Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3598

Appeals PA14-366 and PA14-496

Ryerson University

April 19, 2016

Summary: The university received a request under the *Act* for an agreement between it and a bank relating to the issuance of university-branded credit cards. The university granted partial access to the agreement, withholding some information in reliance on the exemption for third party information at section 17(1) of the *Act*. Both the requester and the bank appealed the university's decision, with the requester arguing that none of the agreement is exempt under section 17(1) and the bank arguing that the entire agreement is exempt under section 17(1). In this order, the adjudicator finds that none of the information in the agreement was "supplied" to the university and, therefore, section 17(1) does not apply. She orders the university to disclose the agreement in its entirety to the requester.

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

Orders Considered: Orders P-1545, PO-2018, PO-2384, PO-3032 and PO-3364.

Cases Considered: *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner*), 2014 ABCA 231; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII); *R. v. Daoust*, [2004] S.C.J. No. 7; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (Ont. Div. Ct.); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII).

BACKGROUND:

[1] These appeals arise out of a request made to Ryerson University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> Ryerson's contractual agreement with [a named financial institution] including information pertaining to Ryerson's earnings per credit card sign up, if any.

[2] The university identified one record responsive to the request, the First Amended and Restated Affinity Agreement (the agreement), and notified the named financial institution (the bank) to seek its views on the disclosure of the agreement. The bank objected to disclosure, arguing that the agreement is exempt from disclosure pursuant to the exemption for third party information under section 17(1) of the *Act*.

[3] The university then issued a decision granting access to the agreement and Schedule A, but denying access to Schedule B, citing sections 17(1)(a) and 17(1)(c) of the *Act* as the basis for that denial. However, the university did not release any of the agreement, pending any appeal by the bank within the 30-day appeal period.

[4] Both the bank and the requester appealed the university's decision. The bank appealed the university's decision to grant the requester access to the agreement and Schedule A (Appeal PA14-366), while the requester appealed the university's decision to deny access to Schedule B (Appeal PA14-496).

[5] As mediation did not resolve the appeals, they were moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act.* I issued Notices of Inquiry and sought representations from the requester, the bank and the university. Only the bank filed representations.

[6] In this order, I find that section 17(1) does not apply to any of the agreement. As a result, I uphold the university's decision, in part, and order it to disclose the entire agreement to the requester.

RECORD:

[7] The record at issue is the First Amended and Restated Affinity Agreement, including Schedules A and B (the agreement).

DISCUSSION:

[8] The sole issue in this appeal is whether the mandatory exemption for third party

information found in section 17(1) of the *Act* applies to the agreement.

[9] The bank relies on sections 17(1)(a) and (c) of the *Act*, which state:

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

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

[11] Previous orders of this office have found that for section 17(1) to apply, the party resisting disclosure 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;

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.

[12] The bank submits that the agreement should be withheld in its entirety. It submits that the agreement contains commercial and financial information that it supplied to the university in confidence (or that the "supplied" requirement is a misinterpretation of the *Act*), and that the prospect of the agreement's disclosure gives rise to a reasonable expectation that the harms listed in sections 17(1)(a) and (c) will occur.

---

[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[13] I will refer in more detail to the bank's representations on each element of the three-part test below.

Part 1: type of information

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

> *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.[3]
>
> *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.[4]

[15] The bank submits that the agreement as a whole relates to the buying, selling, and exchange of financial services between it and the university. In particular, the agreement outlines the terms of the bank's provision of an exclusive affinity arrangement for the issuance of university-branded credit cards. In addition, the bank submits that the agreement provides a window into fundamental aspects of the bank's credit card business operations, which is inherently commercial information. Finally, the bank submits that the terms of the agreement also include provisions relating to payments between the parties, which constitute financial information.

[16] Having reviewed the bank's representations and the agreement itself, I find that the entire agreement pertains to a commercial arrangement between the bank and the university with respect to the issuance of university-branded credit cards. I find, therefore, that the entire agreement constitutes commercial information.

Part 2: supplied in confidence

[17] 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.[5] 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

---

[3] Order PO-2010.
[4] Order PO-2010.
[5] Order MO-1706.

inferences with respect to information supplied by a third party.[6]

[18] 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.[7]

[19] 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 the making of accurate inferences with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[8] The "immutability" exception applies where a contract contains information supplied by a third party that is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[9]

[20] The bank has summarized its position on the "supplied" requirement as follows:

> The most significant issue in this appeal is whether the information in the Agreement was "supplied" to Ryerson by [the bank]; a technical matter that has been treated as a precondition for the s. 17 exemption to apply. Pursuant to s. 17 of the *Act,* the Agreement cannot be disclosed, notwithstanding the requirement that it be "supplied", for four reasons:
>
> First, the Agreement falls under the "inferred disclosure" exception. The terms of [the bank's] affinity agreements are unique and commercially valuable. The disclosure of the Agreement would allow individuals to determine the terms of those affinity agreements in general, revealing an important piece of commercial information and destroying the value of this "informational asset".
>
> Second, the "immutable information" exception or a modified form consistent with *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner*)[10] applies. The structure of [the bank's] affinity agreements

---

[6] Orders PO-2020 and PO-2043.
[7] 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*).
[8] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[9] *Miller Transit*, cited above at para. 34.
[10] 2014 ABCA 231 (*Imperial Oil*).

> is functionally immutable. It is the unique contractual structure of the affinity agreement that has led [the bank] to be particularly successful in entering such relationships with institutions such as Ryerson. In practice, therefore, the structure of the Agreement is not subject to substantial changes, in substance or in form, during negotiations, as doing so would defeat its unique nature. The Alberta Court of Appeal in *Imperial Oil* recently held that third party confidential information contained in a contract did not lose its protected status because it was negotiated. "Supplied" relates to the source of the information.
>
> Third, if the Agreement does not fit within the "inferred disclosure" or "immutable information" exceptions, a new exception should be recognized to protect structural contractual information. In light of the purposes of the *Act* explained in *Merck Frosst*,[11] a contract, the structure of which is itself an informational asset, should be protected by s. 17.
>
> Fourth, the "supplied" requirement … under s. 17 is a misinterpretation of the *Act.* Information need not have been "supplied" by a third party in order to be protected from disclosure under the *Act.* The French language version of the *Act,* which is equally authoritative, *does not* require confidential information to have been "supplied" by a third party in order to prevent disclosure under s. 17. Decisions to the contrary misinterpreted the *Act* by referring only to the English language version. As such, the description of the law concerning the "supplied" requirement in the Notices of Inquiry (part 2) is we submit incorrect.

[21] I will address each of the bank's arguments in turn, albeit in a different order. I begin by addressing the bank's argument that the "supplied" argument is a misinterpretation of the *Act*.

Is the "supplied" requirement a misinterpretation of the Act?

Representations

[22] The bank submits that while numerous decisions have applied the requirement that information must be "supplied" by a third party before it can be exempt from disclosure under section 17(1) of the *Act,* that requirement is a misinterpretation of the *Act.*

[23] The bank submits that in Ontario, legislation must be enacted in both English and French, and neither version trumps the other. Instead, courts are obligated to read and rely on both versions and must search for a shared meaning that is consistent with

---

[11] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII) (*Merck*).

the context of the legislation and legislative intent. The French version of section 17(1) reads as follows:

> Renseignements de tiers
>
> 17. (1) La personne responsable refuse de divulguer un document qui révèle un secret industriel ou des renseignements d'ordre scientifique, technique, commercial, financier ou qui ont trait aux relations de travail, dont le caractère confidentiel est implicite ou explicite, s'il est raisonnable de s'attendre à ce que la divulgation ait pour effet, selon le cas :
>
> a) de nuire gravement à la situation concurrentielle ou d'entraver gravement les négociations contractuelles ou autres d'une personne, d'un groupe de personnes ou d'une organisation;
>
> b) d'interrompre la communication de renseignements semblables à l'institution, alors qu'il serait dans l'intérêt public que cette communication se poursuive;
>
> c) de causer des pertes ou des profits indus à une personne, un groupe de personnes, un comité, une institution ou un organisme financiers;
>
> d) de divulguer des renseignements fournis à un conciliateur, un médiateur, un agent des relations de travail ou une autre personne nommée pour régler un conflit de relations de travail, ou de divulguer le rapport de l'une de ces personnes.

[24] The bank submits that the French version of the statute contains no indication that the third party information must be "supplied", and further submits that it cannot be right that the narrow, technical meaning that has been applied to the word "supplied" in the case law is the correct interpretation of the statute when that concept does not exist in the French language version. It submits that the omission of a concept of "supplied" in the French language version indicates that it is the confidential character of the information that is relevant.

[25] The bank submits, further, that if the legislature had intended not to extend the protection of section 17 to valuable commercial or financial information, simply because that information is embodied in a negotiated document, it would surely have said so, clearly and in both languages. As such, the bank submits that the description of the law concerning the "supplied" requirement in the Notices of Inquiry (that description of the law also appears on page 5 of this order) is incorrect. It submits that that the interpretation given to the word "supplied" by the Alberta Court of Appeal in *Imperial*

Oil is more consistent with the concept expressed in both official languages to the effect that what is protected is third party confidential information.

Discussion and findings

[26] Both language versions of a bilingual statute are authoritative expressions of the law, and neither enjoys priority over the other. This is known as the equal authenticity rule.[12]

[27] The basic rule governing the interpretation of bilingual legislation is known as the shared meaning rule. In the Supreme Court of Canada's ruling in *R. v. Daoust*,[13] Bastarache J., as he then was, wrote:

> We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning"… If there is ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions… The common meaning is the version that is plain and not ambiguous…

[28] The Supreme Court has also held that, where one version is broader than the other, the shared meaning would favour the more restricted or limited meaning.[14]

[29] The shared meaning must also be tested against other indicators of legislative intent, and the presumption in favour of shared meaning is rebutted where the shared meaning is not an accurate expression of the legislature's intent.[15] This intent can be inferred from reading the legislation in context having regard to the purpose and scheme of the legislation.[16]

[30] An argument similar to the bank's argument in this appeal was made in *Canadian Medical Protective Association v. Loukidelis*.[17] In that case, it was argued before the Divisional Court that the adjudicator had placed excessive emphasis on the word "supplied" as it appears in section 17(1) and had erred in not considering that the French language version of the statute has no equivalent to "supplied". In rejecting that argument, the Court stated:

---

[12] *Canada (Attorney General) v. Mossop*, [1992], S.C.J. No. 20.
[13] [2004] S.C.J. No. 7 (*R. v. Daoust*).
[14] See *Schreiber v. Canada (Attorney General)*, [2004] S.C.J. No. 7 (*Schreiber*); *R. v. Daoust,* cited above.
[15] *R. v. Compagnie Immobilière BCN Ltée*, [1979] S.C.J. No. 13.
[16] R. Sullivan, *Sullivan on the Construction of Statutes, Fifth Edition*, (Markham: LexisNexis Canada Inc., 2008) at 119-121.
[17] 2008 CanLII 45005 (Ont. Div. Ct.).

> The CMPA's submission regarding the French language version of a statute was not put before the Adjudicator and, therefore, the CMPA should not be permitted to raise a new interpretative argument at this stage. In any event, the French version of s. 17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s. 17(1) incorporates the idea that the exemption is designed to protect information "received from" third parties, a notion that conforms with the concept of "supplied". Thus, the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.

[31] The bank appears to argue that the Divisional Court's comments on the relationship between the English and French statutes are *obiter* and therefore not binding on me. Even if that is the case, I agree with the Court's comments for the following reasons.

[32] First, I find that the "supplied" requirement represents a shared meaning between the English and French versions of section 17(1). I agree with the Divisional Court that the French version of section 17(1) can be interpreted in such a way as to incorporate the idea that the exemption is designed to protect information received from third parties. Although the opening words of the French version of section 17(1) do not contain the French word for "supplied", I note that section 17(1)(b) uses the phrase "la communication de renseignements semblables à l'institution" and section 17(1)(d) uses the phrase "des renseignements fournis à un conciliateur, un médiateur, un agent". Both of these phrases imply a concept of information being supplied to an institution. I disagree with the bank, therefore, that the concept of "supplied" is absent in the French language version of section 17(1).

[33] In any event, even if the French version of section 17(1) does not imply a concept of information being "supplied", it is, at the very least, ambiguous on that point, in which case the English version prevails, because the English version is unambiguous in requiring that information be "supplied". The Supreme Court held in *R. v. Daoust*[18] that the common (i.e. shared) meaning is the version that is plain and not ambiguous.

[34] Additionally, where one version of legislation is broader than the other, the shared meaning favours the more restricted or limited meaning.[19] If the French version of section 17(1) is read as not requiring that information be "supplied", then the English version is narrower than the French because it provides that the exemption is available only where information has been "supplied".

---

[18] [2004] S.C.J. No. 7.
[19] See *Schreiber*, cited above, and *Daoust,* cited above.

[35] I also find that the "supplied" requirement is in keeping with the legislature's intent. The purposes of the *Act* are set out in section 1 as follows:

> The purposes of this Act are,
>
> > (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
> >
> > > (i) information should be available to the public,
> > >
> > > (ii) necessary exemptions from the right of access should be limited and specific, and
> > >
> > > (iii) decisions on the disclosure of government information should be reviewed independently of government; and
> >
> > (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.[20]

[36] I find that this office's interpretation of the "supplied" requirement in section 17(1) is consistent with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. It is also consistent with the Divisional Court's recognition that accountability for expenditures of public funds requires access to information in contracts entered into by government institutions.[21]

[37] I also disagree with the bank that the Alberta Court of Appeal's interpretation of "supplied" in *Imperial Oil* differs from the interpretation of that term in previous orders of this office. I address *Imperial Oil* in more detail in my discussion of the "inferred disclosure" exception, below. In any event, decisions of the Alberta Court of Appeal are not binding on this office.

---

[20] The French version reads:

> La présente loi a pour objets :
>
> a) de procurer un droit d'accès à l'information régie par une institution conformément aux principes suivants :
>
> > (i) l'information doit être accessible au public,
> >
> > (ii) les exceptions au droit d'accès doivent être limitées et précises,
> >
> > (iii) les décisions relatives à la divulgation de l'information ayant trait au gouvernement devraient faire l'objet d'un examen indépendant du gouvernement;
>
> b) de protéger la vie privée des particuliers que concernent les renseignements personnels détenus par une institution et accorder à ces particuliers un droit d'accès à ces renseignements

[21] *Miller Transit,* cited above at para 44.

[38] I conclude, therefore, that the "supplied" requirement in section 17(1) is not a misinterpretation of the *Act*. My finding is consistent with previous orders of this office that have considered similar arguments, such as Orders PO-3032 and PO-3364.

Does the "inferred disclosure" exception apply?

Representations

[39] As noted above, 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.[22] The bank submits that the information contained in the agreement allows inferences to be drawn about the bank's standard affinity agreements. It submits that the content of its original proposed affinity agreement is indisputably information that was "supplied" to the university in the course of their negotiations. It submits that even if the final agreement was not "supplied" because it was nominally the subject of negotiation, the original draft was clearly not a mutual work product and was a piece of information supplied to the university.

[40] The bank submits that its affinity contract structure, acquired through its purchase of another banking institution, is a commercially valuable piece of information that competitors have been unable to replicate. It submits that even if the agreement is nominally modified from the draft agreement, and is therefore not treated as "supplied", it clearly allows significant inferences to be drawn about the original draft agreement or template structure on which it is based. The bank points out that, as can be seen from a comparison of the agreement and the draft affinity agreement provided to the university, the agreement is substantially similar to the standard draft agreement used by the bank in a large number of similar relationships. It submits that the structure is unchanged while the details of some terms were modestly negotiated. It submits that, on the basis of the agreement, the overwhelming majority of terms contained in its standard agreements could be discerned.

[41] The bank also argues that if a recipe or a computer program were sold to a government client, it would be illogical if the theoretical possibility of minor adjustments by the client would be sufficient to conclude that the program or design as a whole was not "supplied" to the client, and therefore was subject to disclosure. It submits that the same logic should apply to a contract. It relies on the Supreme Court's decision in *Merck*, where the Court found that it is the content, not the form, of information that is relevant.

[42] The bank submits that the structure of the contract is, for all intents and

---

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

purposes, a "trade secret" and the fact that the secret is embodied in a contract, rather than another form, should not alter its treatment. In this regard, it relies on the following quote from the Alberta Court of Appeal's decision in *Imperial Oil*:

> ...If Imperial Oil supplied protected financial, scientific and technical information to Alberta Environment in order to enable the negotiations of the Remediation Agreement, that information would still be "supplied" and therefore protected. "Supplied" relates to the source of the information, and whether information was "supplied" does not depend on the use that is made of it once it is received. If the disclosure of the Remediation Agreement "would reveal" that protected information then non-disclosure is mandatory under s. 16. To suggest that information loses its protection just because it ends up "in an agreement that has been negotiated" is not one that is available on the facts and the law.

Discussion and findings

[43] In Order PO-2018, Assistant Commissioner Sherry Liang addressed a similar argument that, even if information in a contract was not "supplied", its disclosure would reveal the information supplied by the third party in its proposal to the Management Board Secretariat. Assistant Commissioner Liang, in rejecting this argument, stated as follows:

> MBS expresses a concern that even if the information in Articles 8.5(d), 12.1(a) and (c) is found not to have been "supplied" by the affected party, the disclosure of these terms would result in revealing information supplied confidentially to MBS during the RFP process. MBS submits that a comparison of the terms of the pro-forma agreement against the terms of the final agreement would allow the requester to determine substantially all of the information in the affected party's proposal.
>
> In my view, this concern is not a basis for exempting the information at issue from disclosure. If it were, then I would see no reason to distinguish the information in the specific articles in dispute, from the rest of the contract which has been disclosed to the requester. As a general proposition, this interpretation of section 17(1) would result in the exemption from disclosure of the terms of any number of contracts awarded through a similar process to that used in this case.
>
> Such a result would clearly not be in keeping with the intent of the *Act*. In any event, the disclosure of the final terms of a contract, and the comparison of those terms with the terms of a pro-forma agreement, would only indicate the starting point and concluding point of negotiations. It would not, with any precision, reveal all of the details of

> the two parties' positions during those negotiations and the various proposals, counterproposals and changes to positions that might have been involved.

[44] Assistant Commissioner Liang's order is consistent with a previous order, Order P-1545, where a consultant had been asked to set out its terms and conditions of a consulting contract, and those terms then became the basis of the contract. In that order, Assistant Commissioner Tom Mitchinson concluded:

> Although some of the terms of the contract, and perhaps the contract as a whole, may have been agreed to with little discussion or the more extensive negotiation process normally associated with this type of agreement, I find that the record nonetheless represents a negotiated arrangement between Hydro and the affected person. In its representations on section 18(1)(c), quoted earlier in this order, Hydro appears to acknowledge that there is an element of negotiation to this type of contract when it argues that disclosure of the record could result in a potential future candidate choosing to "negotiate more advantageous terms". I find that the contract was the result of negotiations, however minimal, and that the record was not "supplied" for the purposes of section 17(1).

[45] I agree with the principles set out in the above orders and apply them in the context of this appeal. Although the bank argues forcefully that the structure of the agreement is an informational asset that it supplied to the university, it has not identified with any precision what particular aspect of the contract's "structure" it seeks to protect. In any event, I am not persuaded that the agreement's structure can be viewed as separate from its terms. The structure of a contract is part of what gives its terms meaning and it is artificial, if not impossible, to distinguish a contract's terms from its structure. Having reviewed the bank's representations and the agreement, I find that the agreement, as a whole, represents a negotiated arrangement between the bank and the university. The bank acknowledges that there was some negotiation, in that the terms of the agreement differ somewhat from the terms of the bank's standard draft agreement. Indeed, this is evident from my review of the two documents. The fact that negotiation may have been limited does not change the fact that the agreement represents terms mutually agreed upon by the parties.

[46] I have also considered the bank's argument that the overwhelming majority of terms contained in its standard agreements could be discerned as a result of disclosure of the agreement. However, on review of the agreement, I find that the only terms that can be discerned from the agreement are those that appear in the agreement itself. Moreover, I agree with Assistant Commissioner Liang, where she states as follows in Order PO-2018:

> As indicated above, this element of the three-part test under section 17(1) has been the subject of a number of prior orders, most of which have concluded that contracts between government and private businesses do not reveal or contain information "supplied" by the private businesses. These findings reflect the common understanding of a contract as the expression of an agreement between two parties. *Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered a type of "informational asset" which qualifies for exemption under section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.* (emphasis added).

[47] I agree with this analysis. The fact that disclosure of the agreement may, in a general sense, provide information about the kinds of agreements that the bank enters into, including their structure, does not mean that the agreement itself is an "informational asset". If it were, this would greatly expand the number of contracts exempt under section 17, which would not be in keeping with the intent of the *Act*.

[48] The appellant relies on *Imperial Oil*, a decision of the Alberta Court of Appeal. In *Imperial Oil*, the Court found that disclosure of the agreement at issue would reveal other information that had been supplied to the government, including technical letters that Imperial Oil had commissioned from environmental consultants. However, the facts in this appeal differ from those in *Imperial Oil* and from those in previous orders of this office that have employed similar reasoning as that in Imperial Oil.[23] In the present appeal, the only "other" information that the bank argues would be revealed by disclosure of the agreement is the structure of its affinity agreements. I have found above that the structure of the bank's affinity agreements is not an "informational asset". In addition, and as noted above, decisions of the Alberta Court of Appeal are not binding on this office.

[49] The appellant also relies on the Supreme Court of Canada's decision in *Merck.* However, that decision is not inconsistent with this office's approach. This office's interpretation of the "supplied" component of the section 17(1) test in the context of contracts was considered and upheld by the Divisional Court in *Miller Transit*.[24] In response to an argument that the approach approved in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)* was no longer good law in light of *Merck*, the Court stated:

---

[23] See Orders MO-3058-F and MO-3080-I.
[24] Above note 8.

> *Merck* does not alter the law on this point. Rather, the presumption that contractual information was negotiated and therefore not supplied is consistent with *Merck*. A party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the "inferred disclosure" or "immutability" exception applies.

[50] I conclude that the "inferred disclosure" exception does not apply to the agreement.

Does the "immutability" exception apply?

[51] The "immutability" exception applies where a contract contains information supplied by the third party that is not susceptible to negotiation. Examples of immutable information are financial statements, underlying fixed costs and product samples or designs.

Representations

[52] The bank submits that the most valuable and innovative aspects of its affinity agreements relate to the structure of those agreements. It submits that, while marginal details of the agreement may be subject to negotiation and may be "mutable", the overall structure of the agreement was not subject to negotiation, and constitutes information that the bank "supplied" to the university. It submits that the importance of this "core" of the agreement is reflected by the fact that no competitor has succeeded in replicating the agreement. It submits that while in theory, all aspects of any agreement are subject to negotiation, in the sense that agreement of both parties is required, as a practical matter the basic structure of the relationship encapsulated in the agreement is not. The bank submits that it would be a triumph of form over substance to ignore this practical business reality.

Discussion and findings

[53] In my view, the structure of the agreement does not represent immutable information. The bank submits that the basic structure of the agreement is not subject to negotiation, while conceding that in theory, any aspect of an agreement is subject to negotiation. However, based on my review of the agreement, including its structure, I find that it consists of information (including the structure) that was subject to negotiation. Also, as I observed above, I do not see how this agreement's terms can be separated from its structure in any meaningful way.

[54] I also agree with Adjudicator Faughnan where he states in Order PO-2384:

> [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively

> "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

[55] I agree with Adjudicator Faughnan's interpretation of the "immutability" exception. Immutable information is information that is not capable of change, not information that is unlikely to change or has never been changed in the bank's previous contractual dealings. Applying this meaning, it is clear that the structure of the agreement does not constitute immutable information.

Should there be a new exception for "innovative contractual arrangements"?

Representations

[56] The bank submits that the valuable private information that it seeks to protect in this case is the contract structure created by the financial institution it purchased. It argues that much as it is necessary to protect private information to encourage innovation in the development of pharmaceuticals (the issue in *Merck*), so too should the law protect legal innovation in the development of contractual, legal relationships. It submits that the rationale expressed in *Merck* applies equally to the agreement at issue in this case.

[57] Therefore, the bank submits, much as the "inferred disclosure" and "immutability" exceptions were created by case law to strike the balance needed under the *Act*, a new exception should be recognized in this case for "innovative contractual arrangements". It submits that this exception would rebut the presumption that the information contained in a contract is not "supplied" in limited circumstances where the contract itself constitutes valuable financial or commercial information.

Discussion and findings

[58] The bank has not explained in what respect the agreement before me can be

described as innovative, other than to point out that it is based on a template that it also uses for agreements with others and that other banks have not replicated it. However, I find that it is reasonable to expect that many commercial arrangements between the government and third parties are achieved via the use and/or modification of standard form contracts or precedents/templates created by the third parties. If this office were to create a new exception for such contracts, a significant amount of information would be shielded from the public's view. As noted above, the Divisional Court has recognized that accountability for expenditures of public funds requires access to information in contracts entered into by government institutions.[25] To create a new exception for "innovative contractual arrangements" would undermine this principle of accountability. Further, in my view, it would not be in keeping with the principles expressed in section 1 of the *Act* that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

[59] I decline, therefore, to adopt and apply a new exception for "innovative contractual arrangements" in the circumstances of this appeal.

Conclusion

[60] To summarize, my findings above are as follows:

a) the "supplied" requirement in section 17(1) is not a misinterpretation of the *Act*;

b) neither the "inferred disclosure" nor the "immutability" exception applies to the agreement; and

c) I do not adopt a new exception for "innovative contractual arrangements".

[61] As a result, I find that the information in the agreement was mutually generated, rather than "supplied" by the bank. Therefore, the bank has failed to meet the requirements of Part 2 of the section 17(1) test.

[62] In its representations, the bank discusses various harms that it submits can reasonably be expected to occur if the agreement is disclosed. However, section 17(1) does not exempt from disclosure all information that will cause harm if disclosed. To be exempt from disclosure under section 17(1), information must have been "supplied" to the institution. As I have found that the agreement was not supplied to the university, I do not need to consider Part 3 of the test, that is, whether its disclosure could reasonably be expected to result in either of the harms set out in sections 17(1)(a) and (c).

[63] I conclude that none of the information in the agreement is exempt from

---

[25] *Miller Transit,* cited above at para 44.

disclosure pursuant to section 17(1) of the *Act*.

ORDER:

1. I uphold the university's decision, in part, and order it to disclose the agreement to the requester, in its entirety, by sending him a copy by **May 25, 2016** but not before **May 17, 2016**.

2. In order to verify compliance with provision 1, I reserve the right to require the university to provide me with a copy of the record which is disclosed to the requester.

Original Signed by: April 19, 2016

Gillian Shaw
Adjudicator