Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2314

Appeal PA-030028-2

Centennial College of Applied Arts and Technology

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NATURE OF THE APPEAL:

The requester made a request to Centennial College of Applied Arts and Technology (the College) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to "[A]ll of the details of the $10.25 million dollar donation made to the College by [two named companies] (the affected parties), including:

1. Amount of the receipt the college gave to donors for a charitable tax deduction
2. Amount of cash and the schedule of delivery to the college
3. an identification of all gifts in kind and the schedule of delivery to the college
4. Details of all college commitments to [the named companies] in connection to the donation
5. Details of all current college contracts with [the named companies]"

Initially, the College refused to give the requester access to any of the information and/or records responsive to his request, relying on sections 17(1) (third party information) and 18 (economic and other interests) of the *Act*.

The requester, now the appellant, appealed the College's decision to deny access to the identified records and the College's position that no further responsive records exist.

During the mediation stage of the appeal, the following issues were clarified:

- the College indicated that it was specifically relying on sections 17(1) and 18(1)(c) and (d);
- the College confirmed that one record responsive to part 5 of the request was the subject of another appeal with this office and would not, therefore, be addressed in this appeal;
- one of the affected parties agreed to disclose portions of one of the records (Record 3). Therefore, the College issued a revised decision in which it provided the appellant with a severed copy of Record 3.

Access to the remaining records remained unresolved and the appeal moved to the adjudication stage. Initially, the Adjudicator sought and received representations from the College and the two affected parties, the non-confidential portions of which were then shared with the appellant. This office also received representations from the appellant.

RECORDS:

There are 3 records at issue in this appeal:

1. A slide presentation
2. A Strategic Technology Relationship Agreement with one affected party
3. A Strategic Relationship Agreement with the other affected party

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The College submits that each of the records contain information which qualifies as "commercial information" as it relates to "the sale and purchase of goods/services by an institution". One of the affected parties indicates that, in its view, the Record 2 contains technical, commercial and financial information belonging to it. The other affected party makes similar claims with respect to the information in Record 3 and adds that this document also includes information that falls within the ambit of the definitions of "trade secret", "technical information" and "labour relations information" for the purposes of section 17(1).

The types of information listed 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 [Order PO-2010].
>
> *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 [Order PO-2010].
>
> *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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *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 [Order PO-2010].

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 dispute [P-1540]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]

- an account of an alleged incident at a child care centre [P-121]

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

One of the affected parties argues that the information in Article 10.1 and Schedule K of Record 3 may be characterized as "labour relations information" for the purposes of section 17(1). In my view, Article 10.1, a clause respecting the recruitment by the College and the affected party of each others' employees is not "labour relations information" within the meaning of the exemption. In order to qualify as "labour relations information" for the purposes of section 17(1), the information must deal with the collective relationship between an employer and its employees. Article 10.1 does not do so. Similarly, Schedule K, the affected party's daily rates for its employees, does not qualify as "labour relations information" for the purposes of section 17(1) as it does not address the collective relationship between the affected party and its employees either.

I accept that all three of the records contain information that meets the definition of the term "commercial information" described above. The records describe in detail the terms of the Agreements for the purchase, sale and servicing of various products by the affected parties to the College. Clearly, information pertaining to price, the services being provided by the affected parties, the equipment being purchased and other commercial terms relating to the transactions qualify as "commercial information" for the purposes of the exemption.

I also agree with the position taken by one of the affected parties that Record 3 also contains information that qualifies as technical information under section 17(1). I do not, however, agree that this information may also properly be characterized as a "trade secret". The information in the record does not include the types of information referred to in the definition of that term in

Order PO-2010. Accordingly, I find that the affected party has not provided me with sufficient evidence to enable me to make such a finding.

Finally, I agree with the position taken by the affected party whose information appears in Record 3 that this document also includes "financial information" for the purposes of section 17(1). This information, relating to its pricing practices, meets the definition of the term "financial information". Therefore, I find that the first part of the test has been satisfied with respect to much of the information in Records 1 and 3.

Part 2: supplied in confidence

General principles

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [PO-2043]

Representations of the parties

The College submits that:

> . . . contracts with third parties such as those enumerated above are the products of 'supplied' information from the third parties. This information may take one of several forms. Firstly, the contracts contain information supplied in proposals created by the third parties. Where negotiations of the contracts include proposals from the College, the third party must still 'supply' consent to any such proposals. Thirdly, the records in question were prepared by the affected third parties and, ultimately, supplied to the College.

The affected party whose information appears in Record 2 indicates that:

> When the records were provided to Centennial they were provided in confidence. [The affected party] strives to maintain its technical and commercial advantage in the market place by consistently adopting practices intended to maintain confidentiality in its trade secrets, and its scientific, technical, commercial, financial and labour relations information. This information is consistently provided in confidence by [the affected party] because disclosure can significantly prejudice our competitive position. If [the affected party] felt that the confidentiality of its information would not be protected from disclosure it may be reluctant to participate in similar arrangements with entities such as Centennial.

The other affected party who is a party to the Agreement with the College that comprises Record 3 has provided me with detailed submissions on this issue. It begins its submission by reiterating that section 17(1) is "about the protection of information assets belonging to third parties". It also acknowledges that the contents of a contract between a third party and an institution will not normally qualify as having been supplied if the contract is the result of a negotiation process between the two. However, it argues that specific provisions of a contract can be exempt if they contain the "informational assets" of an affected party. This affected party takes the position that the "communications solutions" described in the Agreement that comprises Record 3 originated with it and were not the subject of any negotiation with the College. As a result, it argues that this information was supplied by it to the College for the purposes of section 17(1).

The affected party also argues that the disclosure of the information in Record 3 could reasonably be expected to permit an "accurate inference to be made of underlying non-negotiated confidential information supplied to" the College.

In Order PO-2228, I was asked to address the application of section 17(1) to similar records involving the College and one of the affected parties in the present appeal. I reviewed the most recent jurisprudence of the Commissioner's office as follows:

> In Orders MO-1705 and MO-1706, Adjudicator Bernard Morrow examined in detail the treatment of contract documents under section 10(1) of the municipal

Act, the equivalent provision to section 17(1) of the *Act*. Addressing the "supplied" aspect of the second part of the test in Order MO-1706, Adjudicator Morrow stated:

> A number of previous orders of this office have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was "supplied" within the meaning of section 10(1). Because the information in a contract is typically the product of a negotiation process between two parties, the contents of contracts involving an institution and an affected party will not normally qualify as having been supplied (see, for example, Orders P-36, P-204, P-251, P-1545 and PO-2018).
>
> In addition, the 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). 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 (see Order P-1545).
>
> . . .
>
> As stated above, past decisions of this office have established that the terms of a contract between an institution and affected party will not normally be considered to have been "supplied" within the meaning of section 10(1). This is the case even where the contract substantially reflects terms proposed by a third party.
>
> In this case, there would appear to be consensus between the parties that the terms of the Contract were negotiated over a fairly lengthy period of time. However, both the affected party and the Board take the position that the severed information in the Contract was not the result of a negotiation process since the severed information is identical to the information contained in the Proposal. I disagree. In general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. Except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret), agreed upon terms of a

> contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied".
>
> . . .
>
> . . . I find that the withheld information in the Contract that comprises the essential terms of an agreement between the Board and affected party cannot be considered to meet the "supplied" test in section 10(1) and, therefore, part two of the three-part test has not been met in regard to this information.

In Order PO-2200, Assistant Commissioner Tom Mitchinson reached a similar conclusion with respect to information relating to the status of various leasing contracts between the Government of Ontario and a private sector service provider. Assistant Commissioner Mitchinson determined that:

> The remaining three portions relate to leasing agreements between the named company and three ministries of the Ontario government, including MBS. In each case, the withheld text describes the basis for calculating leasing costs for these agreements. Although MBS takes the position that this information was provided by the named company in its bid proposals for the various leasing contracts, in my view, it comprises an essential term of any agreement for leasing services of this nature, and is properly characterized as having been "negotiated" not "supplied" for the purposes of section 17(1) of the *Act*. While the named company may have proposed the specified leasing cost basis, the Government of Ontario was not bound to accept it. If the proposed term remained unchanged in the leasing agreements themselves, it is reasonable to conclude that the Government considered the proposal put forward by the named company in each instance and found it to be acceptable. In my view, a process of this nature is a negotiation, regardless of whether any actual discussion on the proposed term took place, or whether the contract contains the same wording as the named company's bid proposal.
>
> Accordingly, I find that the financial information concerning the three ministries contained on pages 3 and 4 of Record 6 was not "supplied" for the purposes of section 17(1), and fails to meet the requirements of part two of the test without any need for me to consider the parties' submissions on the "in confidence" component of the test.

> I adopt the findings and the reasoning of the Assistant Commissioner and Adjudicator Morrow for the purposes of this appeal.
>
> Applying these principles to the records at issue in the present appeal, I find that the commercial and technical information contained in Records 1 through 8 was not supplied to the College by the service providers for the purposes of section 17(1). As noted above, each of these records represent contracts entered into between the College and various service providers for the provision of information technology services. In accordance with the findings in Orders MO-1706 and PO-2200, I find that the information contained in the contracts which comprise Records 1 to 8 was the product of negotiation, whether or not any discussion of details of the contracts actually took place. The information in Records 1 to 8 was not, therefore, supplied to the College as is required under the second part of the test under section 17(1). As all three parts of the section 17(1) test must be satisfied, I find that Records 1 to 8 do not qualify for exemption under this section.

Similarly, applying the reasoning set forth in the decisions in Orders MO-1705, MO-1706, PO-2200 and PO-2228, I find that the information contained in Records 2 and 3 was not "supplied" to the College by the affected parties within the meaning of section 17(1). The information described in the contracts was in fact the product of negotiation, regardless of the fact that discussion of their terms may or may not have taken place. Again, as all three parts of the test under section 17(1) must be satisfied, Records 2 and 3 do not qualify for exemption under that section.

Record 1 is a presentation by College staff to its Board of Governors describing in some detail the contents of the contracts that form Records 2 and 3. Again, I find that the information pertaining to the terms and conditions in the contracts were not "supplied" to the College by the affected parties. As a result, Record 1 does not contain information that was "supplied" and is therefore not exempt from disclosure under that section.

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

The Ministry also relies on the application of sections 18(1)(c) and (e) to deny access to the records. These sections state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

In support of this contention, the College argues that:

> . . . [it] is a frequent purchaser of computer services and goods in order to run its operation and provide its services. In order to obtain the best price available the College often tenders its projects to a number of different vendors. Regardless as to whether the tender process is used or not, the release of information regarding the types of terms the College has been prepared to settle for permits other vendors approached on subsequent purchases the opportunity to take a view of the terms that the College is prepared to settle for. Such release permits vendors to tailor their responses more closely to that of a successful bid and undermines the College's ability to ensure that it has obtained the best possible terms (both financial and otherwise) for tendered services thereby leading to increased costs for goods and services to the College.
>
> Release of the records therefore can 'prejudice the economic interests' of the College under section 18(1)(c) and could reasonably be expected to be injurious to the financial interests of the institution. An identical argument was held to justify denying access under Order M-712.

The appellant argues that any harm to the College's economic interests which might flow from the disclosure of the records is "speculative at best". He notes that pricing for the supply of computer goods and the services required to keep them operating is volatile and is currently at a low ebb. The appellant also notes that pricing and other terms described in the records may be out of date at this time as the contracts are dated November 14, 2001 and May 2, 2002.

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words 'could reasonably be expected to' appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated 'harms' [including section 18(1)(c)]. In the case of most of these exemptions, in order to establish that the particular harm in question 'could reasonably be expected' to result from disclosure of a record, the party with the burden of proof must provide 'detailed and convincing' evidence to establish a 'reasonable expectation of harm' [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario*

> *(Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In order to qualify for exemption under subsection 18(1)(e), the College must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; and

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and

3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Order P-219]

In Order PO-2228, I also addressed the possible application of sections 18(1)(c) and (e) to records containing similar types of information. In that decision, I held that:

> In my view, the College has not provided me with the kind of "detailed and convincing" evidence required to establish a reasonable expectation of harm under section 18(1)(c). The evidence tendered by the College in support of its argument that the records are exempt under this section does not describe in sufficient detail how the disclosure of the information contained in these records could reasonably be expected to result in the harm envisioned by section 18(1)(c). I find that the College has failed to make the necessary evidentiary link between the disclosure of the records and the harm contemplated by the section 18(1)(c) exemption. As a result, I find that this section has no application to the records at issue.
> . . .
>
> Similarly, based on the evidence presented by the College, I am unable to find that the records contain information which may be described as "positions, plans, procedures, criteria or instructions" which it intends to apply to current or future negotiations. I accept the arguments of the appellant that any future negotiations for the contracting of information technology services will entail different considerations from those existing at the time of the negotiation of these contracts. In my view, the records do not contain information relating to the conduct of current or future negotiations. Any suggestion of harm to the

> College's negotiating position as a result of the disclosure of the records is purely speculative.

In my view, the circumstances extant in the present appeal are virtually identical to those in the appeal which gave rise to Order PO-2228. I am not satisfied, based on the information provided by the College, that the disclosure of the information contained in the records could reasonably be expected to result in the types of harm contemplated by sections 18(1)(c) or (e). In addition, I agree with the appellant that due to the passage of time, the likelihood of injury to the economic interests of the College are significantly diminished.

As I have found that sections 17(1) and 18(1)(c) and (e) do not apply to the three records at issue, I will order that they be disclosed to the appellant.

REASONABLENESS OF SEARCH

The appellant takes the position that additional records responsive to this request beyond those initially identified by the College ought to exist.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The College provided me with an Affidavit sworn by its Freedom of Information and Protection of Privacy Coordinator (the Coordinator) who also serves as the Executive Assistant to the College's President. The Coordinator describes the nature and extent of the searches conducted by the former Coordinator, the former and current Directors of Finance and staff with the College's Developmental Office. The Coordinator indicates that as a result of his inquiries, he is able to confirm that no charitable donation receipt was issued by the College to either of the affected parties. In addition, the Coordinator deposes that no other contracts responsive to part 5 (which was one of the records at issue in the appeal which gave rise to Order PO-2228) or other records responsive to parts 2, 3 and 4 of the request exist beyond those already identified.

The appellant maintains that the College possesses additional responsive records, such as memoranda or correspondence between senior officials at the College and its Board of

Governors, as well as documents relating to "budgeting and reporting processes" or "general ledger entries" relating to these transactions.

In my view, the records identified by the College are responsive to the request as originally framed and completely respond to it. In his original request, the appellant is seeking access to certain information which is contained within the three identified records. In my view, the other types of records referred to by the appellant go beyond the scope of the original request and would not, accordingly, be responsive to it. Accordingly, I uphold the College's search and find that it was reasonable in the circumstances.

ORDER:

1. I order the College to provide the appellant with copies of the records by September 21, 2004.

2. In order to verify compliance with Provision 1, I reserve the right to require the College to provide me with copies of the records that are disclosed to the appellant.

3. I uphold the College's search and dismiss that part of the appeal.

August 30, 2004

Donald Hale
Adjudicator