

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4055

Appeals PA17-522 and PA18-120

Headwaters Health Care Centre

July 29, 2020

Summary: Headwaters Health Care Centre (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to its linen and laundry services agreement with a third party provider. The hospital denied access to the responsive records in part, citing the application of the mandatory third party information exemption in section 17(1). Both the requester and the third party service provider (the third party appellant or TPA) appealed the hospital's decision.

In this order, the adjudicator orders the hospital to withhold the information in the records related to the TPA's response to the hospital's Request for Proposal that reveals detailed information about its operations and pricing and how this information can be tailored to provide linen and laundry services to the hospital. She orders the hospital to disclose the remaining responsive information in the records that she finds is not exempt under section 17(1).

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

Orders Considered: Orders MO-1706, MO-3058-F, MO-3258, MO-3372, MO-3799, PO-3885, PO-3886 and PO-3887.

OVERVIEW:

[1] Headwaters Health Care Centre (the hospital) received a request for the following records under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*):

1. All linen and laundry services agreements currently in force or which were in force at any time between January 1, 2016 and the present, relating to or in the custody or control of Headwaters Health Care centre; and
2. All documents relating to the linen or laundry service agreements requested in part 1 including, but not limited to, any amendments, proposed amendments, term or service extensions, internal and external correspondence, briefing notes, memos, successful bids, quotations or proposal documents, whether those agreements and documents form part of the institution's Contract and Agreements, Facilities Management Records, Laundry Services Records or other classes of records and whether they are stored in paper or electronic form.

[2] Following notification of a number of affected third parties, the hospital issued an access decision granting partial access to the responsive records. The hospital denied access to portions of the responsive records pursuant to sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. The hospital also stated that some portions of the records are unrelated to the access request and denied access to those portions of the records.

[3] An affected third party (the third party appellant or the TPA), a linen and laundry services provider who is party to an agreement with the hospital, appealed the hospital's decision and Appeal PA17-522 was opened to deal with its concerns. The requester also appealed the hospital's decision. Appeal PA18-120 was opened to address the requester's concerns.

[4] During mediation, the hospital disclosed records to the requester that were not subject to the third party appeal, PA17-522.

[5] The requester stated that she was not seeking access to the portions of the records withheld pursuant to section 21(1) of the *Act*; therefore, those portions of records are not at issue in this appeal. The requester also stated that she was not pursuing the non-responsive portions of the records and those portions of records are also not at issue in this appeal. The requester stated that she was seeking only the portions of the records withheld pursuant to section 17(1) of the *Act*.

[6] As mediation did not resolve the issues in these appeals, they were transferred to the adjudication stage where I conducted an inquiry.

[7] Representations were sought and exchanged between the hospital, the TPA and the requester in accordance with section 7 of the IPC's *Code of Procedure and Practice*

Direction 7.

[8] In its representations, the TPA revised its position as to what portions of the records it is claiming are subject to section 17(1). The TPA's new position as to what is at issue is reflected in the index of records, below. The TPA also agreed to the disclosure of Record 5, the Linen Site Visit Questionnaire, and in view of this consent under section 17(2) of the *Act*, I will order this information disclosed.¹

[9] In this order, I partly uphold the application of section 17(1) in relation to the TPA's operations and pricing information. I order the hospital to disclose the remaining non-exempt responsive information in the records.

RECORDS:

[10] The information remaining at issue is described in the following index of records provided by the TPA:

Record #	General Description of Record	Section Heading	Page(s)	Information Location
1	Agreement of June 5, 2012 between Headwaters Health Care System and the TPA [the agreement]	Schedule 4, Article 4.2.1	15	Per pound Charges set out in lines 4-7 Per bag charges set out in line 8
			15-16	Per piece charges set out in table
2	Invoices from the TPA to the hospital	Entire document		Entire document
3	TPA's response dated May 26, 2011 to RFP ²	1. Executive Summary	4-5	Entire Executive Summary

¹ The requester is only seeking access to the TPA's information, not that of other laundry and linen suppliers. Therefore, only the information in Record 5 relating to the TPA is to be disclosed.

² Request for Proposals.

	issued by the hospital			
		2. <u>Service Overview</u> 2.1 Dedicated Clean/Dedicated Soil – Full Exchange System	6-7	Entire Section
		2.2 On Site Clean Delivery	7	Entire Section
		2.3 O.R. Linen and Sterile Packs	8-9	Entire Section
		2.6 Ownership of Inventory and Linen Carts/Tubs	9	Sentence related to Assumptions
		2.7 Performance Standards and Guarantees	11	One sentence under Fill- Rates
		2.10 Benefits to [the hospital]	13	Entire Section
		4.1.4 Value Adds	16	Bullets 1, 2, 3, 5
		4.2.9 Implementation Process	22-23	Entire section following the sentence "A copy of the TPA's contingency plan ..."
		4.2.10 E-Commerce Transaction Capability/Electronic Enablement	23-24	All sections until the end of EDI Specifics on p. 24
			24-25	Linen Usage Benchmarking & Reporting - Entire Section
		Exhibit 2 Appendix "D" Proposal Submission Form	29	Pricing Requirements - Price per pound
			29-32	Price Table - Entire second last

				column
		Exhibit 4 Operations Contingency Plan	37-41	Entire Section
		Exhibit 5 Quality Assurance Program	4-5 of Exhibit 5	Quality Assurance Protocol - Entire Section
			5 of Exhibit 5	Quality Objectives - Entire Section
			6 of Exhibit 5	Quality Assurance Protocol - Entire Section
		Exhibit 7 Environmental Initiatives	63-64	Conservative Use of Energy - Entire Section
		Exhibit 10 Plant layout	2 pages	Entire exhibit
4	Bid Analysis	Comparison of unit prices provided by the TPA and other proponents; notes re differences.	2 pages	Information in the third column about the TPA

DISCUSSION:

Does the mandatory third party information exemption at sections 17(1)(a) or (c) apply to the records?

[11] The TPA relies on sections 17(1)(a) and 17(1)(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;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[12] Section 17(1) is designed to protect the confidential “informational assets” of

businesses or other organizations that provide information to government institutions.³ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.⁴

[13] 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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: does the record reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information?

Representations

[14] The hospital states that the records illustrate a pricing model/strategy, in which discounts are offered or anticipated, given volume levels and/or other factors. It submits that the business knowledge and experience that goes into crafting a complex model of this sort is, reasonably speaking, financial information (i.e. a pricing practice).

[15] The hospital states that pages 6 to 9, 38, 39, and pages 4 to 5 of Exhibit 5 of Record 3, contain trade secrets and states:

...much of the information found in the TPA's RFP response [Record 3] would be valuable to them, allowing the newcomer to get a "head start" in their efforts, by modelling their operations on details found in the submissions. Several of these details would surely qualify as "trade secrets", in that they would have, "economic value from not being generally known."

³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[16] The hospital submits that pages 22 to 25 and Exhibit 10 of Record 3 contain technical information.

[17] The hospital submits that page 38 of Record 3 contains labour relations information.

[18] The TPA states that the request seeks access to commercial information that is related to the relationship between the hospital and a supplier for the provision of linen and laundry services - the exchange of services between a not-for-profit entity, the hospital and the TPA as a profit-making enterprise. It states that this characterization is also evidenced by the nature of the responsive records, which includes agreements between the TPA and the hospital and specific information severed from the other records at issue.

[19] The TPA states that the information at issue in Record 2 - the invoices – also constitutes financial information as it relates to money and its use and distribution and refers to specific data, because some of it is expressed in quantities and specific dollar amounts.

[20] The requester states that she has not reviewed the records and is, therefore, constrained in her ability to assess whether they contain the types of information claimed by the other parties. She does specifically refer to Record 4, and submits that to the extent that this record contains numerical scores, rankings, or evaluator comments of the TPA's bid, this is not the type of information carved out for protection in section 17(1).

Analysis/Findings re part 1

[21] The types of information relied upon by the hospital and the TPA in section 17(1) have been discussed in prior orders:

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

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁵

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.⁶ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

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.⁸

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.⁹

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute¹⁰
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,¹¹

⁵ Order PO-2010.

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

⁹ Order PO-2010.

¹⁰ Order P-1540.

but not to include:

- names, duties and qualifications of individual employees¹²
- an analysis of the performance of two employees on a project¹³
- an account of an alleged incident at a child care centre¹⁴
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation.¹⁵

[22] I agree with the TPA that the records contain commercial and financial information relating to the selling of linen and laundry services to the hospital and the costs of these services.

[23] I disagree with the hospital's position that the records contain trade secrets. I do not have sufficient information from my review of Record 3 or otherwise to conclude that the information the hospital has identified as consisting of trade secrets is not generally known in the laundry and linen services provider business. I also note that the TPA, who prepared Record 3, did not submit that it contains trade secrets.

[24] I also disagree with the hospital that the records contain technical information. The TPA did not claim that Record 3 contains technical information and I cannot ascertain how the two portions of Record 3 identified by the hospital consist of "information prepared by a professional and describe the construction, operation or maintenance of a structure, process, equipment or thing."

[25] I agree with the hospital's position that page 38 of Record 3 contains labour relations information. This page is about relations and conditions of work as defined above.

[26] I have taken into consideration the requester's position that Record 4 may contain scoring or related information. From my review of this record, it does not contain such information, but contains pricing information, and therefore, contains financial information as defined above.

¹¹ Order P-653.

¹² Order MO-2164.

¹³ Order MO-1215.

¹⁴ Order P-121.

¹⁵ Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[27] Therefore, part 1 of the test under section 17(1) has been met, as the information at issue consists of commercial, labour relations or financial information.

Part 2: was the information supplied to the hospital in confidence, either implicitly or explicitly?

Supplied

Representations

[28] The hospital did not provide representations on the issue of whether the information was supplied for the purpose of part 2 of the test in section 17(1).

[29] The TPA states that the records all relate to its response to the hospital's RFP for laundry and linen services.

[30] The TPA states that nowhere in Record 1 is there any suggestion or evidence that the hospital was attempting to negotiate with it with respect to the terms of this record.

[31] The TPA submits that the agreement comprising Record 1 is clearly distinguishable from those considered and found not to be supplied by the Divisional Court in the *Boeing Co.*,¹⁶ *Miller Transit*,¹⁷ *Aecon*¹⁸ and *Accenture*¹⁹ decisions for the following reasons:

- i. Record 1 is a simple services contract.
- ii. Record 1 involves only two parties: the TPA and the hospital.
- iii. There is nothing in the information at issue in Record 1 to suggest that it was in any way "customized."
- iv. The other records, Records 3 and 4, demonstrate that the information at issue in the Record 1 contract was supplied by the TPA in its proposal to the hospital for linen and laundry services.

¹⁶ *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*).

¹⁷ *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al*, 2013 ONSC 7139 (Can LII) (*Miller Transit*).

¹⁸ *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, ONSC 1392 (Div. Ct.) (*Aecon*).

¹⁹ *Accenture Inc. v Ontario (IPC)*, 2016 ONSC 1616 (*Accenture*).

- v. The information at Issue in Record 1 is exactly the same as that included in the TPA's RFP response (Record 3); and
- vi. The TPA did not engage in any negotiations with the hospital prior to the execution of Record 1.
- vii. Nowhere in any of the records is there any suggestion or evidence that the hospital was attempting to negotiate with the TPA with respect to its response to the RFP (Record 3).

[32] The TPA states that for Record 2, each invoice contains a table with the following five columns:

- i. The number
- ii. Description of the item
- iii. The quantity of the item
- iv. The price (per item)
- v. The total cost per item (the item price x the quantity of the item)

[33] The TPA states that the information in columns (i), (ii) and (iv) is the same as some of that severed from Records 1, 3 and 4. The TPA submits, therefore, that the information in these columns in Record 2 was supplied by it to the hospital in response to the RFP.

[34] The TPA states that disclosure of the information in columns (iii) (quantity) and (v) (total cost) would reveal the price per item supplied by the TPA as one would simply have to divide the total cost by the number of items to calculate the unit price per item.

[35] The TPA relies on Orders MO-3693 and MO-3372 as examples of decisions where the adjudicator concluded that invoices had not been supplied. It states that these decisions were based on the principle that pricing information in an invoice that a third party provides to an institution cannot be considered to have been "supplied" by that third party if such information was mutually agreed upon and arises from a contract negotiated between the parties. As a result, the TPA submits that if the information at issue in Record 1 (the agreement) was supplied to the hospital, so too was the information at issue in the invoices (Record 2).

[36] The TPA states that the information in its RFP response (Record 3) was supplied by it to the hospital.

[37] The TPA also states that the information in the Bid Analysis (Record 4) is information extracted from its RFP response (Record 3). It states that its information in this record is included with that of another proponent for the hospital's comparison and analysis of the costs provided by both for the cost of linen rental. The TPA adds:

As can be seen, these dollar costs provided by the TPA in its RFP response [Record 3] are directly incorporated into Schedule 4 to Record 1, the agreement ultimately entered into between the hospital and the TPA as the successful proponent to the RFP.

[38] The requester states that Record 1, the service agreement between the hospital and the TPA, was not supplied. She refers to the IPC and the Divisional Court jurisprudence that found that the contents of a contract involving an institution and a third party are mutually generated and not "supplied" by the third party, even when the contract is preceded by little or no negotiation or discussion.²⁰

[39] The requester states that Record 1 arose in the context of an RFP by the hospital for laundry and linen services. She submits that many previous orders of the IPC have determined that contracts resulting from a bidder's proposal in an RFP process are considered negotiated and not "supplied", even if the information in the contracts was "simply directly copied from the proposal."²¹

[40] The requester states that the fact that some orders of the IPC have been regarding contracts between multiple parties or were of a complex nature is not central to the holding in those cases, as the IPC has also mandated disclosure of straightforward services or product agreements made between two parties.²² She specifically refers to three recent orders, Orders PO-3885, PO-3886, and PO-3887, where I ordered three hospitals to disclose their services agreements for linen and laundry services.

[41] Concerning any pricing information in Record 1, the requester submits that this is a contractual term subject to negotiation (whether actual or deemed) and entirely subject to change depending on the parties, services, and overall agreement.²³

[42] The requester submits that the invoices comprising Record 2 were not "supplied" by the TPA because the invoices are issued in accordance with the contractual arrangement between the hospital and the TPA.²⁴ She states:

²⁰ The requester relies on Orders PO-2755, PO-3264, PO-3311, (upheld in *Aecon*, cited above), and *Miller Transit*, cited above.

²¹ The requester relies on Orders MO-2435, MO-2494, P-1545, PO-2018 and PO-2435.

²² The requester relies on Orders MO-1706, MO-2494, PO-2018, and PO-2435.

²³ The requester relies on Order PO-2435.

²⁴ The requester relies on Orders MO-3372, MO-3258, MO-2115, PO-2806, and PO-3518.

It is presumably the pricing information and quantity of services sold in the invoices that the Third Party seeks to protect from disclosure, but this is precisely the type of information that the IPC has mandated should be disclosed. In Order PO-3845, Adjudicator Corban explained the underlying purpose supporting disclosure of invoices, asserting that "information regarding the amount of monies a government institution has contractually agreed to pay for a service should be available to the public."

[43] The requester states that to the extent the content of the successful RFP (Record 3) was incorporated into the ultimate contract between the TPA and the hospital, this information was mutually generated.²⁵

[44] With respect to Record 4, the bid analysis, the requester submits that this information relates to the hospital's assessment of the proposals and is not considered information that was "supplied" to the hospital.²⁶ Based on the chart in the TPA's submissions, the requester states that this analysis includes notes from the institution about the differences among proponents, which is the type of "scoring and evaluation information concerning the third parties' bids" that the IPC has determined is not "supplied."²⁷

[45] The requester states that previous orders of the IPC have found that bid information that is incorporated into a bid analysis document, including pricing information, is not "supplied" to institutions.²⁸ She submits that any pricing information in the TPA's bid which was used in the bid analysis became the essential terms of the negotiated agreement.²⁹

[46] In reply, the TPA states that in these appeals there is sworn evidence that no negotiations took place. Therefore, the requester must rely on orders, such as Order PO-2435, that unequivocally and broadly conclude that, in the context of an RFP, "information submitted by a bidder which is accepted and becomes a contract constitutes a negotiated agreement. It states that this broad finding is because "the acceptance or rejection of a consultant's bid in response to the RFP released by [the ministry] is a form of negotiation."

²⁵ The requester relies on Orders PO-2753 and PO-3638.

²⁶ The requester relies on Orders MO-3508 and PO-3418.

²⁷ The requester relies on Order MO-3508.

²⁸ The requester relies on Orders PO-2453 and PO_2753.

²⁹ The requester relies on Order PO-2435.

[47] The TPA states that it did not engage in negotiations with the hospital, with respect to pricing or otherwise.

Analysis/Findings re supplied

[48] 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.³⁰

[49] 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.³¹

[50] 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.³²

[51] 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.³³ 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.³⁴

[52] The TPA has not submitted that any of the records contain information that is subject to the "inferred disclosure" and "immutability" exceptions. Nor is such information apparent to me from my review of the records. Therefore, I find that these exceptions do not apply in these appeals.

³⁰ Order MO-1706.

³¹ Orders PO-2020 and PO-2043.

³² This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit*, cited above.

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

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

Record 1

[53] Concerning Record 1, I agree with the requester's submission that many previous orders of the IPC have determined that contracts resulting from a bidder's proposal in an RFP process are considered negotiated and not "supplied", even if the information in the contracts was "simply directly copied from the proposal."

[54] The information at issue in Record 1 is pricing information found at pages 15 to 16 of this record. The TPA submits that this information is exactly the same as that included in the TPA's response to the RFP at Record 3. The pricing information at issue in Record 1 is contained in one column (out of two columns) that takes up a little over one page. The pricing information at issue in Record 3 is contained in one column out of seven columns and takes up almost four pages. From my review of Records 1 and 3, I disagree with the TPA that the pricing information in Record 1, the agreement, was not negotiated because it is exactly the same as that in the TPA's bid at Record 3.

[55] I also reject the TPA's position that the agreement comprising Record 1 is distinguishable from those considered and found not to have been supplied by the Divisional Court in the *Boeing Co.*, *Miller Transit*, *Aecon* and *Accenture* decisions. I find that even if Record 1 is a simple services contract between the hospital and the TPA and the information in it was derived from the TPA's response to an RFP, it does not mean that the agreement was supplied rather than negotiated.

[56] In Orders PO-3885, PO-3886 and PO-3887, which involved three different hospitals, I found that the linen and laundry services agreements between a service provider and each of the hospitals were not supplied. In each of those cases, the third party appellant argued that the almost-identical services agreements were supplied because they were based on a template derived from a Master Services Agreement. As such, the third party appellant argued that these agreements were supplied, not negotiated. In those orders, I stated:

However, the fact that the terms of the Services Agreements do not significantly vary from hospital to hospital does not mean that each Services Agreement is not negotiated. As indicated in Order MO-1706:

[T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract

was "supplied" within the meaning of section 10(1).³⁵ The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.³⁶

I find that the hospital, as a member of the affected party and also in its own right as the defined customer in the Services Agreement between it and the affected party, would have had to agree to the terms of this agreement.

[57] I adopt this reasoning from Orders MO-1706, PO-3885, PO-3886 and PO-3887.

[58] Based on the contents of Record 1, I also disagree with the TPA that the hospital simply adopted its proposal without negotiation. This information at issue was part of a proposal made to the hospital, which the hospital had the option of accepting or not.

[59] Relying, in particular, on the findings set out above in Order MO-1706, and considering the contents of Record 1, I find that the information at issue in Record 1 was not supplied to the hospital.

[60] Therefore, I find that part 2 of the test under section 17(1) has not been met for Record 1, and I will order the information at issue in this record disclosed to the requester.

Record 2

[61] Record 2 consists of invoices that all post-date the agreement at Record 1. The TPA claims that the invoices as a whole are subject to section 17(1). Its position is that some of the information in the invoices is the same as that in Records 1, 3 and 4, and that all of the information in the invoices would reveal the TPA's prices.

[62] I found above that the TPA's agreed-upon prices in Record 1 were not supplied to the hospital. Therefore, I find that the prices in the invoices, and any other information in the invoices that may reveal the TPA's prices charged to the hospital, arise from the agreed-upon terms of Record 1 and were also not supplied to the hospital by the TPA. I make this finding for the same reasons set out for the pricing

³⁵ Section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* is the municipal equivalent to section 17(1) of *FIPPA*.

³⁶ This approach was upheld in *Boeing v. Ontario (Ministry of Economic Development and Trade)* Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

information in Record 1, namely that this information is not the same as that in the TPA's proposal, and, in any event, this information is considered to have been negotiated between the hospital and TPA.

[63] I rely, in particular, on the findings in Order MO-3372, where Adjudicator Colin Bhattacharjee discussed the application of the supplied test to invoices sent to an institution by a third party for services rendered by the third party. He stated:

IPC orders have found that pricing information in an invoice that a third party provides to an institution cannot be considered to have been "supplied" by that third party if such information was mutually agreed upon and arises from a contract negotiated between the parties.³⁷ For example, in Order PO-2806, one of the records before the adjudicator was an invoice that a third party submitted to Ontario Power Generation (OPG), which contained several pieces of information, including a unit price and total payment for the removal by the third party of each tonne of a particular by-product from OPG's Lambton facility. Adjudicator Daphne Loukidelis found this information was not "supplied" for the purposes of part 2 of the test for section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to section 10(1)). She stated:

As regards the withheld price per metric tonne contained in the second affected party's invoice, I also find that it represents a mutually-agreed upon unit price for the removal of each tonne of that particular by-product from OPG's Lambton facility, which is not "supplied."

In my view, the dollar figures mentioned above simply represent calculations arising from negotiated commercial arrangements between OPG and the affected parties. Past orders have established that where an institution has the option to accept or reject a third party's bid or pricing, it cannot argue that the pricing information was "supplied" to it by the third party. In this appeal, there is no evidence to suggest circumstances where OPG was unable to accept or reject the affected parties' unit prices or the terms of its pricing, more generally, for the provision of the removal services. As previously recognized by this office, the

³⁷ See Orders PO-2806, MO-3258 and PO-3638.

option to do so is itself a "form of negotiation" [Orders PO-2435 and PO-2632]. Accordingly, I find that the remaining payment amounts in the spreadsheets and the unit price given on the invoice are not "supplied" for the purposes of part 2 of section 17(1).

From this finding, it follows that the withheld amount of sales tax and the total for the removal of the specific by-product contained in the second affected party's invoice also does not qualify as "supplied." . . .

Adjudicator Diane Smith reached a similar conclusion in Order MO-3258, where the information sought by the appellant included unit prices and quantities of goods and services contained on invoices that a third party submitted to the City of Sudbury for carrying out water and wastewater emergency repairs. Adjudicator Smith followed the reasoning in Order PO-2806 and found that this information was not "supplied" for the purposes of part 2 of the test for section 10(1). She stated:

I also find that the information at issue in the invoices, namely the unit prices and quantity of goods or services sold to the city by the affected party, which information is used to calculate the amount owed by the city to the affected party, simply represent calculations arising from negotiated commercial arrangements between the city and the affected party. Therefore, I find that the information at issue in the invoices was not supplied by the affected party to the city.

Accordingly, I find that none of the information at issue in the records was supplied by the affected party to the city and that part 2 of the test under section 10(1) has not been met. Since all three parts of the test under section 10(1) must be met to find the information exempt under that exemption, I will order the information at issue in the records disclosed to the appellant.

I agree with the reasoning in Orders PO-2806 and MO-3258 and find that it applies to the specific pricing information in the invoices. In my view, the specific type of waste collection service that the waste management company provided to the city and the unit price for each service would have been mutually agreed upon under the negotiated contract between the city and the company. Although the quantity for each specific service provided and the calculated total dollar amount that the company charged for each specific service in the invoices might vary over time, they are undoubtedly derived and arise from commercial and financial terms that were mutually agreed upon in the contract that was negotiated. I find, therefore, that the specific pricing information in these invoices was

mutually generated by the parties rather than "supplied" by the company for the purposes of section 10(1).

[64] Relying on the findings in Order MO-3372 and the orders referred to therein, I find that the invoices were not supplied to the hospital by the TPA for the purpose of part 2 of the test for exemption under section 17(1). The linen and laundry services that the TPA provided to the hospital and the unit price for each service would have been mutually agreed upon under the negotiated contract between the hospital and the TPA.

[65] As was the case in Order MO-3372, the quantity for each specific service provided, and the calculated total dollar amount that the TPA charged, is derived and arises from the mutually agreed upon commercial and financial terms of the negotiated agreement that is Record 1.

[66] Therefore, as the information at issue in Record 2 was not supplied, it does not meet part 2 of the test under section 17(1), and I will order it disclosed.

Record 3

[67] Record 3 is the TPA's winning submission made in response to the hospital's RFP. I find that the information at issue in this record was supplied, in confidence, by the appellant to the hospital. All of the information contained in the submission originated with the TPA who provided the information to the hospital for the purpose of securing the contract for the work sought through the RFP.

[68] In Order MO-3799, Adjudicator Catherine Corban reviewed the IPC's approach to the application of the supplied test in section 17(1) to RFPs. She stated:

The IPC has previously considered the application of section 10(1),³⁸ or its provincial equivalent,³⁹ to winning RFP proposals. Although this office has found, in some circumstances, where a successful proposal becomes the contract between an institution and a third party, it is considered to have been "mutually generated" rather than supplied,⁴⁰ more recent orders

³⁸ This section is the municipal equivalent to Section 17(1) of the *Freedom of Information and Protection of Privacy Act*.

³⁹ Section 17(1) of the *Freedom of Information and Protection of Privacy Act*.

⁴⁰ See, for example, Order MO-2053.

have considered and rejected similar arguments when dealing with winning RFP proposals.⁴¹

In particular, in Order MO-3058-F, Assistant Commissioner Sherry Liang discussed the IPC's consideration of winning proposals when considering records similar to those at issue in this appeal. In that order, the Assistant Commissioner acknowledged that in past orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied" when the terms of the proposal were incorporated into the contract between a third party and an institution. However, discussing the specific winning proposal that was before her, she determined that the circumstances could be distinguished. She stated that although some of the terms proposed by the winning bidder might have been included in the resulting contract, the "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."

I agree with the reasoning expressed by the Assistant Commissioner in Order MO-3058-F and adopt it for the purposes of this appeal to find that the proposal was supplied to the TCHC within the meaning of part 2 of the section 10(1) test. As was the case in Order MO-3058-F, the record at issue in this appeal is also a winning proposal and I have no evidence before me that it formed part of the contract between the appellant and the TCHC.

[69] I also agree with the reasoning expressed by the Assistant Commissioner in Order MO-3058-F and adopt it for the purposes of these appeals to find that Record 3 was supplied to the hospital within the meaning of part 2 of the section 17(1) test. As was the case in Orders MO-3058-F and MO-3799, Record 3 is also a winning RFP proposal. As I am ordering disclosure of the agreement between the TPA and the hospital, Record 1, it is unnecessary for me to consider whether the information at issue in Record 3 is also contained in Record 1.

[70] I will consider whether the information at issue in Record 3 was supplied in confidence to the hospital, below.

Record 4

[71] Record 4 is the hospital's Bid Analysis. It contains a comparison of the TPA's

⁴¹ See, for example, Orders MO-3058-F, MO-3080-I, MO-3282, and MO-3705.

linen rental costs to those of the other proponent that provided a proposal in response to the hospital's RFP.

[72] Only the TPA's charges to the hospital for the rental of certain linen items are at issue. The information in Record 4 would have been extracted from the TPA's proposal (Record 3).

[73] As stated, this record contains a listing of the TPA's and the other proponent's pricing. The information in Record 4 is a straight comparison of the two proponents' pricing and does not contain scoring or evaluative analysis. I note that the pricing information in this record and in Record 3 is different from that in the agreement at Record 1. Therefore, I find that the information about the TPA's pricing at issue in Record 4 was supplied by the TPA.

[74] I will now consider whether the information at issue in Records 3 and 4 was supplied in confidence to the hospital.

In confidence

Representations

[75] The hospital submits that there was an explicit expectation of confidentiality around Record 3, as per section 11.3.1(b) of the published RFP, which states as follows:

All correspondence, documentation and other information furnished in connection with the RFP:

must be treated as confidential.

[76] The hospital states that Record 4 is dated 2011, prior to *FIPPA* applying to hospitals (i.e. January of 2012). It submits, therefore, that there was, reasonably, a heightened expectation of confidentiality around the process at that time.

[77] The TPA submits that it supplied the information at issue to the hospital with a reasonable expectation of confidentiality for the following reasons:

- i. it has (and will continue to) consistently treated information about its pricing related to the provision of linen and laundry services as confidential;
- ii. such information is only used internally within the company to prepare its proposals to potential clients, such as the Hospital;
- iii. the information is not otherwise disclosed; nor is it available from sources to which the public has access;
- iv. it was communicated to the hospital on the basis that it was confidential and that it was to be kept confidential; and

- v. given that it was provided to the hospital for the purposes of submitting a proposal, the TPA held and continues to hold both an implicit and explicit expectation of the maintenance of the confidentiality of the information.

[78] The TPA refers to section 14.0 of Record 1, which reads:

The Client [the Hospital] shall not knowingly disclose any information of a proprietary nature concerning [the TPA] including its methods, systems, and business practices or **pricing arrangements**. Notwithstanding, [the TPA] understands that the Client operates within a legislative framework in which reporting and accountability to government exist and that the Client has the responsibility to conduct business in an open manner through public hearings, meetings and other means. (Emphasis added by the TPA)

[79] The TPA states that it is clear that its pricing arrangements were specifically identified by the hospital as being recognized as the TPA's "proprietary information."

[80] The requester states that in the absence of explicit language, when a notice provision is present, the onus has been found to rest on the individual bidders to identify the components of their submission that contain information they wish to remain in confidence, which the TPA did not.⁴²

[81] The requester points out that in section 14.0 (above), the hospital's commitment to preserving proprietary information as confidential is followed by a notwithstanding clause in which the hospital subjects that commitment to its legal disclosure obligations. She states that the information may only be kept confidential if it is exempt from the hospital's disclosure obligations under *FIPPA*. She states:

More specifically, the TPA did not have a reasonable expectation of confidentiality with respect to general information about the company's services or operations that were included in its bid proposal.⁴³

Since ...the TPA did not have a reasonable expectation of confidentiality with respect to Record 3, the TPA's RFP submission, it follows that the TPA could not have a reasonable expectation of confidentiality in the hospital's analysis and evaluation at Record 4 ...of its proposal.

⁴² The requester relies on Order PO-3311.

⁴³ The requester relies on Order PO-3638.

[82] The TPA provided both confidential and non-confidential reply representations.

[83] In its non-confidential representation, the TPA submits that if the existence of a reference to an institution being subject to *FIPPA* were to always be interpreted, despite evidence to the contrary, as meaning that a third party held no reasonable expectation of confidentiality, there would be no practical purpose served by the notification requirements of third parties in section 28 of the *Act*.

Analysis/Findings

[84] In order to satisfy the "in confidence" component of part two of the section 17(1) test, 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.⁴⁴

[85] 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
- prepared for a purpose that would not entail disclosure.⁴⁵

[86] Record 3 is the TPA's RFP proposal. In Order MO-3058-F, Assistant Commissioner Liang accepted that a winning RFP proposal was supplied in confidence by the third party. She stated that:

I am therefore satisfied that the information in the winning proposal, as well as information in the evaluation records that is derived from all the affected parties' proposals, was supplied to the town within the meaning of section 10(1). I am also satisfied that it was supplied with a reasonably held expectation of confidentiality. As the parties have noted, the

⁴⁴ Order PO-2020.

⁴⁵ 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.

confidentiality provision in the Request for Proposal states that it is subject to the *Act*. Given that the *Act* explicitly protects the confidential informational assets of third parties, this reference does not negate the expectation of confidentiality regarding the proponents' RFP proposals. It is an expression of the town's intent to maintain the confidentiality of the proposals, and it is reasonable for the affected parties to rely on it.

Although I accept that, in general, the proposals were submitted with a reasonably held expectation of confidentiality, I also acknowledge that the winning proposal contains elements which are not inherently confidential. Some of this is in the nature of promotional material, similar to that found on its own website. In fact, the town decided to disclose this material, and the winning bidder does not oppose that decision.

My finding on confidentiality therefore applies only to the parts of the proposal and the evaluation materials that remain at issue, containing commercial information of the proponents.

[87] I adopt these findings from Order MO-3058-F for the winning proposal at Record 3 and the pricing information derived from the winning proposal in Record 4.

[88] The information at issue in Record 3 is information that is inherently confidential and is not information that could be considered promotional information found on its website. The information at issue is detailed information related to how the TPA intends to fulfill its contract with the hospital, should it be awarded the same.

[89] I accept that the TPA had an implicit expectation of confidentiality with respect to the information at issue in its RFP proposal in Record 3 and in the information at issue in Record 4, which was derived from Record 3. I accept that it communicated the information at issue to the hospital on the basis that it was confidential and was to be kept confidential. I also accept that the information was treated by the TPA in a manner that indicates a concern for its confidentiality.

[90] As the information at issue in Records 3 and 4 meet part 2 of the test, I will now consider whether this information also meets part 3 of the test under section 17(1).

Part 3: does the prospect of disclosure of the information at issue in Records 3 and 4 give rise to a reasonable expectation that one of the harms specified in section 17(1) will occur?

Representations

[91] The hospital submits that the information could be used by a competitor to "jump start" their business, and put them in a much more competitive position relative to the TPA, from whom the information would have been "harvested."

[92] The TPA states that it is a large linen processor and has operated as such for

more than 30 years.⁴⁶ It provided detailed confidential representations as to why disclosure of its pricing information could lead to the harms specified by sections 17(1)(a) and (c); specifically, that under these exemptions disclosure could reasonably be expected to:

- prejudice significantly its competitive position,
- interfere significantly with the contractual or other negotiations with other government institutions, or
- result in undue loss to it or undue gain to its competitors.

[93] The requester submits that both the hospital's and the non-confidential portions of the TPA's submissions it was provided with are general in nature and do not meet the harms test in part 3. Concerning the TPA's submissions, the requester states:

...the IPC has determined that being subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice a third party's competitive position or result in undue loss to them, as required by section 17.⁴⁷ Further, a finding that information contained in a bid is several years old has also been found to undermine a determination that the harm step is satisfied.⁴⁸ And finally, in the IPC's recent case mandating disclosure of documents related to a linen and laundry services agreement of Lakeridge Hospital, the IPC found that disclosure of the third party's slide deck presentation which contained information about the services agreement could not reasonably be expected to result in the harms claimed by the third party.⁴⁹

... the identity of the person seeking access to information is not generally considered to be a relevant factor in determining whether documents must be disclosed under *FIPPA*.⁵⁰ In the IPC's recent orders mandating disclosure of three hospitals' linen and laundry services agreements, the

⁴⁶ The TPA provided both confidential and non-confidential representations on this issue. I will be referring only to the non-confidential representations in this order, although I considered all of the TPA's representations.

⁴⁷ Order PO-2435.

⁴⁸ Orders MO-2093 and MO-2072.

⁴⁹ Order PO-3885.

⁵⁰ *Bricklayers and Stonemasons Union Local 2 v Information and Privacy Commissioner of Ontario and Canadian Bricklayers and Allied Craft Unions Members v Information and Privacy Commissioner of Ontario (Bricklayers)* 2016 ONSC 3821.

identity of the requestor was not considered and it should not be considered here.⁵¹

[94] In reply, the TPA submits, relying on *Bricklayers*, that the identity of the person seeking access to the information is a contextual factor that assists in considering the extent of the risk that the harms alleged will materialize. It states that in that case, the alleged harms were relevant only because of the identities of the requester and an affected party.

[95] The TPA states that it assumes that in Orders PO-3885, PO-3886 and PO-3887, where disclosure of three hospitals' linen and laundry services agreements was ordered, the identity of the requester was not considered because the third party appellants did not raise it as a consideration that impacted its arguments on the "harms" issue.

[96] In sur-reply, the requester states that the TPA has offered no explanation why this case qualifies as having the "unusual circumstances" referred to in *Bricklayers* in which the IPC should consider who the requester is in assessing the harm. She submits that the IPC should apply its general approach that the identity of the requester is not relevant.

Analysis/Findings

[97] The party resisting disclosure must provide detailed 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.⁵²

[98] The failure of a party resisting disclosure to provide detailed 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*.⁵³

[99] The TPA provided detailed evidence about the highly competitive linen and laundry services industry, particularly as it pertains to the markets it competes in for

⁵¹ Orders PO-3885, PO-3886, and PO-3887.

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

⁵³ Order PO-2435.

business. Although the actual identity of the requester may not be relevant in an access request, in considering the application of sections 17(1)(a) and (c) to the records in these appeals, the ability of the TPA's competitors and customers to have to access to the requested information is relevant.

[100] The TPA did not provide specific representations on part 3 of the test in relation to the information at issue in the records. The only specific information in its part 3 representations appears to me to focus on pricing information.

[101] I have considered the specific portions of Records 3 and 4 that would reveal the TPA's pricing-related information. For the information identified by the TPA as being at issue in Record 3, this information is found at various portions of this record. For Record 4, the entirety of the information at issue in this record is price-related.

[102] I find that the pricing-related information in the portions of Records 3 and 4 at issue meets part 3 of the test under sections 17(1)(a) and (c). I find that this information, combined with disclosure of the actual terms of the agreement entered into with the TPA (Record 1), could provide information to the TPA's competitors and its other customers as to the rate structure under which the TPA is willing to offer its services and the price differential range it is prepared to accept.

[103] I also agree with the hospital that the non-pricing information identified by the TPA as being subject to section 17(1) in its RFP response in Record 3 would be valuable to the TPA's competitors, allowing the newcomer to get a "head start" in their efforts, by modelling their operations on details found in this record. This information reveals the details of the TPA's proposed approach to the project. This information is unique to the TPA, was developed for the purpose of this particular project (based on its experience and expertise) and is not publicly known.⁵⁴ It is specific detailed information of the TPA related to its operations and how these operations can be tailored to provide linen and laundry services to the hospital.

[104] Therefore, I am satisfied that the information at issue in Records 3 and 4, if disclosed, could reasonably be expected to be used to the advantage of the TPA's competitors and disadvantage of the TPA. Disclosure could therefore reasonably be expected to result in significant prejudice to the TPA's competitive position, and result in undue loss to it with corresponding undue gain to its competitors, for the purpose of sections 17(1)(a) and 17(1)(c).

[105] Accordingly, I find that the information in Records 3 and 4 that was identified by

⁵⁴ See Order MO-3058-F.

the TPA as being subject to its concern about disclosure meets part 3 of the test and is exempt under section 17(1). This information is identified above in the index of records.

[106] I will order disclosure of the remaining information in Records 3 and 4, except for the following:

- The employment history of the TPA's employees found at page 18 of Record 3 withheld under section 21(1), which the requester is not interested in receiving access to; and,
- Information about linen and laundry suppliers other than the TPA in Record 4, which is not responsive to the request.⁵⁵

ORDER:

1. I order the hospital to:

- withhold Records 3 to 5, in part; and,
- to disclose the remaining information in Records 1 to 5.

With a separate cover letter dated July 31, 2020, I will courier the hospital a highlighted copy of the information in Records 3 to 5 that is not to be disclosed from the records. The hospital is to disclose the non-highlighted information in Records 1 to 5 to the requester by **September 9, 2020** but not before **August 31, 2020**.

2. The timeline noted in order provision number 1 may be extended if the hospital is unable to comply in light of the current COVID-19 situation. I remain seized of the appeals to address any such requests.

Original Signed by: _____

Diane Smith
Adjudicator

July 29, 2020

⁵⁵ Similarly, the information of other suppliers in Record 5 is not responsive to the request and will not be ordered disclosed.