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

ORDER PO-2529

Appeal PA-060034-1

Ministry of Government Services

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Government Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. A copy of all contracts entered into with [a named company] and its subsidiaries by the former Management Board Secretariat and the current Ministry of Government Services and its agents since 1 January 2004.

2. All correspondence between [a named company] and its subsidiaries and the former Management Board Secretariat and the current Ministry of Government Services and its agents relating to the contracts specified in section 1 of this letter.

3. A copy of all tender documents and/or RFPs related to each of those contracts.

4. The list of all bidders for each of those contracts.

5. The list of all companies contacted by the Ministry and/or its agents to submit bids or proposals relating to the contracts whether or not such bids and proposals were ultimately submitted.

6. All correspondence (electronic or otherwise) between the Ministry and its agents and the companies identified in section 4 of this letter relating to the bids and proposals requested by the Ministry as outlined in section 2 of this letter whether or not those bids and proposals were ultimately submitted.

The Ministry located 17 documents that were responsive to the request. It issued a decision letter to the requester that provided him with partial access to these records.

One of these records is a letter of agreement, dated June 21, 2004, between Management Board Secretariat (MBS) and a company that apparently won a bid for a "Government Branding Project." The Ministry decided that it would disclose most of this agreement to the requester, but would withhold certain portions pursuant to the exemption in section 17(1) of the *Act* (third party information).

Specifically, it decided to withhold the total projected hours of work that would be undertaken by the company, and the hourly rate that would be paid to the company (page 1 of the agreement).

Moreover, page 2 of the agreement contains a section on staffing. The Ministry decided that it would disclose the roles and names of staff at the company who would be performing work under the agreement, but would sever the estimated number of hours that would be expended by each individual or division of the company, and the total estimated hours of work that would be undertaken by the company.

The Ministry's decision letter informed the requester that disclosure of this record would affect a third party (the company named in his request), and that the *Act* requires that the Ministry wait 30 days before disclosing the record in order to give this third party an opportunity to appeal the

decision. It also informed the requester that he could appeal the Ministry's decision to this office.

The Ministry notified the third party of its decision under section 28 of the *Act* and sent it a copy of the severed agreement that it intended to disclose to the requester. The third party appealed the Ministry's decision to this office. Consequently, this third party is now the appellant for the purposes of this appeal.

During the mediation stage of the appeal process, the appellant stated that it agreed with the Ministry's proposed severances to the agreement pursuant to the third party exemption in section 17(1) of the *Act*, but submitted that additional portions of the agreement should be withheld from the requester pursuant to both the section 17(1) exemption and the personal privacy exemption in section 21(1) of the *Act*. Specifically, it asked that the roles and names of individuals in the staffing section on page 2 of the agreement be withheld.

In response to a suggestion from the mediator, the Ministry sent the requester a severed version of the agreement. In response, the requester stated that he would like to continue to pursue access to the entire agreement. The mediator informed him that he would have to appeal the Ministry's decision to this office. No such appeal was received.

This is a third party appeal. Consequently, the only information at issue is the additional portions of the agreement (the roles and names of individuals found in the staffing section on page 2) that the appellant claims should be withheld pursuant to sections 17(1) and 21(1) of the *Act*. The Ministry's decision is to disclose these portions of the agreement to the requester.

The original severances that the Ministry made to pages 1 and 2 of the agreement pursuant to section 17(1) of the *Act* are not at issue in this appeal, because the requester did not appeal the Ministry's access decision to this office.

Initially, I issued a Notice of Inquiry to the appellant and the Ministry and invited them to submit representations. Both the appellant and the Ministry submitted brief representations in response. I then issued a Notice of Inquiry to the requester, along with the complete representations of the appellant and the Ministry. The requester did not submit any representations in response.

RECORDS:

The record is a three-page agreement, dated June 21, 2004, between MBS and a company that apparently won a bid for a "Government Branding Project." The specific information at issue is the roles and names of individuals found in the staffing section on page 2 of the record.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal

information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The appellant submits that it is only asking for the severing of "limited personal information" concerning the identities and roles of its individual employees. Furthermore, it states that it has no objection to disclosing all relevant information in the agreement to the requester or the public, but argues that this should be done in a manner that does not compromise the privacy of its employees. It submits that:

> As the name of the governing statute suggests, a particular request for information is as much about protection of privacy as it is about freedom of information. [The named company] submits that its proposal strikes the correct balance in this case between transparency of government contracting processes and protection of individual privacy.

I have carefully considered the representations of the appellant. The information at issue in this appeal is the roles and names of individuals who are employed by the company and provided services to MBS under the terms of the agreement. In my view, this information relates to these individuals in their professional or business capacities, not their personal capacities, and its disclosure would not reveal anything of a personal nature about them. I find, therefore, that the agreement contains professional or business information relating to these individuals, not personal information, as that term is defined in section 2(1) of the *Act*.

The personal privacy exemption in section 21(1) of the *Act* only applies to personal information. Given that I have found that the agreement does not contain personal information relating to these individuals, the section 21(1) exemption cannot apply in the circumstances of this appeal.

However, the appellant also claims that the information is exempt under the mandatory exemption in section 17(1) of the *Act*. Consequently, I will now turn to assessing whether this exemption applies to the information at issue.

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

In its representations, the appellant simply submits that the names and roles of its individual employees who staffed the contract "constitutes commercial, financial, and/or labour relations information …"

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].

In Order PO-1818, Adjudicator Donald Hale found that the names and job titles of the individual employees or consultants identified by companies in the bid proposals that they submitted to the government is "commercial information":

> This information describes who will actually perform the work on behalf of each firm. In my view, this information may also be characterized as commercial information. The provision of consulting services to government is a highly competitive field. I find that some commercial value exists in the names of the "players" who were identified … as having particular areas of expertise in the marketplace.

I agree with Adjudicator Hale. In the circumstances of this appeal, I find that the roles and names of the individuals employed by the company is information that has some commercial value. These individuals have particular areas of expertise that were provided to MBS under the terms of the agreement. I find, therefore, that the information at issue qualifies as commercial information, which satisfies part 1 of the three-part test.

Part 2: supplied in confidence

Supplied

The appellant submits that the information at issue was supplied to MBS in confidence:

> In the competitive process for government advertising work, the Advertising Review Board makes explicit assurances that steps will be taken to keep this type of information confidential. (See: Advertising Review Board – Advertising Agencies "Pool" Competitions 2004.)

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].

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 [Orders PO-2018, MO-1706].

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

In Order PO-2435, Assistant Commissioner Brian Beamish adopted this approach with respect to per diem rates paid to consultants in accordance with contracts between the Ontario Family Health Network and these consultants. He observed that the government had the option of accepting or rejecting a consultant's bid, which is "a form of negotiation":

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation.

Orders MO-1706 and PO-2371 discuss two exceptions to the general rule that 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). These may be described as the "inferred disclosure" and "immutability" exceptions.

The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution.

The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

In the circumstances of this appeal, the appellant appears to have won a bid for providing services for a "Government Branding Project." The information at issue is found in a letter of agreement between MBS and the appellant. This letter was sent from MBS to the appellant and sets out the terms of the "working relationship" between the two parties. Both parties have signed the letter of agreement. I find, therefore, that this letter of agreement constitutes a contract between MBS and the appellant.

In its representations, the appellant states that, "The staffing configuration of a contract is often the key factor in a successful proposal." In other words, it appears that the roles and names of those employees that would perform the work were included in the appellant's bid. In my view, MBS had the option of not accepting the appellant's bid and not entering into a contract with the appellant. For example, if MBS concluded that the staff members proposed by the appellant

were insufficiently experienced or qualified to provide the services it required, it had the option of not accepting the appellant's bid. As noted by Assistant Commissioner Beamish in Order PO-2435, the acceptance or rejection of a bid, in response to a request for proposals, is a form of negotiation.

In other words, the contents of the contract, including the roles and names of the appellant's employees, were subject to negotiation, which means that it cannot be considered "supplied" for the purposes of section 17(1) of the *Act*, subject to the two exceptions set out above.

With respect to the first exception, there is no evidence before me that would suggest that disclosure of this information would permit a person to make an accurate inference with respect to underlying non-negotiated confidential information supplied by the appellant to MBS. I find, therefore, that the "inferred disclosure" exception does not apply to the information at issue.

With respect to the second exception, given that I have found that MBS had the option of not accepting the bid, including the roles and names of the appellant's staff who would be performing the work, this information is clearly susceptible to change. I find, therefore, that the "immutability" exception does not apply to the information at issue.

In short, I find that the inclusion of the information at issue in the contract is the product of a mutual negotiation process between MBS and the appellant. Consequently, this information cannot be considered to be "supplied," for the purpose of section 17(1).

Given that I have found that the information cannot be considered to be "supplied" for the purpose of section 17(1) of the *Act*, it is not necessary to consider the "in confidence" element of part 2 of the three part test or to move on to Part 3 of the test.

However, the thrust of the appellant's representations is that disclosure of the information at issue would cause harm to its competitive position and result in similar information no longer being supplied to government. In the interests of fairness, I will consider these submissions with respect to Part 3 of the test, even though I have already concluded that the appellant has failed to satisfy Part 2 of the test.

Part 3: harms

To meet this part of the test, the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

In its representations, the Ministry submits that based on the information provided by the appellant, it determined that there was insufficient information indicating that the harms outlined in section 17(1) of the *Act* would occur should the information be released.

The appellant provided representations on section 17(1)(a) and (b) of the *Act*. It submits that disclosure of the staffing information could significantly prejudice its competitive position (section 17(1)(a) of the *Act*):

> Rival agencies could … achieve a significant gain, for example, by copying [our] staffing formula or seeking to hire away key staff whose creative or other input was a vital component in a winning proposal. Revealing this information could also significantly compromise future negotiations between [our company] and government agencies because it will set a precedent for disclosure of details of proprietary staffing formulas and deter [our company] or other quality agencies from pursuing government work.

The appellant further submits that it is in the public interest for this staffing information to be protected, and disclosure may discourage companies from supplying similar information (section 17(1)(b) of the *Act*):

> Confidentiality ensures that agencies can pursue government work by submitting the most advantageous staffing configurations, at the most competitive cost, and have the information protected from their competitors. Without assurances of confidentiality, such information may no longer be supplied as a component of proposals from [our company] or competing agencies. Indeed, some agencies may no longer compete for government work at all.

I have carefully considered the representations of both the appellant and the Ministry. In my view, the appellant has not provided the kind of detailed and convincing evidence required to establish that disclosure of its staffing information would prejudice its competitive position or result in similar information no longer being supplied to government.

I recognize that the appellant operates in a highly competitive environment in its pursuit of government contracts. However, I do not accept its submission that the disclosure of the roles and names of its staff could reasonably be expected to significantly prejudice its competitive position by enabling rival firms to "copy" its staffing formula or hire away these staff.

The identities of staff who work at firms that provide services to government is often publicly available (e.g., on a firm's website), or is the type of information that these firms would make available to anyone interested in the services they provide. In my view, the notion that the disclosure of this information could enable rival firms to "copy" the appellant's staffing formula or hire away its staff, amounts to speculation of possible harm. The appellant has not submitted the kind of detailed and convincing evidence required to support its submissions on this point. I

find, therefore, that the appellant has failed to prove that the harms contemplated in section 17(1)(a) of the *Act* could reasonably be expected to occur if the information at issue is disclosed.

I also do not accept the appellant's argument that disclosure of the roles and names of its staff could reasonably be expected to discourage both the appellant and other firms from supplying similar information to government or even from competing for government business.

Both the appellant and its competitors generate significant amounts of revenue as a result of providing services to government. It is not credible that these firms would forgo such revenue or limit the staffing information that they submit in support of their bids simply because the identities and job titles of their staff could be revealed. In my view, this argument amounts to speculation of possible harm. The appellant has not submitted the kind of detailed and convincing evidence required to support its submissions on this point. I find, therefore, that the appellant has failed to prove that the harms contemplated in section 17(1)(b) of the *Act* could reasonably be expected to occur if the information at issue is disclosed.

In summary, I find that the section 17(1) exemption does not apply to the information at issue in this appeal.

ORDER:

1. I uphold the Ministry's decision to disclose to the requester the roles and names of staff on page 2 of the record. For greater certainty, I have highlighted the portions of the record that remain exempt on a copy that I am sending to the Ministry with this order. This highlighted information must *not* be disclosed to the requester.

2. The Ministry must disclose a copy of the record to the requester by **January 8, 2007** but not before **January 3, 2007**.

3. In order to verify compliance with provisions 1 and 2, I reserve the right to require the Ministry to provide me with a copy of the record that it discloses to the appellant.

Original signed by: November 30, 2006
Colin Bhattacharjee
Adjudicator