

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3523

Appeals PA13-488 and PA13-489

Ministry of Health and Long-Term Care

August 17, 2015

Summary: The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records regarding a particular Request for Tender (RFT) issued by the Ministry of Health and Long-Term Care. The records include a third party's submission in response to the RFT and related evaluation documents. The ministry granted access to some records, but denied access to others, claiming the application of the mandatory exemption in section 17(1) (third party information). In this order, the adjudicator upholds the ministry's decision, in part. The ministry is ordered to disclose some of the records to the appellant.

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

OVERVIEW:

[1] This order disposes of the remaining issue raised as a result of two appeals of a decision of the Ministry of Health and Long-Term Care (the ministry or the Ministry of Health) in response to a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a particular Request for Tender (RFT). Specifically, the requester sought access to the following information:

1. All proposals received in response to specified Request for Tender;

2. All records generated or received by the ministry as part of the proposal evaluation process in the RFT, including any reference forms and any accompanying materials submitted by the bidders;
3. The contract entered into with the successful bidder as a result of the RFT (the "contract"), along with any amendments and any records related to the contract;
4. Copies of all purchase orders issued under the contract;
5. Confirmation as to the number of units delivered pursuant to the contract as of the date of the request;
6. Confirmation as to the total amounts paid to date to the successful bidder pursuant to the contract; and
7. Any correspondence and related material between the ministry and the successful bidder in relation to the supply of tourniquets, either before or after the date of the RFT.

[2] Upon receipt of the request, the ministry advised the requester that the Ministry of Government Services (MGS) may also have responsive records in its custody or control. As a result, the requester submitted an identical request to MGS, which transferred the request back to the ministry.

[3] The ministry then issued two decisions in response to the two requests. In response to the first request, it located one responsive record and issued a decision to the requester granting him full access. In response to the second request, the ministry located additional responsive records and issued a decision letter to the requester granting partial access to one record, but denying access to others. The ministry claimed the discretionary exemption in section 19 (solicitor-client privilege) to withhold portions of one record, and the mandatory exemption in section 17(1) (third party commercial information) to withhold the remaining records, in full.

[4] The requester, now the appellant, appealed the ministry's two decisions to this office. In response, this office opened appeal files PA13-488 and PA13-489, respectively. In addition to appealing the exemptions claimed by the ministry, the appellant indicated that he believes that additional responsive records should exist; specifically records relating to the scoring of the RFT submissions and correspondence to the successful bidder.

[5] During the mediation of the appeals, the mediator joined the two appeals as they relate to two identical requests and a single institution. In response to the appellant's claim that additional responsive records ought to exist, the ministry conducted a second

search for responsive records. The ministry then issued a supplementary decision to the appellant, advising that it located three additional responsive records relating to scoring and evaluations, but that it denied access to them in their entirety, claiming the mandatory exemption in section 17(1) of the *Act*. The ministry also provided additional information regarding the RFT process and its search for records responsive to the appellant's request. Finally, the ministry advised the appellant that MGS confirmed that it did not have any additional records regarding the request and that the ministry had custody or control of all records pertaining to this RFT.

[6] The appellant advised the mediator that he was satisfied with the searches conducted. As a result, the reasonableness of the ministry's search is no longer at issue in these appeals. The appellant also confirmed that he was no longer pursuing access to the information withheld under section 19 of the *Act*. Accordingly, this exemption and the portions of the record withheld under it are no longer at issue in these appeals. In addition, the appellant advised the mediator that he did not take issue with the transfer of his request from MGS to the ministry.

[7] The appellant further confirmed to the mediator that he seeks access to only the RFT and evaluation records relating to the successful bidder (the affected party) that were denied under section 17(1) of the *Act*. As a result, the mediator notified the affected party of the appellant's request. The affected party did not provide its consent to disclose the records to the appellant.

[8] The files were then moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeals sought representations from the parties. The ministry and the affected party provided representations, but the appellant did not. The appeals were then transferred to me for final disposition. I note that portions of the evaluation records relate to third parties other than the affected party. Given that the appellant narrowed the scope of the request to only the RFT and evaluation records relating to the affected party, I find that any information in the records relating to other third parties is not responsive to the request and will not be disclosed to the appellant.

[9] With respect to the information in the records relating to the affected party, for the reasons that follow, I uphold the ministry's decision, in part. I find that some of the records are not exempt under section 17(1) of the *Act* and I order the ministry to disclose them to the appellant.

RECORDS:

[10] The records at issue consist of:

- the affected party's RFT submission;
- the RFT evaluation summary as it relates to the affected party;

- the confidentiality agreements of the evaluation team members;
- the technical requirement forms as they relate to the affected party;
- two copies of addendum number 3 to the RFT;
- an email summary of the RFT bids received by MGS; and
- the mandatory requirements stage 1 evaluation form as it relates to the affected party.

DISCUSSION:

[11] The remaining issue in this appeal is whether the mandatory exemption in section 17(1) applies to the records. The ministry is claiming the application of sections 17(1)(a) and (c). The ministry submits that the records consist of the affected party's tender package, which is the foundation record that gives rise to the other records, the evaluation documents and related correspondence. The ministry submits that section 17(1) applies to all of the records given that the correspondence regarding the tender is based upon it and contains much of the same information.

[12] 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,

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

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

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

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

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

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

Part 1: type of information

[15] The types of information listed in section 17(1) have been discussed in prior orders:

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

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

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.⁶

³ Order PO-2010.

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

[16] The ministry submits that the affected party's response to the request for tender is, in and of itself, commercial information.⁷ The ministry goes on to argue that the affected party's tender also contains further commercial information, including:

- information about the historical and current contracts the affected party has with other third parties;
- licences and insurance coverage;
- the affected party's presentation strategy in the composition and organization of the tender;
- the inclusion of a particular study in the tender; and
- the affected party's marketing strategy.

[17] The ministry also submits that the tender contains: financial information consisting of the affected party's pricing per unit and the aggregate cost of its product to the ministry; and technical information consisting of details of the construction, operation and efficacy of the affected party's product. Lastly, the ministry argues that the evaluation records and related correspondence contain commercial, financial and technical information as the information therein was derived from or in response to the affected party's response to the request for tender.

[18] The affected party states that it concurs with the ministry's decision to deny access to the records, and that the records contain proprietary scientific, technical and financial information.

[19] I am satisfied that most of the information contained in the records constitutes "commercial information" for the purposes of section 17(1) of the *Act*. I make this finding because both the affected party's proposal to provide a product to the ministry and the resulting evaluation documents relate solely to the buying, selling or exchange of merchandise. I also find that portions of the records contain "financial information" for the purposes of section 17(1) because they contain the affected party's pricing practices with respect to this proposal. Lastly, I find that portions of the records contain "technical information" for the purposes of section 17(1) as they describe the construction, operation and maintenance of the affected party's product.

[20] Therefore, the first part of the three-part test in section 17(1) has been met with respect to the records at issue.

Part 2: supplied in confidence

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

⁷ See Orders PO-1957, PO-1818, PO-1753 and MO-1462.

⁸ Order MO-1706.

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

[22] 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.¹⁰

[23] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹¹ The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.¹²

[24] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹³

[25] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; or

⁹ Orders PO-2020 and PO-2043.

¹⁰ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

¹¹ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹² *Miller Transit*, above at para. 34.

¹³ Order PO-2020.

- prepared for a purpose that would not entail disclosure.¹⁴

[26] The ministry submits that the affected party prepared and supplied the response to the request for tender with a reasonable expectation of confidentiality. The response was treated as confidential by all parties and was not disclosed outside of the evaluation process or made accessible to the public. With respect to the evaluation records and related correspondence, the ministry submits that these records contain information that was originally contained in the affected party's proposal, thus revealing or permitting the drawing of accurate inferences about the information actually supplied by the affected party. This information, the ministry goes on to argue, was therefore supplied to the ministry by a third party. In addition, the ministry submits that insofar as these evaluation records contain information that was supplied in confidence to the ministry by the affected party, they must also be considered as supplied in confidence for the purposes of section 17(1).

The response to the RFT

[27] With respect to the affected party's response to the RFT, I am satisfied that most of it was "supplied" to the ministry by the affected party. The affected party's response was compiled by it and provided to the ministry in response to the ministry's RFT. With respect to whether the affected party's response to the RFT was supplied "in confidence" for the purpose of section 17(1), I am satisfied that it was. I accept the position taken by the ministry that at all times it both maintained the confidentiality of the information, and conveyed to the affected party an expectation of confidentiality through its RFT process. Consequently, this record has met the second part of the two-part test in section 17(1), with some exceptions.

[28] Portions of the affected party's response to the RFT wholly re-produce portions of the RFT that was created and issued by the ministry. I find that these portions of the affected party's response to the RFT were not "supplied" to the ministry by it for the purposes of section 17(1). This information was, in fact, supplied to the affected party by the ministry. These portions include:

- the ministry's RFT Cover page;
- the ministry's RFT Table of contents;
- Part 1 of the RFT;
- portions of Part 2 of the RFT;
- Part 3 of the RFT;
- Part 4 of the RFT;
- Addendum no. 2 to the RFT;

¹⁴ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

- Addendum no. 3 to the RFT;
- Appendix A of the RFT; and
- portions of the Technical Requirements Form.

[29] Having found that the information detailed above was not “supplied” by the affected party to the ministry, part two of the two-part test in section 17(1) had not been met, and I find that these portions of the response to the RFT are not exempt under section 17(1). As no other exemptions have been claimed with respect to these portions of the records, I order the ministry to disclose it to the appellant.

The evaluation documents

[30] The evaluation documents are internal records created by the OPP, the ministry and MGS. I am satisfied that some of the information contained in these records was originally “supplied” by the affected party to the ministry as part of its response to the RFT. As previously stated, 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.¹⁵ In this case, I am satisfied that disclosure of the pricing information of the affected party’s product that is contained in an email from MGS to the ministry and details about the occlusion rate of its product would reveal information that was supplied by the affected party to the ministry. With respect to whether the pricing and occlusion rate information I have found to be supplied was done so “in confidence” for the purpose of section 17(1), I am satisfied that it was. I accept the position taken by the ministry that at all times it both maintained the confidentiality of this information, and conveyed to the affected party an expectation of confidentiality through its RFT process. Consequently, I find that the pricing and occlusion information has met part two of the two-part test in section 17(1).

[31] Conversely, I find that the remaining evaluation documents were neither supplied to the ministry by the affected party, nor do they reveal or permit the drawing of accurate inferences with respect to information supplied by a third party to the ministry. Instead, I find that these records, which were created by the ministry, or on behalf of it, relate to the evaluation of the affected party’s response to the RFT, but do not actually reveal information that was supplied by the affected party to the ministry in that response.

[32] In particular, I find that the following information either originated from the ministry itself and was, therefore, not “supplied” to it by the affected party; or does not reveal information that was supplied by the affected party to the ministry:

¹⁵ Orders PO-2020 and PO-2043.

- the OPP RFT Evaluation Summary – this record contains the names and signatures of the evaluation committee members, as well as whether the affected party passed or failed the Stage 1 Mandatory Criteria;
- the confidentiality and conflict of interest agreements entered into between the ministry and the members of the evaluation committee;
- two copies of Addendum 3 to the RFT – this record contains a revision to the ministry’s RFT;
- two Technical Requirements Forms – these records were completed by the evaluation committee members and set out the ministry’s technical requirements that were contained in its RFT, and whether the affected party was compliant with those requirements or not; and
- the Stage 1 Evaluation of Mandatory Requirements – this record sets out only the general headings of the RFT and whether the affected party met those requirements.

[33] Having found that the information detailed above was not “supplied” by the affected party to the ministry, part two of the two-part test in section 17(1) had not been met, and I find that it is not exempt under section 17(1). As no other exemptions have been claimed with respect to this information, I order the ministry to disclose these records to the appellant.

Part 3: harms

[34] The remaining information at issue consists of portions of the affected party’s response to the RFT, the pricing information contained in an email, and the occlusion rate of the product set out in two copies of the Technical Requirements Form. The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁶

[35] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁷

[36] The ministry argues that disclosure of the detailed information regarding the cost and technical specifications of the affected party’s product could reasonably be expected to prejudice the affected party’s competitive position vis-à-vis other providers

¹⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁷ Order PO-2435.

of similar products who compete with the affected party in the private and public sector. In addition, the ministry submits that disclosure of the records would reveal the affected party's methodology in the composition of its tender to competitors who provide similar products. Competitors, the ministry argues, could make use of these methodologies and tailor their own proposals to imitate those of successful bidders.¹⁸

[37] The ministry also submits that disclosure of the records could reasonably be expected to result in undue loss to the affected party and undue gain to its competitors. The ministry states:

. . . As discussed in the "Commercial information" section of these representations, although all tenders were required to contain the same categories of information as prescribed by the RFT, the specific information selected for inclusion by a bidder, and the very manner and format it employs to do so, are unique to each bidder because these choices reflect their unique marketing strategy. Since a competitor could reasonably be expected to imitate the style, as well as the substance, of the tender in preparing for future competitions initiated in the public or private sector, the disclosure of [the response to the RFT] would result in an undue loss to the affected party and an undue gain to a competitor.

[38] Lastly, the ministry submits that because the evaluation records and related correspondence reflect the detailed and specific information contained in the affected party's response to the RFT, the harms to the affected party described above would also apply if these records are disclosed.

[39] The affected party submits that disclosure of the records would jeopardize future competitive submissions, which may result in future financial losses for its company.

[40] In order for me to find that the section 17(1) exemption applies, the ministry and the affected party must establish using detailed and convincing evidence that there is a reasonable expectation of one of the harms in sections 17(1)(a), or (c) occurring upon the disclosure of the information at issue. In respect of the harm in section 17(1)(a), I must determine whether disclosure of the record could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization. For the harm in section 17(1)(c), I must decide whether disclosure of the record could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

¹⁸ Order PO-1818.

[41] Having reviewed the parties' representations and the records at issue, I find that, with one exception set out below, all of the information that I have found to be "supplied in confidence," if disclosed, would result in a reasonable expectation of harm to the affected party under section 17(1)(a). On my review of the records, I find that the detailed financial, commercial and technical information contained in the records would reveal the affected party's pricing practices, contractual relationships with other companies, and the technical specifications and uses of the product that is the subject matter of the tender. I am also satisfied that the ministry has provided sufficiently "detailed and convincing" evidence that disclosure of this information could reasonably be expected to prejudice the affected party's competitive position in responding to future tenders. I find, therefore, that this information, which is contained in the affected party's response to the RFT, the email and the Technical Requirements Form, is exempt from disclosure under section 17(1)(a).

[42] On the other hand, I am not satisfied that disclosure of Appendix B¹⁹ of the affected party's response to the RFT could reasonably be expected to result in the harms contemplated by either section 17(1)(a) or (c). The information in this record consists of general information relating to the affected party's compliance with the requirements of the RFT, but does not actually reveal detailed information about its pricing practices, methodology or its product specifications, with the exception of the occlusion rates.

[43] In my view, this information does not provide insight into the commercial, financial or technical methodology of the affected party or the possible unique design of its proposal, such that disclosure of the information could significantly prejudice its competitive position or provide an undue gain to competitors. Therefore, I find that disclosure of Appendix B, not including the occlusion rates, would not reasonably be expected to cause the harms contemplated under sections 17(1)(a) and (c) of the *Act*.

[44] Consequently, as all three parts of the three-part test in section 17(1) must be met, I find that Appendix B is not exempt under sections 17(1)(a) or (c), and I order the ministry to disclose it to the appellant, with the exception of the occlusion rates.

ORDER:

1. I uphold the ministry's decision, in part. With the exception of the records identified in order provisions 2 and 3, I find the records are exempt from disclosure under section 17(1).
2. I order the ministry to disclose the ministry's RFT Cover page, the ministry's RFT Table of contents, Parts 1, 3 and 4 of the RFT, Addendums no. 2 and 3 of the RFT, Appendix A of the RFT, the confidentiality and conflict of interest agreements, and

¹⁹ With the exception of the occlusion rates of the product.

Addendum 3 in the evaluation documents, in their entirety to the appellant by **September 22, 2015** but not before **September 16, 2015**.

3. I order the ministry to disclose Part 2 of the RFT, the Technical Requirements Form in the affected party's response, the OPP RFT Evaluation Summary forms, the Technical Requirements Forms in the evaluation documents, the Stage 1 Evaluation of Mandatory Requirements form and Appendix B – Form of Offer, in part to the appellant by **September 22, 2015** but not before **September 16, 2015**.

I have enclosed copies of portions of these records with this order. The highlighted portions are not to be disclosed to the appellant as they are either exempt from disclosure or non-responsive to the request. The remaining portions of the records listed in this order provision that I have not included with this order are also to be disclosed to the appellant.

4. I reserve the right to require the ministry to provide me with copies of the records that it discloses to the appellant as a result of order provisions 2 and 3.

Original Signed By: _____
Cathy Hamilton
Adjudicator

August 17, 2015 _____