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

ORDER PO-2371

Appeal PA-040193-1

Ontario Science Centre

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NATURE OF THE APPEAL:

Under the *Freedom of information and Protection of Privacy Act* (the *Act*), the Ontario Science Centre (the Science Centre) received a request for access to the following:

1. A copy of the contract between the Science Centre and a third party for the development and design of exhibits for a show entitled 'Candy Unwrapped', and

2. The evaluation report related to the show.

The Science Centre responded with a separate decision for each of the requests and assigned them separate request numbers.

After notifying the third party (the affected party) pursuant to section 28 of the *Act* and receiving representations from the affected party to the effect that parts of the contract should not be disclosed, the Science Centre granted partial access to the contract, severing certain items of information from the copy of the contract provided to the requester.

In its decision letter granting partial access to the requester, the Science Centre claims that the severed information is exempt under section 17 of the *Act* (third party information).

The requester (now the appellant) appealed the decision to deny access to the severed portions of the contract. Accordingly, this appeal deals only with the request for a copy of the contract between the Science Centre and the affected party for the development and design of exhibits for the "Candy Unwrapped" show (the contract).

Mediation was not successful and the matter was moved to the adjudication stage.

A Notice of Inquiry was sent to the Science Centre and the affected party initially. Both provided representations in response. The Science Centre advised that its representations could be shared in their entirety with the appellant. The affected party asked that certain portions of its representations be withheld from the appellant due to confidentiality concerns. A Notice of Inquiry and the complete representations of the Science Centre, along with the severed representations of the affected party were then sent to the appellant, which also provided representations in response.

RECORD

The following undisclosed portions of the contract are at issue:

Page 2	Contract Price
Pages 13, 14, 15	Attachment "B" (Exhibits Development Process)
Pages 16 to 31	Attachment "C" (Contractor's Program Schedule)
Page 32	Attachment "D" (Budget)
Page 33	Attachment "E" (Cash Flow)
Page 34	Attachment "F" (Design Intent Drawing Sample)

DISCUSSION:

General principles

Section 17(1) states, in part:

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

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 Science Centre and/or the affected 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 Science Centre 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), and/or (c) of section 17(1) will occur.

Part 1: Type of Information

Commercial and Financial Information/Trade Secrets

The Representations of the Science Centre

Relying on Orders PO-394 and PO-493, the Science Centre submits that the severed information qualifies as financial and commercial information. In its representations, the Science Centre also refers specifically to Order PO-2027 in support of its assertion that the business methodology of a third party supplied in the schedules to an agreement is commercial information relating to the business operations of the third party.

The Representations of the Affected Party

The affected party submits that the severed information is commercial and financial information and/or trade secrets as it contains sensitive information pertaining to the price, design, development and fabrication of exhibits.

The affected party also submits that Attachment "B" (Exhibits Development Process) gives detailed information about moving from the exhibition project definition and concept development stage to the design development phase. It states that Attachment "B" summarizes the tasks to be achieved, the rationale behind them, and the key documents and reports to be completed. The affected party submits that Attachment "C" (Contractor's Program Schedule) provides a visual summary of the above steps and, and graphically illustrates timelines and responsibilities. These attachments, the affected party says, refer to the proprietary processes and programmes/techniques by which exhibitions are developed and provide a synopsis of how a successful exhibit can be accomplished in a time and cost-efficient manner. It submits that the internal process related to exhibit design is unique proprietary information that is "jealously guarded" within the exhibition development industry. The affected party further submits that a contractor expends considerable resources in developing such expertise, and the process by which it develops an exhibition may give it a significant competitive edge. Information relating to this process, it says, is very commercially sensitive information.

The affected party further submits that Attachments "D" (Budget) and "E" (Cash Flow) outline the specific costs of the various stages of development. Attachment "D", it says, gives a line-by-line description of the costs associated with this project, and includes break-outs of what percentage of the overall Project Value is attributed to concept and design development and other inputs. It submits that specific figures for content development, editorial and copy writing, environmental design, exhibit prototyping, exhibit design, mechanical design and graphic design are included in Attachment "D", and adds that sensitive information like salaries and rates of pay is also listed. It submits that Attachment "E" lays out in explicit detail the costs of the various phases of the project and payment for items like project management and co-ordination, prototype assessment and development, copywriting, and graphic design.

The Representations of the Appellant

The appellant acknowledges that the severed information contains commercial and financial information but submits that the affected party has not established that the severances contain trade secrets. This is because the affected party did not provide any evidence to show that the severed portions of the contract contained information not generally known to producers and manufacturers of museum exhibits; that such information has economic value from not being generally known; or that the information is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Analysis and Finding

The terms "trade secret", "financial information" and "commercial information" have been defined in prior orders as follows:

> *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
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> (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].
>
> *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].

My review of Attachments and my careful consideration of the representations made with respect to them leads me to conclude that even if it could be established that the specific substance of any information resembled a "trade secret", in that it can somehow be viewed as a "formula, pattern, compilation, programme, method, technique or process or information contained in a product, device or mechanism" used in the business of the affected party in this

appeal, is not generally known in that business and has economic value from not being generally known, I am not satisfied that the information was the subject of efforts that are reasonable to maintain its secrecy. My rationale for this conclusion is explained in more detail in the section relating to my analysis of whether the information was "supplied", in which I concluded that the actual terms of the contract and the lack of any statement in writing or otherwise that the information should be treated in a confidential manner belie the position asserted that the information was treated confidentially, either implicitly or explicitly. This finding therefore supports my conclusion that the information was not the subject of reasonable efforts under the circumstances to maintain its secrecy. Hence the fourth part of the definition of "trade secret" consistently applied by this office has not been met.

That said, regardless of whether the severed information can be viewed as a "trade secret", the undisclosed information does contain data on the costs of certain elements of the project, the commercial planning sequence and salaries and rates of pay. The project which gave rise to the contract at issue in this appeal is clearly a commercial venture, and the undisclosed information is the type of information routinely found to qualify as "commercial information" and/or "financial information" for the purposes of part one of the section 17(1) test. I therefore find that, notwithstanding my conclusion that the Attachments do not contain information that qualifies as a "trade secret", part one of the test has been satisfied.

Part 2: Supplied in Confidence

In order to satisfy part 2 of the test, the Science Centre and/or the affected party must establish that the information at issue was "supplied" to the Science Centre in confidence, either implicitly or explicitly.

Supplied

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, in this case the Science Centre and the affected party, 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 [Order PO-2043].

The Representations of the Science Centre

The Science Centre acknowledges that the content of the contract to which it is a party does not usually qualify as having been supplied. However, it refers to Order P-1105 in support of its submission that this office has consistently held that if the information at issue is the same as that which was actually supplied to it, then the information has been "supplied" for the purposes of section 17(1). It submits therefore, that the undisclosed information at issue in this appeal was "supplied" to the Science Centre.

The Representations of the Affected Party

The affected party submits that the severed information was submitted to the Science Centre after careful consideration of internal and external costing factors, which are assessed in light of its own unique circumstances and expertise. These, it submits, especially the internal costing factors, are unique to the contractor and would not otherwise be available to the Science Centre. By definition then, it says, "such information would have to have been supplied to the government institution".

The Representations of the Appellant

Relying on Order MO-1706, the appellant submits that the severed portions of the contract were mutually generated by the Science Centre and the affected party and not "supplied" by the affected party to the Science Centre.

The appellant also refers to Order PO-2228 where, it says, information similar to that at issue in this appeal was found not to have been "supplied" and a Professional Services Statement of Work for Fixed Price Deliverables, Statement of Work for Server Relocation, and Project and Operating Cost details of several contracts relating to the acquisition and implementation of a database system were ordered to be disclosed. Finally, the appellant points out that in Order PO-2200 the institution was ordered to disclose information relating to the basis for calculating leasing costs in several contracts between a third party and three ministries.

Analysis and Finding

If the terms of a contract are developed through a process of negotiation a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. More particularly, Order MO-1706, stands for the principle that, except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be supplied.

The basis for the conclusion reached by Adjudicator Morrow in MO-1706 was, amongst other things, Order 01-20 issued by the Information and Privacy Commissioner for British Columbia. In describing that decision, Adjudicator Morrow said:

> The Board also makes reference to British Columbia Order 01-20 to support its position that information contained in a negotiated agreement is not necessarily the product of negotiations but may be information that has been supplied by a third party. The facts in Order 01-20 are very similar to those in this case. In that case, David Loukidelis, Information and Privacy Commissioner for British Columbia, ordered the release of a contract regarding an exclusive sponsorship agreement between the University of British Columbia (UBC), its student society and a named third party for the supply of cold beverage products to UBC. In his analysis, Commissioner Loukidelis spoke of an "exception to a general rule" in which negotiated information is not "supplied". He called this exception "inferred disclosure". In explaining the concept he stated at paragraph 86:

> If the disclosure of information in a contract with a public body would permit an accurate inference to be made of underlying confidential information supplied by the contractor to the public body – such as the contractor's non-negotiated costs for materials, labour or administration – that inferred disclosure of information can be protected […].

Of note, in the circumstances of the B.C. case, Commissioner Loukidelis did not find the evidence supported the application of the inferred disclosure exception. In my view, in regard to this appeal, the same is true. Neither the affected party nor the Board have provided convincing evidence that disclosure of the information in the Contract would permit an accurate inference to be made of underlying *non-negotiated* confidential information supplied by the affected party to the Board. In fact, on my review of the Contract the severed information clearly falls into the category of contractual terms and not non-negotiated contractual terms of the sort contemplated by Commissioner Loukidelis.

Commissioner Loukidelis' ruling in Order 01-20 was also the subject of discussion in a subsequent decision of Madam Justice Ross of the Supreme Court of British Columbia. In *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848, at paragraphs 72 to 79 of the decision, Madame Justice Ross explained with respect to the ruling at first instance that was being challenged:

> The Delegate noted that, for purposes of the section, information that is contractual is negotiated, not supplied, despite having been initially drafted or delivered by a single party, see Order 01-20.

She then made reference to an exception to this rule, stating:

> [45] Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is 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 s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied". It is 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.
>
> [46] In other words, information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) 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, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).

With respect to this first exception, the Delegate considered the decision in Jill Schmidt [*Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner),* [2001] B.C.J. No. 79.] and then concluded:

> [49] In my view, it does not follow from the fact that information initially provided by one party was eventually accepted without significant modification by the other and put into their contract that the information is "supplied" information. If so, the disclosure or non-disclosure of a contractual term would turn on the fortuitous brevity of finessing of negotiations. Rather, the relative lack of change in a contractual term, along with the relative immutability and discreteness of the information it contains are all relevant to determining whether the information is "supplied" rather than negotiated. Evidence that a contractual term initially provided or delivered by the third party was not changed in the final contract is not sufficient in itself to establish that the information it contains was "supplied."

She also addressed a second exception, namely, that the otherwise negotiated information is such that its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was "supplied" by the Third Party, that is, information not expressly contained in the contract.

CPR's interpretation focuses on whether the information remained unchanged in the contract from the form in which it was originally supplied on mechanical delivery. The Delegate's interpretation focuses on the nature of the information and not solely on the question of mechanical delivery. I find that the Delegate's interpretation is consistent with the earlier jurisprudence, see for example Order 26-1994:

> 1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and...

Further, I do not consider that the Delegate elevated immutability to a test. Rather, it is clear from her reasons that she considered it, legitimately, in my view, to be one of the factors to be considered in assessing whether the information is "supplied" in the terms of section 21. I do not find her interpretation to be unreasonable.

The Delegate undertook a lengthy and meticulous examination of the evidence adduced by the parties. Her conclusion was that CPR had failed to bring itself within either of the two exceptions. Accordingly, she concluded:

> CPR's evidence on the question of supply falls short of what is required to establish that the information in issue was "supplied" within the meaning of s. 21(1)(b).

Having carefully reviewed her Report, together with the evidence and submissions, I can find no material evidence that was overlooked or misapprehended by the Delegate. It is for the Delegate to weigh the evidence, I do not find either her review, or her conclusion in that regard to be unreasonable.

In the appeal before me, some contractual terms or attachments may be in the same form as was provided to the Science Centre. Nevertheless, based upon the above reasoning, and my review of the representations and records, I am satisfied that the information contained in the records consist of agreed upon essential terms that are considered to be the product of a negotiation process, with the exception of Attachment "F" (a Design Intent Drawing Sample). Therefore, in the circumstances of this appeal, I do not consider the information in the other Attachments at issue to have been "supplied" by the affected party for the purposes of this part of the test.

In Confidence

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 Science Centre 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 party prior to being communicated to the Science Centre;

- not otherwise disclosed or available from sources to which the public has access;

- prepared for a purpose that would not entail disclosure [PO-2043].

The Representations of the Science Centre

The Science Centre submits that it is its normal and consistent practice to treat the proprietary business and financial information provided to it by businesses as confidential information.

In its representations it refers to section 21.1 of the contract, which provides as follows:

> Subject to the Freedom of Information and Protection of Privacy *Act*, R.S.O. 1990, chapter F.31, as amended from time to time, the confidentiality of the Services [defined in paragraph 1.1 of the contract as being set out in the Attachments] and the Confidential Information *shall be at the discretion of the OSC* [defined in the Contract as the Science Centre] *both during and after the term of the agreement*. No such confidential information about the Services shall be used by the Contractor or divulged in any form without the prior written consent of the OSC Representative. (My emphasis)

The Science Centre submits that the affected party advised that it interpreted that clause as not contemplating the disclosure of the price or details of pricing structure or arrangements. It submits therefore that the contract was entered into with the expectation that the Science Centre would treat the severed information as confidential and the Science Centre has treated it in that way. It submits that since there are a limited number of companies that can provide exhibit development services, it was implicit that the Science Centre would not reveal this information since it would have an adverse effect on the affected party's business. The Science Centre refers to Order PO-2027 in support of this submission.

The Representations of the Affected Party

The affected party also refers to section 21.1 of the contract in support of its position that the information was supplied on a confidential basis. It submits that because section 21.1 of the contract refers to the Science Centre's discretion in respect of confidentiality "about the services" but does not contemplate disclosure of the price of the contract or details of the pricing structure and arrangements, this is an implicit recognition that the severed information was supplied confidentially. Furthermore, the severed information is not otherwise available to the public, is generally considered very sensitive in the industry and was prepared specifically for this contract. As such, the affected party had a reasonable expectation of confidentiality that the information described in part one would not be disclosed.

The Representations of the Appellant

The appellant does not specifically address this element of the test, basing its submission on its position that the information was not "supplied".

Analysis and Finding

I am not satisfied that the contractual term referred to by both the Science Centre and the affected party goes as far as suggested, nor did it take the same form as the contractual provisions under consideration in Order PO-2027. The formation of this contract does not have the same hallmarks of confidentiality either implicit or explicit as are found in, for example, some bid tender processes. The contractual provision itself recognizes that disclosure of the services set out in the attachments to the contract is a possibility, and that confidentiality is by no means assured. Section 21.1 of the contract allows the Science Centre, not the affected party, to control the dissemination of information it asserts it wishes to protect. Thus the Science Centre, not the affected party, is in control of the confidentiality of the services and confidential information, subject, to the terms of the *Act* (which can, of course, require disclosure). There is no similar provision giving the affected party the right or ability to control the disclosure or retention of its confidential information. Neither the Science Centre nor the affected party have provided evidence of any other statement in writing, or otherwise, that would reasonably lead the affected party to consider that the information was provided in confidence, or give the level of comfort that the affected party asserts it had that the terms of its contract would not be disclosed.

Accordingly, I am not satisfied that the undisclosed information was supplied in confidence, either implicitly or explicitly within the meaning of section 17(1). I find, therefore, that the Science Centre and the affected party have not satisfied the requirements of this branch of the test.

As all three parts of the test under section 17(1) must be met in order for the exemption to apply, I find that section 17(1) has no application to the undisclosed information and I order that it be disclosed.

ORDER:

1. I order the Science Centre to disclose the records to the appellant by sending a copy to the appellant by March 31, 2005, but not earlier than March 23, 2005.

2. In order to verify compliance with this order, I reserve the right to require the Science Centre to provide me with a copy of the records disclosed to the appellant in accordance with paragraph 1 above.

Original Signed by: February 22, 2005
Steven Faughnan
Adjudicator