

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3895

Appeal PA17-33

Infrastructure Ontario

October 30, 2018

Summary: Infrastructure Ontario (IO) received a request for information under the *Freedom of Information and Protection of Privacy Act (the Act)* for copies of records about the changes to the contract regarding the expansion and renovation of St. Michael's Hospital. IO granted partial access to the responsive records, citing the mandatory third party information exemption in section 17(1) to deny access to certain pricing and other financial information.

A third party appealed IO's decision to disclose certain information in the records citing section 17(1), and also claimed that some of this information was not responsive to the request. The requester raised the application of the public interest override in section 23 to the information the appellant claimed is subject to section 17(1).

This order finds that all of the information at issue is within the scope of the request. The order also orders IO to withhold additional information from the records as being subject to section 17(1), and finds that the public interest override in section 23 does not apply to this information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a), 23, and 24.

Orders and Investigation Reports Considered: Order PO-3392.

Cases Considered: *Accenture Inc. v. Ontario (Information and Privacy Commissioner) and Metrolinx*, 2016 ONSC 1616 (CanLII), (Div. Ct.), motion for leave to appeal dismissed June 23, 2016 (C.A. M46285).

OVERVIEW:

[1] Infrastructure Ontario is a Crown corporation dedicated to delivering some of the province's larger and more complex infrastructure renewal projects, on time and on budget; managing one of the largest real estate portfolios in Canada and providing real estate services, such as asset management and property and land management; and providing the public sector and not-for-profit organizations with long-term financing to renew public infrastructure.

[2] Infrastructure Ontario (IO) and the Ministry of Health and Long-Term Care are working with St. Michael's Hospital (the hospital) to expand and renovate the hospital.¹

[3] IO received a request for information from a media requester under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for:

...copies of all requests for change orders made by the St. Michael's Partnership Consortium,² or SMP, with respect to its expansion and renovation of St. Michael's Hospital [SMH or the hospital]. This FOI³ request includes all records, including but not limited to, emails, reports, memorandums, etc...

[4] Pursuant to section 28 of the *Act*, IO notified two third parties which were part of the consortium of its intention to disclose portions of the information in the responsive records. In response, one third party objected to disclosure by IO of certain information in the records. IO then issued its access decision granting full access to 17 records and partial access to 25 records. IO cited sections 17(1) (third party information), 20 (danger to safety or health), and non-responsiveness to withhold information from the records.

[5] The third party that objected to the disclosure of certain information by IO (now the appellant) appealed IO's decision, asserting the application of section 17(1) to this information.

[6] During the mediation stage, the appellant provided a marked copy of the records to IO indicating the information it wished to have withheld. IO subsequently provided partial disclosure of the records to the requester in accordance with the appellant's redactions, but maintained its decision that the information the appellant wished redacted should be disclosed.

¹ <http://www.infrastructureontario.ca/Planning-Design-Compliance-Team-selected-St-Michael-Hospital/>

² St. Michael's Partnership Consortium is designing, building and financing this project.

³ Freedom of information.

[7] In addition, during mediation, IO notified the appellant about an additional record (Record 1 - an email); the appellant objected to disclosure of this record. As the appellant objected to disclosure of this record, this record was added as a record in issue to this appeal.

[8] Also during mediation, the requester indicated that he wished to pursue access to the information the third party is seeking to have withheld and asserted a public interest in disclosure, thereby raising section 23.

[9] As the requester did not appeal IO's decision, section 20 and the non-responsiveness of certain information in the records are no longer at issue, along with the information in the records that IO had itself decided to withhold under section 17(1).

[10] Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. Portions of the appellant's representations were withheld as they met the criteria for withholding set out in *Practice Direction 7*.

[11] As the appellant raised the issue of the scope of the request, I added this as an issue to this appeal.

[12] In this order, I find that all of the information at issue comes within the scope of the request. I also order IO to withhold additional information from the records, as being subject to section 17(1). I find that the public interest override does not apply to the information I found subject to section 17(1).

RECORDS:

[13] Portions of 42 records are at issue. The records relate to the expansion of the hospital undertaken by IO and the hospital jointly. The records were prepared for the purpose of completing this project according to the plans prepared by IO and the hospital.

[14] Record 1 is an email exchange between the hospital, the appellant and other individuals.

[15] Records 2 to 42 are Hospital Variation Notices (HVNs) with attachments provided by the appellant and its consultants or subcontractors. The attachments include forms, letters, drawings, contractual specifications, miscellaneous correspondence between the appellant to the hospital and IO, consultant reports, photographs, subcontractor and consultant requests for changes, schedules, and subcontractor/supplier quotations. The appellant's subcontractors or consultants are other construction professionals, such as architects and engineers. These records also contain emails and letters exchanged between the hospital and the appellant and other individuals.

[16] The information at issue is not part of the contract between the hospital and the appellant, but information outlining the appellant's response to each HVN for each separate change or extra to the scope of the work being done for the hospital expansion.

[17] IO has severed certain information from the records that it claims is subject to section 17(1). This information consists primarily of pricing information. As the requester has not appealed IO's decision, the information withheld by IO is not subject to this appeal and will not be disclosed to the requester.

[18] The appellant is seeking to have withheld certain additional information in the attachments to each of the HVNs. The appellant has highlighted the information in the records that it claims is also subject to section 17(1).

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Does the mandatory third party information exemption at section 17(1) apply to the records?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption?

DISCUSSION:

Issue A. What is the scope of the request? What records are responsive to the request?

[19] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
 - ...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer

assistance in reformulating the request so as to comply with subsection (1).

[20] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁴

[21] To be considered responsive to the request, records must "reasonably relate" to the request.⁵

[22] The appellant submits that IO has taken it upon itself to release information and records in excess of what was requested by the requester. It submits that the request was clearly limited to change order requests, however, IO has decided to release drawings, contractual specifications, miscellaneous correspondence, consultant reports, photographs, subcontractor and consultant requests for change, schedules, and subcontractor/supplier quotations, which go above and beyond the original request.

[23] IO states that the request was for copies of all requests for change orders made by the consortium with respect to its expansion and renovation of the hospital. It states that this request included all records, including but not limited to, emails, reports, memorandums, etc.

[24] IO states that in a subsequent email discussion with the requester, the request was clarified to include, "all variations submitted by the consortium, with respect to its expansion and renovation of St. Michael's Hospital from January 2015 to August 31, 2016."

[25] The requester states that if he was seeking only copies of the requests for change orders then he would not have included the second sentence, which seeks

...all records, including but not limited to, emails, reports, memorandums, etc.

[26] The requester submits that this second sentence in his request captures the many records generated as a result of the change order requests, including IO's internal reactions to the requests, correspondence with the contractor about the requests, and the final change variations agreed to by IO and the contractor.

[27] In reply, the appellant states that the scope of the request was clearly limited under the Notice of Inquiry to "requests for changes orders" and did not include: "all

⁴ Orders P-134 and P-880.

⁵ Orders P-880 and PO-2661.

records, including but not limited to, emails, reports, memorandums, etc...". It further submits that the breadth of disclosure from IO went far and above the amount of information that was requested.

Analysis/Findings

[28] The mediator's report in this appeal file provided that:

Infrastructure [Ontario] received a request for information on [date], under the *Act*, for copies of all requests for change orders made by the St. Michael's consortium or SMP, with respect to its expansion and renovation of St. Michael's Hospital, including emails, reports, memorandums, etc...

[29] The mediator's report also identified the records at issue consist of variation notices - Records 1-42.

[30] The letter from the mediator to the appellant that accompanied the mediator's report read:

...The mediation stage of this appeal has now been completed. Enclosed please find a copy of the Mediator's Report setting out any issues that have been resolved and the issues that remain in dispute.

The purpose of the report is to provide the parties to an appeal with a record of the result of mediation and to provide the adjudicator with information regarding records and issues that remain to be adjudicated.

Please review the report and if there are any errors or omissions, please contact me no later than [date]. I will consider your comments and determine whether the report should be revised. You need not contact me unless there are errors or omissions.

After [date] the appeal will be transferred to an adjudicator, who may conduct an inquiry and dispose of the outstanding issues in the appeal... [Emphasis added by me].

[31] There is no indication that the appellant contacted the mediator to advise her of any errors or omissions in the mediator's report. Moreover, the appellant did not indicate that some of the records did not reasonably relate to the request.

[32] The Notice of Inquiry listed all 42 records at issue as referred to in the mediator's report.

[33] Although the Notice of Inquiry summarized the request, it did not unilaterally restrict the scope of the request or the records at issue, which at the end of mediation was not contested by the parties to be as set out in the mediator's report.

[34] Therefore, I find that the scope of the request includes all 42 records listed above and is as set out in the mediator's report, which is for:

...copies of all requests for change orders made by the St. Michael's consortium or SMP, with respect to its expansion and renovation of St. Michael's Hospital, including emails, reports, memorandums, etc...

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

[35] The appellant relies on the mandatory exemptions in sections 17(1)(a) to (c), which 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;

(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; or

[36] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.⁶ 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.⁷

[37] 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

⁶ *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.*).

⁷ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[38] The appellant submits that the records consist of information about change notices, variation requests, requests for information, contemplated change notices, and differing site conditions, which are commercial and/or financial information.

[39] In particular, the appellant submits that many of the variation requests contain pricing information, which is commercial and financial information. It also states that the records contain construction schedules, the reasons and description of each change request and contract time extensions, which are commercial information.

[40] IO states that it has previously removed any personal, financial, or commercial information from the requested records in accordance with its access decision and that the redactions sought by the appellant do not meet the threshold for part 1 of the test under section 17(1) as they do not relate specifically to the buying, selling, or exchange of services. Rather, they are correspondence sent from the appellant to the hospital or IO.

[41] IO submits that the emails and letters, which are comprised of Records 1, 9, 13, 14, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, and 39, do not contain any commercial or financial information.

[42] The requester did not provide representations on part 1 of the test under section 17(1).

[43] In reply, the appellant states that contemplated change notices, change orders, variation requests, requests for information and differing site conditions is commercial information as it is related to the buying, selling or exchange of services. It states:

For instance, when [the appellant] requires a change in the contract price or extension to the contract time, [it] submits a request. This request constitutes [the appellant's] selling further or alternative services to SMH and in exchange the SMH agrees to either accept or in other words "buy" the service that [the appellant] has offered...

Analysis/Findings re part 1

[44] As noted above, the records relate to the revitalization of St. Michael's Hospital, which is being overseen by Infrastructure Ontario. The hospital and IO hired the

appellant to design, build and finance this expansion and renovation project.

[45] The types of information listed in section 17(1) have been discussed in prior orders, as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁸ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁹

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.¹⁰

[46] Based on my review of the records, I find that they all contain commercial information as they relate to the selling of services by the appellant to the hospital with respect to its expansion and renovation of the hospital.

[47] I disagree with IO that Records 1, 9, 13, 14, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, and 39 do not contain commercial information. Although some of these records contain emails or letters, they all contain commercial information related to the selling of services to the hospital by the consortium, of which the appellant is a part.

[48] As I have found that the records contain commercial information, part 1 of the test under section 17(1) has been met and it is not necessary for me to also consider whether they contain financial information.

Part 2: supplied in confidence

Supplied

[49] 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.¹¹

[50] 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

⁸ Order PO-2010.

⁹ Order P-1621.

¹⁰ Order PO-2010.

¹¹ Order MO-1706.

inferences with respect to information supplied by a third party.¹²

[51] 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.¹³

[52] 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.¹⁴ 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.¹⁵

[53] The appellant submits that the information at issue details how it will implement the change, the cost impact of the requested change and the schedule impact. It submits that this information is similar to the Detailed Feasibility Notices (the DFNs) in Order PO-3392,¹⁶ which ultimately satisfied part 2 of the test under section 17(1).

[54] The appellant states that requests for change orders constitute just a part of the negotiation with the hospital regarding whether the hospital will accept the appellant’s request for change or not and that all of the requests for change order are supplied to the hospital for the hospital’s consideration. The appellant further states that none of the documents requested to be disclosed are documents from the hospital that form part of the contract documents as they would have been in *Boeing*,¹⁷ and the change notices in Order PO-3392.

[55] The appellant did not provide record-specific representations. Its representations focus on the types of records at issue.

¹² Orders PO-2020 and PO-2043.

¹³ 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*).

¹⁴ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹⁵ *Miller Transit*, above at para. 34.

¹⁶ PO-3392, upheld in *Accenture Inc. v. Ontario (Information and Privacy Commissioner) and Metrolinx*, 2016 ONSC 1616 (CanLII), (Div. Ct.), motion for leave to appeal dismissed June 23, 2016 (C.A. M46285).

¹⁷ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851.

[56] The appellant describes the records as negotiated proposals supplied to the hospital outlining what requests for each separate change or extra to the scope of work.

[57] The appellant states that the requests for change orders by the consortium, variation notices, requests for information and/or differing site condition forms are present in Records 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 30, 31, 32, 33, 36, 37, 40, and 41.

[58] The appellant states that the requests for change orders are supplied to the hospital and none are documents from the hospital that form part of the contract documents.

[59] The appellant describes the remainder of the information at issue in the records outside of the change order requests as: drawings, contractual specifications, miscellaneous correspondence from it to the hospital and *vice versa*, consultant reports, photographs, subcontractor and consultant requests for change, schedules, and subcontractor/supplier quotations. It says that the emails and letters are found in Records 1, 9, 13, 14, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, and 39

[60] IO concedes that the change orders, variation requests, requests for information, contemplated change notices, and differing site conditions were supplied to it by the appellant.

[61] The requester did not address this issue as to whether the records were supplied.

In confidence

[62] 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.¹⁸

[63] 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

¹⁸ Order PO-2020.

- 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
- prepared for a purpose that would not entail disclosure.¹⁹

[64] The appellant states that the information contained in each request for change was supplied in confidence by it to the hospital, as well as to its consultants and subcontractors. It states that all variances and requests for changes to the work was information only intended for the recipient party as part of a negotiated change to the contract for the benefit of the project and that just as its negotiations of the original contract are maintained as confidential, each negotiated change order request should be treated in the same manner.

[65] IO states that the records do not contain any markings or statements to indicate that they were explicitly confidential and that it has not provided any indication to the appellant that its information would be treated in a manner to suggest it would be protected from disclosure. IO further states that its internal records are generally open to all employees and that it does not have a specific policy protecting third party records from disclosure.

[66] IO states that the records were prepared for the purpose of completing the project according to the plans prepared by it and the hospital and that the records indicate that a transaction took place between the parties as part of a contract that is publicly available. It submits that this indicates that the records were not prepared for a confidential purpose.

[67] IO states that, as the appellant suggests that the records were provided to the hospital as part of a negotiated change order to the contract, then the information cannot be held to be supplied. In the alternative, it submits that it has redacted any information required to be redacted under section 17(1), i.e. any information of commercial or industrial value.

[68] The requester did not address this issue as to whether the records were supplied in confidence.

[69] In reply, the appellant submits that correspondence between representatives of IO and its representatives should not be disclosed. It points out that IO publishes a redacted version of the Project Agreement (the contract between the parties that is

¹⁹ 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.

sent out at the Request for Proposal stage to all preferred proponents) on its website, however, internal correspondence and project specific information is not shared on IO's website.

[70] The appellant states that its representatives send change requests, schedules, reports and any other project document to intended recipients by email and that each employee working at the SMH project has a disclaimer at the bottom of every email they send, which states:

This e-mail transmission is strictly confidential and intended solely for the person or organization to whom it is addressed. It may contain privileged and confidential information and if you are not the intended recipient, you must not copy, distribute, or take any action in reliance on it. IF YOU HAVE RECEIVED THIS EMAIL IN ERROR, PLEASE NOTIFY US AS SOON AS POSSIBLE AND DELETE IT. [Emphasis in original].

[71] The appellant submits that as a result of this disclaimer, each project specific email is explicitly confidential, and every attached change request would consequently have been explicitly confidential as well.

[72] The appellant states that not only were the requested documents explicitly supplied to SMH in confidence but they were also implicitly supplied in confidence as every request for change is made during the course of the project, and therefore, any and all project related correspondence is implicitly confidential.

[73] The appellant states that its employees sign confidentiality agreements in their employment contract and that the conversations, correspondences and submissions from its representatives are not available to other members of the public for their use. It also states that IO's representations are incorrect and that all variances and requests for changes constitute information that was supplied prior to any negotiated change and that change requests were part of its submission for negotiation over whether the hospital would accept its request for change or not.

Analysis/Findings re supplied in confidence

[74] Record 1 is not a request for a change order. It is an email from the hospital to the appellant that was copied to IO. This email was sent to two other individuals and provides information to the appellant, IO and others about information the hospital has received from another source.

[75] I find that Record 1 was not supplied by the appellant to IO. As well, even if I had found that the information in this email had been supplied to IO by the appellant, based on its content and who it was distributed to, I would not have found Record 1 to have been supplied in confidence.

[76] Therefore, part 2 of the test under section 17(1) has not been met for Record 1.

As no other mandatory exemptions apply, I will order this record disclosed.

[77] The remaining records are all Hospital Variation Notices with attachments.

[78] IO has applied section 17(1) to certain information in the appellant's forms. The appellant has sought to have exempted under section 17(1) additional information of its forms, as well as on the other attachments to the hospital's variation notices.

[79] Each of the variation notices from the hospital has an attached form from the appellant, which are change orders, variation requests, requests for information, contemplated change notices, and differing site conditions. There are also other forms, letters, reports or other documents attached to each HVN from the appellant's subcontractors or consultants, which are other construction professionals, such as architects and engineers. The records also contain email exchanges between the hospital and the appellant and other individuals. The emails contain the above-noted confidentiality provision.

[80] Based on my review of the parties' representations, I agree with the appellant that the information at issue in Records 2 to 42 was supplied in confidence by the appellant to the hospital. The appellant was providing information to the hospital as to the work it suggested was needed to be performed to accomplish the change in construction. This information was not part of a contract to perform the work.

[81] I agree with the appellant that the information at issue in Records 2 to 42 is similar to the information at issue in the Detailed Feasibility Notices in Order PO-3392. In that case, the information in the DFNs was found to have been supplied in confidence as these documents detailed how the third party appellant in that appeal would implement a change, as well as the costs associated with the DFNs. The DFNs were provided in response to change notices and provide a detailed description of the third party appellant's proposed solution to the Change Notices.

[82] In this appeal, the HVN is akin to the request for a change order by the hospital. It details the changes that the project requires. The attachments, that contain the information at issue, are similar to the DFNs in Order PO-3392. Like that appeal, the attachments to the HVNs detail how the appellant will implement the change set out in the HVN, the cost impact of the change and the schedule impact.

[83] Accordingly, I find that the information at issue in Records 2 to 42 was supplied in confidence by the appellant to the hospital and IO for the purpose of completing the project. Therefore, part 2 of the test has been met for this information.

[84] I will now consider whether part 3 of the test has been met for the information at issue in Records 2 to 42.

Part 3: harms

[85] The party resisting disclosure 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.²⁰

[86] The failure of a party resisting disclosure to provide such 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*.²¹

[87] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 17(1).²²

[88] Much of the appellant's representations under part 3 were confidential. It states in its non-confidential representations that disclosure would cause harm should a competitor in the construction marketplace obtain the information that contains pricing information, and descriptions of the methods to which would issue a change at a particular project. It states that this information could very easily be exploited by other general contractors as well as other subcontractors competing for work at the particular project.

[89] The appellant submits that should the information at issue be released, clients with active contracts with it may use this information to their own advantage. The appellant submits that should a competitor with no relation to the hospital obtain this information then that competitor could very well gain a competitive advantage to diminish the appellant's negotiating position on another active contract on a different project.

[90] IO states that the information relates solely to the completion of the project and that any pricing information has been redacted in accordance with IO's access decision. It disputes that disclosure of the information at issue could reasonably be expected to cause the harms set out in sections 17(1)(a) to (c) and states that it is in the commercial interest of those contracting with IO to continue supplying this type of information.

²⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²¹ Order PO-2435.

²² Order PO-2435.

[91] IO states that the appellant, as the contractor on the project, is contractually bound to complete the project and the change orders, variation requests, requests for information, contemplated change notices, and differing site condition are a necessary condition of performing the contract.

[92] The requester states that the records concern changes to a \$300 million contract to redevelop St. Michael's Hospital. He states that as the contract was awarded a long time ago, it is very difficult to conceive how information about those changes "could very easily be exploited by other general contractors as well as other subcontractors for work at the particular project." He also points out that the changes are very site specific and he finds it difficult to imagine a rival contractor scrutinizing a change to a particular feature of the project and applying that to a different hospital or different construction project.

[93] The appellant provided confidential representations in reply on part 3 of the test.

Analysis/Findings re harms

[94] The appellant has sought to have withheld most of the substantive information in the attachments to the HVNs, including the information that repeats what change is being sought in each HVN.

[95] The appellant's concern focuses on it being held mistakenly responsible for the changes requested in each record and the additional costs to the project arising from these changes. However, from my review of the records, I find that most of the changes were not initiated by the appellant. I find that the changes that are the subject matter of Records 2 to 42 arise from matters outside of the contractual terms or matters that have arisen unexpectedly due to:

- Hidden or unforeseen obstructions discovered during excavation of the ground or the removal of the existing structure;
- Non-working or inadequate existing hospital systems;
- Items discovered that had not been accounted for in the drawings or plans related to the initial construction of the hospital;
- Government regulatory requirements arising during construction;
- New drawings or sketches being provided by the hospital to the appellant during construction; and,
- Changes requested by hospital during construction.

[96] The appellant is responding to the hospital's HVNs and providing information to the hospital as to how each HVN will be complied with.

[97] The information at issue in this appeal is similar to the information at issue in the DFNs in Order PO-3392. In that order, the DFNs were responses to the change notices created by the institution to initiate a change of the project's scope. The change notices in that order are similar to the HVNs in this order.

[98] As was the case with change notices in Order PO-3392, the HVNs list the changes that were needed to be made to the existing contract. The appellant's response contained in the records attached to the HVNs consists of a description of the particular solution to be provided by the appellant and specifying in detail the manner in which the change can be implemented and includes pricing information that is outside the boundaries of the financial information contained in the main agreement.

[99] In Order PO-3392, Adjudicator Cathy Hamilton found that the portions of DFNs and attachments that the institution proposed to disclose consisted of information that is general in nature or that reveals the total cost of a given change to the contract. She was not satisfied that disclosure of this information could reasonably be expected to result in any of the harms set out in sections 17(1)(a), (b) or (c).

[100] Likewise, I find that some of the information that the appellant wants withheld is general in nature or reveals the total cost of the change to the project agreement. In particular, the information that the appellant seeks to withhold from its own forms or cover letters to the hospital is information that repeats the information disclosed by the hospital in the HVNs and does not contain specific detailed information. These forms consist of the appellant's change orders, variation requests, requests for information, contemplated change notices, and differing site conditions, as well as the cover letters from the appellant to the hospital. I find that this information does not meet part 3 of the test under sections 17(1)(a) to (c).

[101] IO states that it has removed the pricing information in the records, however, I note that many of the records still have pricing information that has not been removed by IO, including the total cost of each change. IO has not explained why it did not remove this pricing information. Consistent with the findings in Order PO-3392, I find that the pricing information in the records, other than the total price in each record, could reasonably be expected to cause the harms set out in sections 17(1)(a).

[102] Concerning the remaining information in the records, as was the case in Order PO-3392 for the remaining information in the DFNs, I find that this information consists of detailed financial, commercial and technical information. Disclosure of this information could reasonably be expected to prejudice significantly the competitive position of the third party appellant, if disclosed, as this information could be used by a competitor to undermine the appellant.

[103] The remaining information at issue in the records could provide a competitor with an accurate picture of the detailed pricing and structure of the solutions in the records. It would allow a competitor to have detailed insight into the appellant's

methods and techniques in responding to specific construction situations.

[104] Based on my review of the parties' representations and taking into account in particular the confidential representations of the appellant and the information at issue in the records, I agree with the appellant that disclosure of this information could reasonably be expected to cause the harms set out in sections 17(1)(a). Disclosure of this information in the records could reasonably be expected to significantly prejudice the competitive position of the appellant.

[105] In conclusion, I have found that the information in the appellant's forms, other than the specific pricing information, as well as the appellant's cover letters to the hospital are not exempt by reason of sections 17(1)(a) to (c). This information either reiterates or generally expands on what information is in the HVNs that have been provided to the requester and, therefore, are not at issue in this appeal.

[106] I have found, however, that the attachments to the HVNs in Records 2 to 42 that are not the appellant's forms or cover letters to the hospital, are subject to section 17(1)(a) as disclosure could reasonably be expected to prejudice significantly the appellant's competitive position. I will consider whether the public interest override applies to this specific information.

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

[107] Section 23 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.

[108] 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.

[109] 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.²³

[110] The requester states that the awarding of the St. Michael's redevelopment contract was a controversial process and that there are internal IO email records that show that the process of awarding this contract was considered "very murky." He refers specifically to an email from IO's General Counsel and Vice President describing the contract awarding process as "not how a procurement should go."

[111] The requester states that one of the reasons the process was so controversial was the vast and unusual spread between bids, as the appellant's bid was \$200 million less than the runner up. He states that both the hospital and IO agreed to bring in an independent third party to review the appellant's bid to see if it was compliant and if it could be done for that price and in the end the bid was approved and the appellant was awarded the contract.

[112] The requester submits that it is this context that makes these change order records so decidedly in the public interest as it is important for the public to know if the price that allowed the winning bidder to secure the contract is in fact the price that the project is being built for. He further submits that the information at issue in the records will shed light on whether that is the case.

[113] The appellant states that the SMH procurement was fairly and squarely won by it as the lowest bidder and that its legitimate bid was further affirmed by an independent committee that was retained by IO to investigate and clarify the appellant's bid to ensure that it satisfied the criteria for award. The appellant states that the independent committee confirmed that the project was not compromised and that there was no evidence whatsoever of any attempt to inappropriately influence the bidding process.

[114] The appellant submits that it was awarded the contract under an immensely scrutinized evaluation criteria that its bid was determined to be compliant. It points out that one of the other bids did not meet the minimum technical score, and therefore could not be selected.

[115] The appellant is also concerned about being the subject of inaccurate or inflammatory media coverage if the records are disclosed.

Analysis/Findings

[116] 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*

²³ Order P-244.

central purpose of shedding light on the operations of government.²⁴ 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 the information the public has to make effective use of the means of expressing public opinion or to make political choices.²⁵

[117] A public interest does not exist where the interests being advanced are essentially private in nature.²⁶ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.²⁷

[118] A public interest is not automatically established where the requester is a member of the media.²⁸

[119] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".²⁹

[120] Any public interest in *non*-disclosure that may exist also must be considered.³⁰ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".³¹

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

- the records relate to the economic impact of Quebec separation³²
- the integrity of the criminal justice system has been called into question³³
- public safety issues relating to the operation of nuclear facilities have been raised³⁴

²⁴ Orders P-984 and PO-2607.

²⁵ Orders P-984 and PO-2556.

²⁶ Orders P-12, P-347 and P-1439.

²⁷ Order MO-1564.

²⁸ Orders M-773 and M-1074.

²⁹ Order P-984.

³⁰ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³¹ Orders PO-2072-F, PO-2098-R and PO-3197.

³² 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.).

³³ Order PO-1779.

³⁴ 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.

- disclosure would shed light on the safe operation of petrochemical facilities³⁵ or the province's ability to prepare for a nuclear emergency³⁶
- the records contain information about contributions to municipal election campaigns³⁷

[122] 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 considerations³⁸
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations³⁹
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁴⁰
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁴¹
- the records do not respond to the applicable public interest raised by appellant⁴²

[123] Based on review of the information remaining at issue in the records and the parties' representations, I find that there is not a compelling public interest in disclosure of the remaining information at issue in the records. This information is detailed technical and pricing information that shows the appellant's and its contractors and consultants construction-specific solutions to the changes needed to the project.

[124] Based on what I have ordered to be disclosed above, I find that a significant amount of information has been ordered to be disclosed and this is adequate to address any public interest considerations. This information explains the reasons for the changes that were needed to be made to the project and the total cost for each change to the project. It also provides the details of what is to be changed.

[125] The information I have ordered disclosed serves the purpose of informing or enlightening the citizenry about the activities of their government or its agencies. It

³⁵ Order P-1175.

³⁶ Order P-901.

³⁷ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

³⁸ Orders P-123/124, P-391 and M-539.

³⁹ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁴⁰ Orders M-249 and M-317.

⁴¹ Order P-613.

⁴² Orders MO-1994 and PO-2607.

addresses the requester's concerns about what work was to be done arising outside of the contract for the project.

[126] As I have found that there is not a compelling public interest in the information I have found exempt by reason of section 17(1), there is no need for me to also consider whether there is a public interest in non-disclosure or whether the existence of a compelling public clearly outweighs the purpose of the established section 17(1) exemption claim in the specific circumstances.

ORDER:

1. I order IO to disclose Record 1 to the requester by **December 5, 2018** but not before **November 29, 2018**.
2. I order IO to disclose to the requester the information at issue in Records 2 to 42 that I have found not subject to section 17(1) by **December 5, 2018** but not before **November 29, 2018**. For ease of reference, I have provided IO with a highlighted copy of this information that I have ordered to be disclosed in Records 2 to 42.
3. I order IO to withhold the remaining information at issue in the records.

Original Signed by: _____
Diane Smith
Adjudicator

_____ October 30, 2018