

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3468

Appeal PA13-378

London Health Sciences Centre

February 27, 2015

Summary: A requester sought information related to the procurement process for hospital housekeeping services. The hospital denied access in part, relying on the mandatory exemption for third party information in section 17(1)(a) and (c) of the *Act*. Neither the hospital nor the third party made submissions in the appeal. In this order, the adjudicator finds that there is insufficient evidence to conclude that the harms described in the *Act* could reasonably be expected to result from disclosure of the information at issue. Accordingly, the information is not exempt from disclosure.

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

Orders and Investigation Reports Considered: Order PO-1791.

OVERVIEW:

[1] A requester made a request to the London Health Sciences Centre (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the procurement process for hospital housekeeping services. In particular, the requester sought access to:

... all information from the successful proposal for the awarded contract for [a specified Request for Proposal (RFP)] including pricing and all rated schedules and submissions used in decision making.

[2] The hospital contacted the requester upon receipt of his request, and through their discussion the request was clarified to include the proposal submitted by the successful contractor, including its answers to questions submitted in all the schedule forms that were evaluated by the evaluation committee, as well as the final pricing agreement between the successful contractor and the hospital.

[3] The hospital identified the successful contractor as a party whose interests may be affected by disclosure of the requested information (the affected party), and gave its notice of the request pursuant to section 28 of the *Act*.

[4] After receiving the contractor's representations on disclosure, the hospital issued a decision to grant partial access to the requested information. In its decision, the hospital disclosed 158 pages in full, and withheld 156 pages in full or in part on the basis of the mandatory exemptions at sections 17(1)(a) and (c) (third party information) of the *Act*. In addition, the hospital identified two pages as being non-responsive to the request.

[5] The requester appealed the hospital's decision to this office, becoming the appellant in this appeal.

[6] As a result of discussions that took place during the mediation stage of the appeal process, the hospital issued a revised decision granting full access to previously withheld scorecard summary records for the contractor (the affected party). Also during mediation, the appellant narrowed the request to include only the pricing information contained on four pages of the affected party's proposal.

[7] The affected party did not consent to disclosure of the four pages at issue in this appeal, and the hospital continued to rely on the third party exemption in section 17(1) to withhold access to this information. In addition, at mediation, the appellant raised the possibility of a public interest in disclosure of the requested information; as a result, section 23 of the *Act* was added as an issue in this appeal.

[8] As mediation did not resolve the issues, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry under the *Act*.

[9] I issued a Notice of Inquiry to the hospital and the affected party, initially, inviting them to provide written representations on the application of sections 17(1) and 23. Neither the hospital nor the affected party submitted representations in response to

the Notice. In the circumstances, I found it unnecessary to seek representations from the appellant.

[10] In this appeal, I find that the three-part test for the application of section 17(1) is not satisfied. As the information is not exempt from disclosure under section 17(1), there is no need to consider the application of the public interest override in section 23 of the *Act*. Therefore, for the reasons discussed below, I conclude that the information at issue ought to be released in its entirety to the appellant.

INFORMATION AT ISSUE:

[11] The information at issue in this appeal is the pricing information contained on pages 188, 189, 190 and 191 of the affected party's proposal.

DISCUSSION:

Does the mandatory exemption at section 17 apply to the information?

[12] The hospital relied on sections 17(1)(a) and/or 17(1)(c) to withhold the requested information. These sections read:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[13] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

² Orders PO-1805, PO-2018, PO-2184, MO-1706.

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

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

[15] In this case, the hospital and the affected party declined to submit representations on the application of section 17(1).

[16] Assuming, without deciding, that the first two parts of the test have been established, I will address part three of the three-part test.

[17] To meet the third part of the test, the hospital and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.³ The failure of a parties resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.⁴

[18] In Order PO-1791, this office discussed the impact on an appeal of this nature, of the failure by a third party to submit representations:

As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in

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

⁴ Order PO-2020.

other cases, do not offer any evidence applying these general principles to the circumstances of this affected party. In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

[19] These comments have even more force in this appeal, where neither the affected party nor the hospital provided representations. In the absence of any representations, I am similarly left without any evidence on the issue of reasonable expectation of harm from disclosure with respect to the pricing information. I have also reviewed the record and find nothing in it that would allow me to infer harm from disclosure. As a result, I am unable to conclude that the harms described in section 17(1)(a) or (c) could reasonably be expected to result from disclosure of the information at issue. As all parts of the three-part test for exemption under section 17(1) must be satisfied, I find that this exemption does not apply.

[20] Given my conclusion that the information is not exempt, there is no need to consider the possibility of a public interest in disclosure of the requested information overriding this exemption, pursuant to section 23 of the *Act*. Accordingly, I find that the pricing information contained on pages 188, 189, 190 and 191 of the affected party's proposal must be disclosed to the appellant.

ORDER:

1. I order the hospital to disclose the information at issue to the appellant no later than **April 8, 2015** but no earlier than **April 1, 2015**.
2. In order to verify compliance with provision 1, I reserve the right to require the hospital to provide me with a copy of the material disclosed to the appellant.

Original Signed by: _____
Sherry Liang
Assistant Commissioner

February 27, 2015 _____