial and financial information. Adjudicator Hale rejected that argument, finding that the scoring records before him did not contain the actual commercial or financial information that was submitted by the affected party with its proposal, but rather described the scoring process and the proposals in general.

[30] Adjudicator Hale's analysis was adopted by Adjudicator Daphne Loukidelis in Reconsideration Order PO-3062-R. In that decision, Adjudicator Loukidelis found that information relating to the scoring of the bids at issue did not contain the affected party, or any proponent's, bid information. In fact, Adjudicator Loukidelis found that the scoring records "represents the application of 'internally generated criteria' to the proponents' bid information to create a record resulting in a score for each proponent". I adopt this analysis for the purposes of this appeal.

[31] Despite Affected Party 3's submission that the scoring contains its proprietary information, I find the columns on pages 4 through 9 that identify the scores each proponent received does not contain the affected parties' actual commercial or financial information. These columns consist of numerical values only. I note that Affected Party 1 did not argue that the scoring information would disclose its technical or commercial information. This information is similar to the scoring records considered in Order PO-3062-R. Accordingly, I find the scoring columns represent Affected Party 1's application of the scoring criteria to the proponent's proposals to create a score for each of them. As a result, I find that the scoring columns in the records do not contain the type of information contemplated by section 17(1).

[5] These pages of the records are duplicated on pages 3-8 of records identified on Index #2, pages 14-19 of Index #3 and pages 1-6 of Index #4.

[32] Similarly, I find that the scoring summary on page 11 of the records does not contain the type of information contemplated by section 17(1). Instead, the information simply represents Affected Party 1's application of the scoring criteria to the proponent's proposals and the final score for each proposal. As all three parts of the test under section 17(1) must be satisfied, I conclude that the score columns on the scoring document and the score summary table on page 10 of the records in Index #1 are not exempt from disclosure under that exemption. As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that they be disclosed to the appellant.

[33] Additionally, I find that pages 10 and 11 of the records identified on Index #1, with the exception of Affected Party 2's samples of their labels, do not contain any of the types of information contemplated by section 17(1) of the *Act*. Again, Affected Party 1 did not claim that the information contained in these pages of the records was its own third party commercial information. Pages 10 and 11 of the records identified on Index #1 consist of a briefing note submitted by Affected Party 1 to the hospital with regard to the results of the RFP. The briefing note contains background information for 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.

[34] 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 pages 10 and 11 contain a general summary of the RFP process and the resulting award and future contract. As all three parts of the test under section 17(1) must be satisfied, I conclude that pages 10 and 11 of the records identified on Index #1 are not exempt from disclosure under that exemption, with the exception of the label information on the bottom of page 10. I find that Affected Party 2's label information is commercial information for the purposes of section 17(1) and I will consider whether this information was supplied in confidence below. As no other exemptions have been claimed for this information and no mandatory exemptions apply to the information they contain, I will order that it be disclosed to the appellant.

[35] However, I find that the remaining information at issue consists of the winning response to an RFP and summaries of the proposed services to be provided by all bidders for the provision of pre-mixed IV solutions and compounding ingredients. I find that the information qualifies as commercial information because it includes and relates to some of the elements of proposed commercial services arrangements between the hospital and the affected parties.

[36] I am also satisfied that some of the information at issue contains financial information, specifically pages 2-3 of the records identified in Index #1 and pages 7-8 of the records identified in Index #3 . These pages contain information describing the proposed fees for the products to be supplied by Affected Party 2 and Affected Party 3.

Therefore, I find that these pages contain financial information for the purposes of part 1 of section 17(1).

[37] I will now consider whether this commercial or financial information was "supplied in confidence" to the hospital under part 2 of the test.

Part 2: supplied in confidence

[38] In order to satisfy part 2 of the test under section 17(1), the hospital and affected parties must provide evidence to satisfy me that the affected parties "supplied" the information to the hospital in confidence, either implicitly or explicitly.

[39] 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.[6]

[40] 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.[7]

[41] 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]

[42] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and

[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[9]

[43] The hospital submits that the IPC has previously found that the 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 information that is "supplied" for the purposes of section 17.

[44] In the case of this RFP, the hospital states that Affected Party 1 is a group purchasing organization that manages procurement processes on behalf of its members, which includes the hospital. The hospital states that the records were provided to Affected Party 1 by the other three affected parties in response to the RFP.

[45] The hospital and four affected parties all emphasize that the records were submitted to Affected Party 1, acting on behalf of the hospital, in explicit confidence. The hospital and four affected parties state that Affected Party 1's procurement process outlined confidentiality and indicate that it is "normal commercial practice to treat competitive proposals as proprietary and confidential". Additionally, Affected Party 2 notes that all of the information contained in its response to the RFP was explicitly supplied in confidence. Affected Party 2 submits that "this is clear on the face of the documents themselves" as every page is stamped with the word "confidential".

[46] In her representations, the appellant concedes that Affected Party 3 and Affected Party 4 (the two unsuccessful proponents) supplied their information to the hospital with a reasonable expectation of confidentiality as understood by the *Act*. However, the appellant submits that Affected Party 2, the successful bidder, did not. The appellant notes that a number of the IPC's orders have found 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 section 17(1). In addition, the appellant submits that Affected Party 1 did not supply any of its information at issue to the hospital "because effectively, [Affected Party 1] is [the hospital]: it is owned by its member hospitals and the RFP was evaluated by pharmacy committee representatives from member hospitals".

[47] The hospital and Affected Party 1 both object to the appellant's characterization of their relationship. Both the hospital and Affected Party 1 state that Affected Party 1 is a separate, legally registered corporation and not owned by the hospital, legally or otherwise. The hospital states that its responsibilities under Ontario's *Broad Public Sector Accountability Act* require it to search out the best possible price for goods. As such, its "participation in a group purchasing organization such as [Affected Party 1] fulfills this requirement and directly ensures a greater portion of public money can be spent on directly meeting health care needs, as opposed to diverting these funds needlessly to operational expenses such as medical supplies."

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[9] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. John Do*, [2008] O.J. No. 3475 (Div. Ct.).

[48] As well, Affected Party 2 objects to the appellant's submission that its information that is contained in the record was not supplied. Affected Party 2 submits that the information contained in the bid was not incorporated into the eventual contract.

[49] Past orders of this office have established that RFP proposals provided to an institution as part of a competitive selection process seeking a supplier of goods or services are "supplied" for the purposes of part 2 of the test under section 17(1). In particular, information contained in proposal documents that remains in the form originally provided by a proponent is not necessarily viewed as the product of negotiation between the institution and that party.[10] I agree with this reasoning and I will apply it in my analysis in this appeal.

[50] With regard to the information that remains at issue relating to Affected Parties 3 and 4, I am satisfied that this information was "supplied" to the hospital for the purposes of part 2 of the test under section 17(1).

[51] In addition, I am satisfied that the proposal submitted by Affected Party 2 was "supplied" to the hospital. In Order PO-2755, Adjudicator Diane Smith dealt with the issue of whether a proposal submitted in response to a call for tenders is considered to have been supplied for the purposes of section 17(1). She found that a proposal containing only the contractual terms proposed by a bidder, and not the subject of negotiation, could not be characterized as having mutually generated terms. She found, therefore, that the proposal was "supplied" by the affected party to the institution for the purpose of the third party information exemption.

[52] Recently, in Order MO-3058-F, Senior Adjudicator Sherry Liang considered whether a proposal was considered to be supplied. In making her finding, she undertook a thorough examination of this office's historical approach on this issue. She stated:

> 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:
>
> > …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.

[10] See, for example, Orders MO-1368, MO-1504, PO-2637 and PO-2987.
[11] See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.

> 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.

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

[53] I adopt Senior Adjudicator Liang's and Adjudicator Smith's approaches for the purpose of this appeal.

[54] In this case, the proposal is not a final agreement between Affected Party 2 and the hospital; rather, it is the proposal containing the contractual terms proposed solely by Affected Party 2. Applying Adjudicator Smith's approach, the proposal was not the product of negotiation and, consequently, was not mutually generated by the hospital and the affected party.

[55] Therefore, I am satisfied that Affected Party 2 supplied the information at issue that relates to it to the hospital, for the purpose of section 17(1) of the *Act*.

[56] Based on my review of the representations, I find that Affected Party 1 was not, "effectively", the hospital during the RFP process. Affected Party 1 and the hospital's representations have clearly demonstrated that the two parties are separate and distinct entities. In addition, I find that there is no evidence before me demonstrating

that the information contained in Affected Party 2's proposal was not supplied to the hospital and, instead, forms part of the eventual contract. Upon review of the records and Affected Party 2's reply submission that the information contained in its bid was not incorporated into the eventual contract, I find that its information was supplied to the hospital.

[57] 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.

[58] Therefore, I find that the portions of the records that remain at issue were supplied in confidence for the purpose of part 2 of the test for exemption under section 17(1). I now turn to part 3 of the test.

Part 3: Harms

[59] To meet this part of the test, the hospital and affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[12]

[60] 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.[13]

[61] 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).[14]

[62] In its representations, Affected Party 1 submits that the disclosure of the information that remains at issue would result in undue loss to the proponents. Affected Party 1 submits that these parties provided confidential commercial and trade secret information regarding their businesses and "would be disadvantaged in the market place relative to their competitive position as competitors in the market became aware of pricing and commercial strategies." Affected Party 1 submits that "should respondents be concerned that confidential information would become public, they would not be in a position to respond to group purchasing RFPs" and hospitals would lose the savings which otherwise may result. Finally, Affected Party 1 submits that the disclosure would reasonably result in serious harm to its group procurement activities.

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[12] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[13] Order PO-2020.
[14] Order PO-2435.

[63] Affected Party 2 (the winning proponent) 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 that remains at issue. With regard to section 17(1)(a), Affected Party 2 submits as follows:

> Such 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 [its] competitive position.

[64] 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."

[65] 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, including oncology. Affected Party 3 submits that "intravenous admixing is a critical service that is essential to hospital practice and patient care". Affected Party 3 submits that it "offers an outsourcing service that relieves pressure on hospital pharmacy operations… while maintaining, safety, quality and supply a priority." As part of its commitment to ensure safety and quality, Affected Party 3 submits that its service platform "relies on stringent internal corporate protocols, voluntary standards and best practices [it] has derived globally".

[66] Affected Party 3 submits that, at the time the RFP was issued, admixing services were not formally regulated. Accordingly, Affected Party 3 submits that it developed its own quality control on a multiplicity of levels from training to toxicity levels, the latter of which is an extremely complicated process. Affected Party 3 submits that its standards

are the "gold standards for admixing medications" and its unique and proprietary information is revealed in the records. In addition, Affected Party 3 submits that the information in the records reveals its proposed pricing, rebate, discount and other value-added benefits which, in and of itself, have inherent value for it. Affected Party 3 also submits that the information at issue discloses its operating philosophies and priorities, as well as bargaining tools it uses when engaging hospitals to use its services. Affected Party 3 submits that the disclosure of this information "would most certainly lead to a direct, negative impact on [its] ability to compete for other contracts since competitors would benefit without any effort or expense from [its] established business knowledge, expertise and experience to [Affected Party 3's] detriment."

[67] In addition, Affected Party 3 submits that disclosure of the records "would also lead to a direct, negative impact on [its] ability to negotiate with other customers, such as other hospitals, since the customers would have an insight into [its] strategy and would have an unfair advantage in seeking price concessions and similar value-added benefits." Affected Party 3 also submits that it would be reluctant to respond to other RFPs issued by hospitals, or their agents, "since the harm that it will suffer as a result of disclosure would outweigh any benefit to [it] engaging in the request for proposal process". Finally, Affected Party 3 submits that "the significant prejudice and undue loss that [it] will suffer as a result of its information in the records being disclosed will result in [it] no longer being in a position to provide price concessions, rebates and other value-added benefits to hospitals in the future."

[68] Affected Party 4 submits that the records contain highly sensitive information relating to its internal preparation processes and strategic information. It submits that the disclosure of these records would allow its competitors to access this information and would "immediately harm [its] actual and future business." Affected Party 4 also submits that the disclosure of this information would result in the harm identified in section 17(1)(c) because "much of the information has been developed following significant investment in scientific studies which are only protected under confidential know-how and trade secrets and not patents."

[69] The hospital advises that it "accepts the representations" from the affected parties with regard to the harms.

[70] In her representations, the appellant submits that the affected parties have failed to provide detailed and convincing evidence to establish a reasonable expectation of harm, particularly in relation 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 informational asset." As well, the appellant submits that it is up to the affected party to decide whether to respond to RFPs or not. The appellant submits that any loss of business the affected parties suffer by not participating in RFP processes is a result of their decision, not the disclosure of records.

[71] In response to the appellant's representations, the affected parties maintain that the information at issue is exempt under section 17(1) of the *Act*. Affected Party 4 submits that, contrary to the appellant's submission, pricing information is "very sensitive" and may reveal the cost structure of its business.

[72] 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).

Findings

[73] Based on my review of the records and the parties representations, I agree with the appellant's submission 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).

[74] I am also not satisfied by the representations submitted by Affected Parties 1, 2 and 4 that disclosure of the information at issue that relates to them could reasonably be expected to 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 under section 17(1)(b). Further, I am not satisfied by the affected parties' representations that disclosure of the information relating to them that remains at issue could reasonably be expected to result in undue loss to them or undue gain to others under section 17(1)(c).

[75] 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, the disclosure of which would result in the harms identified in sections 17(1)(a), (b) or (c).

[76] 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, Assistant 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.

[77] In Order MO-2627, Senior Adjudicator Frank DeVries adopted Assistant 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.

[78] 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 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 established that disclosure of the information at issue would provide further information about the under-dosing incident and 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 in my discussion below, I find most of Affected Party 2's information to not be exempt under section 17(1).

[79] I note that page 54 of the records relates primarily to Affected Party 1 and constitutes its commercial information, as it is a list of the participating health care providers that are Affected Party 1's members. Affected Party 1 identifies its members on its website and the members' contact information is also easily accessible online. With regard to the other information that is contained on page 54, I am not satisfied that Affected Party 1 provided me with sufficiently "detailed or convincing" submissions on whether the information that remains at issue could reasonably be expected to cause the harm identified in section 17(1)(c) if it should be disclosed.

[80] Page 10 of the records contains Affected Party 2 labels which the hospital originally withheld under section 19. The hospital has since reconsidered its decision to withhold this information under section 19, however, Affected Party 2 still claimed the label information should be withheld under section 17(1). I find that Affected Party 2 did not specifically address the possible harms with respect to the disclosure of its labels. Moreover, its representations are not sufficiently "detailed or convincing" to

establish that disclosure of the labels could reasonably result in any of the harms in section 17(1).

[81] The only information relating to Affected Party 4 that is still at issue are the records titled "Addendum" and "Preparation Schedule". There is also a "Certificate" which relates to Affected Party 4 that is not addressed in any of the parties' representations[15]. The affected party only submitted representations on the "Preparation Schedule". This record consists of a list of dates for a particular product. I find that Affected Party 4 has not provided "detailed and convincing" evidence to establish that the disclosure of the dates for order and delivery of a specific product would result in the harm set out in section 17(1). The dates listed on the preparation schedule are from four years ago and it is not evident to me that this information would result in any prejudice to the affected party. The "Addendum" consists of information about pharmacist training. I find this information has already been disclosed to the appellant in the scoring information sheets and, as such, I find disclosure of this information could not reasonably be expected to result in the harms set out in section 17(1). Lastly, I find that disclosure of the "Certificate" information relating to Affected Party 4 could not reasonably result in any of the harms set out in section 17(1). Accordingly, as I have found that Affected Party 4 has not established the harm in section 17(1), these three records are not exempt under that exemption.

[82] 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) upon disclosure of its proposed rebates, discounts and other value-added benefits as well as other commercial information relating to its methodology and strategies.

[83] 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 of disclosure of the information on pages 2, 3, 7, 8, 97 and 124 referenced on Index 1 of the records for both itself and Affected Party 2.

[84] However, I find that with respect to the scoring sheets found at pages 4, 5, 6 (in part), 9 (in part) both Affected Party 2 and 3 have not established that disclosure of this information could reasonably be expected to result in the harm in section 17(1). The information on pages 4 and 5 of the scoring sheets does not, in my view, contain methodology or strategy information. Instead, I find it to be commercial information whose disclosure, I find, would not reasonably prejudice either Affected Party 2 or 3's competitive position, interfere with contractual or other negotiations or result in undue

[15] The "Certificate" is listed as an embedded document in the hospital's index. There is no exemption listed for it.

loss or gain to any other person or group. With respect to pages 6 and 9 of the records, I find that Affected Party 3's representations on the reasonable expectation of harm that would result from disclosure only relate to its information on the scoring sheets. I find that the Affected Party 2's information on the scoring sheet does not contain similar information relating to its methodology or strategy and as such the harm in its disclosure is not established.

[85] 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 this information.

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

[86] 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.

[87] 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.

[88] 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

[89] 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 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

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

the information the public has to make effective use of the means of expressing public opinion or to make political choices.[18]

[90] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[19]

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

- the records relate to the economic impact of Quebec separation[20]
- the integrity of the criminal justice system has been called into question[21]
- public safety issues relating to the operation of nuclear facilities have been raised[22]
- disclosure would shed light on the safe operation of petrochemical facilities[23] or the province's ability to prepare for a nuclear emergency[24]
- the records contain information about contributions to municipal election campaigns.[25]

[92] 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[26]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[27]

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[18] Orders P-984 and PO-2556.
[19] Order P-984.
[20] 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.).
[21] Order PO-1779.
[22] 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.) and Order PO-1805.
[23] Order P-1175.
[24] Order P-901.
[25] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[26] Orders P-123/124, P-391 and M-539.
[27] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[28]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[29]

- the records do not respond to the applicable public interest raised by appellant.[30]

[93] The appellant submits that events that she reported on in the paper 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 skepticism of the opposition party's health critic with the findings of the Standing Committee on Social Policy's report on the under-dosing incident.

[94] 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 the 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.

[95] The hospital and all of the affected parties submitted representations on the application of section 23; however, since I am only considering the application of section 23 with respect to Affected Party 2 and 3's information, I will only be referring to their arguments on this issue. Affected Party 3 submits that after the hospital made its decision with respect to disclosure, it approached the hospital to advise that it consented to further information being disclosed. Affected Party 3 states:

> [Affected Party 3] wished to disclose as much of the information as possible that was not exempt under the third-party information exemption under the *Act* and also consented to the disclosure of information that it believed was exempt under the *Act*. This decision was based on considerations of the public interest in disclosure in light of the recent Under-dosing Incidents.

[96] In its representations, Affected Party 3 referred to the other public inquiries that have been conducted into the Under-dosing incident including the investigation and report issued by Dr. Thiessen and the investigation of the Standing Committee on Social Policy. Finally, Affected Party 3 submits that in considering whether there is a public interest in disclosure of the records, I must consider the relationship between the

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[28] Orders M-249 and M-317.
[29] Order P-613.
[30] Orders MO-1994 and PO-2607.

records and the *Act's* central purpose of shedding light on the operations of government. To this end, Affected Party 3 states:

> [Affected Party 3] submits that the Investigation and the Committee was a public process that 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.

[97] Affected party 2 submits that the information that is exempt under section 17(1) is its third party proprietary information relating to its operations. It submits that disclosure of this information would not shed light on the government's activities and 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.

[98] Affected party 2 also submits the similar argument to Affected Party 3 that there have been other public processes and forums that have addressed the public concerns about the incident.

[99] The information that I have found exempt under section 17(1) is Affected Parties 2 and 3's commercial and financial information 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 the services being provided by Affected Party 2 and 3, which do not address the public interest identified by the appellant of the hospital's decision to contract with Affected Party 2. I especially find this in light of the information on pages 10 and 11 of Index 1, which I have found not exempt under section 17(1) that directly relates to the appellant's public interest. Accordingly, I find that there is not a compelling public interest as the records that I have found exempt under section 17(1) do not address the public interest raised by the appellant.

ORDER:

1. I order the hospital to disclose the information to the appellant by providing her with a copy of the records by **May 20, 2015** but not before **May 15, 2015**. To be clear, I have identified in the index of records in the appendix to this order, the information to be disclosed.

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

3. I reserve the right to require the hospital to provide me with a copy of the information provide to the requester in accordance with order provision 1.

Original Signed By: April 14, 2015
Stephanie Haly
Adjudicator

Appendix

INDEX OF RECORDS

Index 1 - WS 10863 Sterile Preparation Compounding Service 2012

Page Number	Description	Disclosure	Finding
2 – 3	Schedule "G" -	Partial disclosure	Withhold, in part
4	Scoring information	Partial disclosure	Disclose
5	Scoring information	Partial disclosure	Disclose
	Certificate[31]	Withheld in full	Disclose
6	Scoring information	Partial disclosure	Disclose, in part[32]
7	Scoring information	Partial disclosure	Withhold
	Question response[33]		Withhold
	Question response[34]	Withheld in full	Withhold
8	Scoring information	Partial disclosure	Withhold
9	Scoring information	Partial disclosure	Disclose, in part[35]
10 - 11	Briefing note	Partial disclosure	Disclose
54	Sterile Preparations Compounding service	Withheld in full	Disclose
94 – 96	Affected party 2 response to RFP	Partial disclosure	Disclose
97 – 99	Affected party 2 response to RFP	Withheld in full	Disclose, in part
100	Affected party 2 response to RFP	Partial disclosure	Disclose
102 – 103	Affected party 2 response to RFP	Partial disclosure	Disclose
107	Affected party 2 response to RFP	Withheld in full	Disclose
112 – 114	Affected party 2 response to RFP	Withheld in full	Disclose
121	Affected party 2 response to RFP	Partial disclosure	Disclose

[31] Affected party 4.
[32] Disclose information relating to Affected Party 2 only.
[33] Affected party 3.
[34] Affected party 2.
[35] Disclose information relating to Affected Party 2 only.

124	Affected party 2 response to RFP – Schedule L	Withheld in full	Withhold

Index 2 – 10863 Sterile Preparation Compounding Service 2012

Page Number	Description	Disclosure	Finding
9 - 20	Affected party 2 – support documentation	Withheld in full	Disclose
28 – 29	Affected party 2 and 3 – Specification form	Partial disclosure	Disclose

Index 3 – WS 10863 Sterile Preparation Compounding Service 2012

Page Number	Description	Disclosure	Finding
2 – 3	Schedule B	Partial Disclosure	Withhold
7 – 8	Schedule G	Partial Disclosure	Withhold
20 - 25	Scoring Master Report	Partial Disclosure	Disclose in part (pages 21 and 22)

Index 4 – 10863 Sterile Preparation Compounding Service 2012

Page Number	Description	Disclosure	Finding
8	Scoring embedded document – Addendum	Withheld in full	Disclose
9	Scoring embedded document – preparation schedule	Withheld in full	Disclose