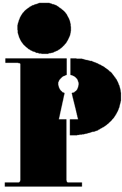


# ORDER PO-2579

## Appeal PA-050050-1

## Ministry of Health and Long-Term Care

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## NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the Ministry of Health and Long-Term Care (the Ministry) received a request for information pertaining to contracts between the Ministry and six specified contractors. The requester indicated that this information was sought from the Ministry and its agency, Smart Systems for Health (SSH), for each fiscal year from April 1, 1997, up to the date of the request.

In particular, the requester sought for each of the contractors:

- The name of the Ministry employee authorizing the contract.
- The date the contract commenced and the Ministry tracking /MERX number.
- The date the contract finished.
- A brief description of the tangible results and deliverables from the contracted work.
- The number of days to be billed in the contract.
- The daily billing rate charged to the Ministry/SSH for the work performed
- The type of Contract - Directed (under $25,000), Vendor of Record, Fee for Service, etc.
- The total number of parties interviewed (including the named contractors) in order to award the contract.

The Ministry issued a separate decision letter for each of the six contractors. In its initial decision letters, the Ministry advised that it could not locate records that were responsive to the request. The requester (now the appellant) initially appealed the decisions solely on the basis of the inadequacy of the Ministry's search for responsive records.

Shortly after the appeal was commenced, this office forwarded a letter to the appellant giving him an opportunity to provide written submissions in support of his belief that records exist. The appellant provided a letter outlining the basis for his belief, along with a copy of a letter dated March 11, 1999 from the Ministry setting out details of a contract awarded under a request for proposal. The appellant submitted that this letter demonstrated that information is available for at least one contract involving one person named in the request.

A Notice of Inquiry was then sent to the Ministry and the appellant on the sole issue of the adequacy of the Ministry's search for responsive records. Typically, when reasonable search is the only issue in an appeal, the inquiry is conducted by way of an oral hearing by an acting adjudicator.

As a result of certain information provided by the appellant during the mediation of the reasonable search issue, as well as his forwarding a copy of the March 11, 1999 letter to the Ministry, an expanded search was conducted. As a result, the Ministry located responsive records relating to three of the six contractors. In separate supplementary decision letters, the Ministry granted partial access to certain information relating to these three contractors to the appellant, upon payment of a fee. The Ministry advised that it could not locate records relating to the other three contractors. In its decision letters, the Ministry relied on the mandatory exemption at section 17(1) of the *Act* (third party information) to deny access to the information it decided to

withhold. The appellant maintained that responsive records should exist for the other three contractors and that access should be provided to all the responsive records that were located by the Ministry. The appellant also took issue with the amount of the fee for access to the information located by the Ministry. As reasonable search was no longer the sole issue on the appeal, the matter was changed from an oral inquiry to a written inquiry.

Mediation did not resolve the appeal and the matter moved to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry and the three contractors (the affected parties) whose records the Ministry located, initially. The Ministry and two of the three affected parties filed representations in response. In addition to representations on the application of section 17(1), one of the affected parties asserted that the mandatory exemption in section 21(1) of the *Act* (personal privacy) also applied. Both of the affected parties asked that their representations be withheld in full from the appellant. The Ministry consented to sharing its complete representations with the appellant.

After considering the submissions on confidentiality, I determined that a portion of one of the two affected party's representations could be shared. In order to address the confidentiality concerns of the other affected party who filed submissions, I determined that I would summarize the substance of the representations in the Notice of Inquiry to the appellant.

Accordingly, I sent a Notice of Inquiry containing the summarized representations of the second affected party, along with the non-confidential representations of the first affected party and the complete representations of the Ministry, to the appellant. The appellant chose not to file representations in response to the Notice.

## RECORDS:

For the purposes of this appeal, the Ministry produced a record consolidating the information from the records which it considered to contain responsive information. The record at issue consists of a three page schedule set out in table format corresponding to the information requested. Where it is available, the information relating to the per diem or hourly billing rate charged to the Ministry/SSH for the work performed by the contractors is set out. The record also sets out responses to some other requested information. Finally, the record indicates specific information requested that could not be found.

The following issues remain unresolved:

- whether the Ministry conducted a reasonable search for responsive records,
- the amount of the fee for access to the information located by the Ministry,
- whether the record contains personal information and if so, whether it qualifies for exemption under section 21(1) of the *Act*, and

- whether the section 17(1) mandatory exemption applies to the information the Ministry withheld from the record.

## DISCUSSION:

### ADEQUACY OF THE SEARCH FOR RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Where an appellant 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 within its custody or control. [Orders P-85, P-221, PO-1954-I].

Although an appellant 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 *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 within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

Although the appellant made no representations on this issue, in his Notice of Appeal regarding the adequacy of the Ministry's search for responsive records, he writes:

> The information I was given by the [Freedom of Information] office is factually incorrect and suggests a "cover-up", the individuals in question are easily found in the latest edition of the Government phone Directory.
>
> Since I already have some documentation that they say isn't available and given that the information I requested is now routinely collected by Management Board, clearly there is a problem here.
>
> Additionally, the [Freedom of Information] office for Smart Systems for Health Agency (SSH) acknowledges certain individuals as providing services to SSH but the individuals in question were not under contract to SSH (i.e. SSH wasn't paying them). This of course raises a series of questions about the accuracy of fiscal data in the Ministry and why such an arrangement would ever be approved, if indeed it was, however, it also indicates that the information I requested must be available somewhere within the Ministry or were the individuals working at no cost?

In response to the letter from this office providing him an opportunity to provide written submissions in support of his belief that records exist, the appellant wrote:

> The records I requested through [the *Act*] are the synopsis of the relevant data either referenced in the applicable contractual or tender documents, or is assembled in order to justify the award of any contract to any individual or firm.
>
> Without the data I have requested it is impossible to imagine any scenario where the expenditure of public funds could be justified if the data was in fact not available.
>
> The assembly of such data for each contract awarded still remains a directive from Management Board of Cabinet.
>
> Without such data being kept there would be no ability to defend the actions of the responsible person to either the taxpayer or Provincial Auditor.
>
> I am attaching a letter dated [March 11, 1999] from the Ministry of Health proving that the information is available for at least one contract for at least one of the individuals named in my request.

During the mediation process the appellant informed the mediator that at least two of the individuals named in the request are listed in the Government of Ontario Telephone Directory.

The Ministry explains in its representations that:

> … [the] original search did not result in the identification of any records that were responsive to the request. After obtaining additional information from the requester during mediation, however, the Ministry conducted an expanded search that lead to the identification of the information that is contained in the record.
>
> The Ministry submits that it has carried out an exhaustive search for records that would be responsive to the request. Since the original request was received, the Ministry has searched for responsive records in several different Ministry program areas. The Corporate Services and Organizational Development division was searched when the request was first received, as this area had oversight for the SSH project during the time period that the request is concerned with. That search did not uncover any responsive records. During mediation, the requester provided more information that led the Ministry to search its Human Services Information and Information Technology Cluster (HSC). HSC located responsive information relating to three of the six contractors named in the request, and compiled this information into the record at issue.
>
> HSC has conducted a further search for responsive information during the appeal stage. During this search, additional responsive information regarding several contracts was located. This additional information is indicated in bold font in the revised version of the responsive record that is being provided to [this office] along with these representations. Please note, however, that the Ministry continues to rely on the section 17(1) exemption to withhold all of the information found under the heading "Daily Rate ($'s) - The daily billing rate to the Ministry/SSH for the work performed".
>
> HSC searched both electronic and physical records to locate information that is responsive to the request. HSC's first step was to conduct a search of its consulting services database, using the vendor names and time parameters provided by the requester. This electronic search identified relevant physical files, which were retrieved from the HSC filing system. These physical files contain the actual contracts entered into between the Ministry and the named contractors, along with other information.
>
> HSC's search was coordinated by the Executive Assistant to the Ministry's Chief Information Officer and the Fee for Service Procurement Specialist Advisor and carried out by several different qualified personnel, drawing on their familiarity with HSC's record management system and their knowledge of the subject matter

> of the records. The original database search was conducted by the Financial Coordinator/Developer of the Ministry's Planning, Finance and Administration Branch (PFA), which is part of HSC. Each physical file was reviewed twice, by different levels of staff, to ensure that all of the responsive information in each particular file was extracted. The retrieval of the physical records and the preliminary search of these records for responsive information were carried out by an administrative assistant within PFA. A final review of the physical records was performed by the Executive Assistant to the Ministry's Chief Information Officer, and the Fee for Service Procurement Specialist Advisor.
>
> Records that were created prior to March 31, 1998 may have been destroyed in accordance with the Ontario government's "Common Records Schedule for Administrative Records for the Government of Ontario (Series 2000-10-Tendered Purchases)".
>
> In light of the above, the Ministry submits that it conducted a reasonable search for responsive records.

***Analysis and Finding***

As set out above, during the mediation stage of this appeal the Ministry conducted another search for responsive records. It also conducted a further search during the inquiry stage of this appeal. These searches, as stated by the Ministry, included "several different Ministry program areas" and yielded the information that remains at issue. Although the appellant provided a great deal of information relevant to the reasonable search issue prior to this matter being moved to adjudication, he chose not to file representations to refute the Ministry's position that it has now conducted a reasonable search for responsive records. In the absence of any submissions from the appellant that might provide a basis to challenge that position, I find that the Ministry has provided sufficient evidence to establish that it has now conducted a reasonable search for records within its custody or control. Therefore, I dismiss this part of the appellant's appeal.

**FEES**

**General principles**

Section 57(1) of the *Act* provides that:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;

(c) computer and other costs incurred in locating, retrieving, processing and copying a record;

(d) shipping costs; and

(e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in section 6 of Regulation 460 (as amended by O. Reg 21/96). This provision states:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
> 2. For floppy disks, $10 for each disk.
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
> 5. For developing a computer program or other method of producing a record from a machine readable record, $15 for each 15 minutes spent by any person.
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Where the fee exceeds $25.00, the institution must provide the requester with a fee estimate. Where the fee is $100.00 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the appeal. A fee estimate of $100 or more must be based on either:

- The actual work done by the institution to respond to the request, or

- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[Order P-81]

This office may review an institution's fee to determine whether it complies with the fee provisions of the *Act* and Regulation 460. In determining whether to uphold a fee, my responsibility under section 57(5) is to ensure that the estimated amount is reasonable. The burden of establishing the reasonableness of the fee rests with the Ministry. To discharge this burden, the Ministry must provide me with detailed information as to how the fee has been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

The Ministry is entitled to charge $7.50 for each 15 minutes (or $30 per hour) of search and/or preparation time (including the time spent severing the record). Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances [see Orders MO-1169, PO-1721, PO-1834, PO-1990].

In its supplementary decision letters, the Ministry claimed a fee of $150.00 for the cost of providing partial access to the information it located relating to the three affected parties. The Ministry submits:

> As noted above, HSC maintains a database that contains information relating to all of the information technology consultants that it has retained for the period of time covering the scope of this request. This database contains limited information about the responsive contracts. The specific details of the contracts (i.e. the deliverables and rates) can only be determined by retrieving the actual physical files indicated by the database search.
>
> The Ministry's initial fee calculation was based on an estimate of the amount of time it would take to locate and collect the responsive records. Specifically, the Ministry based its estimate on the amount of time that it took, on average, to locate, retrieve, and review the physical records, multiplied by the number of relevant physical records that were identified as a result of the Ministry's database search.
>
> The Ministry respectfully submits that the actual cost of locating the responsive information and preparing it for disclosure is in fact greater than the $150.00 estimate that it provided to the requester. This is because the estimated fee does not include charges for several of the actions that were required to locate and prepare the responsive information.

In its representations, the Ministry sets out in two tables the actions and associated time it took to locate the information responsive to the request, and the time required to prepare it for

disclosure. As described in my discussion of the reasonable search issue, the Ministry states that it conducted a search of its record holdings under the six contactor's names and found the physical files containing the actual contracts entered into between the Ministry and the three named contractors, along with other information.

As set out in the first table in its representations, the Ministry indicates that it spent 5 minutes locating and retrieving each file. The Ministry also states that it spent 20 minutes reviewing each file to identify the requested information.

The Ministry submits that the tables also show that its fee claim did not include a charge for actions that involved entering queries into the database and extracting and compiling information from the database, as well as 70 minutes of preparation time. The Ministry submits that it has therefore "already borne $46.50 of the $196.50 cost of locating the responsive information and providing it to the appellant".

As noted above, the appellant did not file any representations in the appeal.

**Analysis and finding**

The Ministry did not pursue a claim for the various additional costs of locating the responsive information. Accordingly, I will not address it here.

In the record at issue there are 12 different contract numbers for the three contractors. I assume that this means that there were 12 files that were located, retrieved and reviewed. I accept that the Ministry spent five minutes locating and retrieving each file (for a total of 60 minutes) and another 20 minutes reviewing each file to identify the requested information (for a total of 240 minutes). As a result, I find that the Ministry spent a grand total of 300 minutes locating and retrieving the files and preparing them for disclosure.

As set out above, the Ministry is entitled to charge $7.50 for each 15 minutes of time spent searching for or preparing the records for disclosure. I find, therefore, that the Ministry is entitled to recoup the cost of the 300 minutes of time spent searching for and preparing the records for disclosure, for a total sum of $150.00.

In accordance with the findings made above, I therefore uphold the Ministry's fee claim of $150.00.

**PERSONAL INFORMATION**

One of the affected parties submits that the record at issue contains an individual's name "and, by implication, financial information", thereby qualifying as "personal information" under section 2(1) of the *Act*. Referring globally to the presumptions at section 21(3) of the *Act*, the affected party's position is that releasing this information would constitute an unjustified

invasion of personal privacy. The affected party submits that, as a result, the information would qualify for exemption under section 21(1) of the *Act*.

In order for a record to qualify for exemption under section 21(1), a record must contain "personal information", as defined in section 2(1) of the *Act*. Under this definition, "personal information" means recorded information about an identifiable individual. This includes information relating to "financial transactions in which the individual has been involved" (paragraph (b)), or the individual's name where 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 (paragraph (h)).

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]. Previous decisions of this office have drawn a distinction between information relating to an individual in a *personal capacity* and information relating to an individual in *a professional or official government capacity*. As a general rule, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

In Order PO-2435, Assistant Commissioner Brian Beamish dealt with an argument that names of individual consultants together with their per diem rates and contract ceiling that relates to these individuals, is exempt under section 21(1) of the *Act*. He wrote:

> Having taken the position that the names of the individual consultants, together with their per diems and contract ceilings is personal information, the Ministry submits that this personal information describes the physicians' income, assets and financial activities and, as a consequence, falls under section 21(3)(f) of the *Act*. As such, its disclosure is presumed to constitute an unjustified invasion of the physician's personal privacy.
>
> The distinction drawn by previous decisions of this office between information relating to an individual in a personal capacity and information relating to an individual in a professional or official government capacity has been noted above. As the Ministry notes, previous orders distinguished between individual consultants and consultants working for corporate entities. However, more recent orders of this office indicate that this issue is more complex. In determining whether information relating to a named individual is "personal information", the appropriate approach is to look at the *capacity* in which the individual is acting

and the *context* in which their name appears. This was enunciated in Order PO-2225 where Assistant Commissioner Tom Mitchinson considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. The Assistant Commissioner posed two questions that help to illuminate this distinction:

> Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: *"in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ....
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

***Analysis and Finding***

Applying the above analysis to the current appeal I find that the context in which any name appears in the records at issue is not inherently personal, but relates exclusively to the professional responsibility and activity of these individuals. In my view, as evidenced by the contents of the records themselves and the nature of the request, any name that appears in the record at issue does so in the context of the provision of commercial consulting services. Similar to the business context present in Order PO-2225, the professional context in which any individual's name may appear in the record, removes it from the personal sphere. Furthermore, in my view, there is nothing about the information in the record that, if disclosed, would reveal something of a personal nature about any individual who may be named therein.

However, like Assistant Commissioner Beamish in Order PO-2435, I also do not have to rely on this analysis because, even if an individual's name appears on the record at issue, because of the operation of section 21(4)(b), this information is still not exempt under section 21(1).

Section 21(1) states that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates…" unless one of the exceptions at section 21(1)(a) to (f) applies. Section 21(1)(f) provides that the exemption will not apply "if the disclosure does not constitute an unjustified invasion of personal privacy."

Section 21(4)(b) of the *Act* identifies a particular type of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 21(4)(b) of the *Act* reads as follows:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution.

In my view, if anything is disclosed by revealing an individual's name, it is information that derives from contracts for personal commercial consulting services, which falls squarely within the parameters of section 21(4)(b). Therefore, the disclosure of this information would not constitute an unjustified invasion of a person's privacy, and the exception to the exemption at section 21(1)(f) applies. I therefore find that the records do not qualify for exemption under section 21(1) of the *Act*.

**THIRD PARTY INFORMATION**

The Ministry claims that the mandatory exemptions at sections 17(1)(a) and (c) of the *Act* apply in the circumstances of this appeal. One of the affected parties who filed representations also claims that section 17(1)(b) applies. Those sections read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (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; or
>
> (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 [*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, PO-2371, PO-2384, MO-1706].

For section 17(1) to apply, the institution and/or an 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 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) and/or (c) of section 17(1) will occur.

**Part 1: Type of Information**

The information withheld from the record consists of per diem and hourly rates for service. The Ministry also withheld some terms and renewal particulars relating to a contract involving one of the affected parties. The Ministry claims that the withheld per diem and hourly rates qualify as "commercial" and "financial" information. One of the affected parties who filed representations also claims that the record contains "technical", as well as "proprietary information". I will treat the claim that the record contains "proprietary information" as an assertion that it contains information that meets the definition of a "trade secret"

Previous orders have defined the terms "trade secret", "technical information", "commercial information" and "financial information" 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
>
> (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].

Based on the representations and my review of the record, I am satisfied that it contains information that is "financial" and/or "commercial" in nature, as defined above. I am not satisfied that the withheld information qualifies as "technical information" or a "trade secret" within the meaning of those terms, as set out above.

Because all of the withheld information in the record could qualify as "financial" and/or "commercial" information, I find that the requirements of part 1 of the section 17(1) test have been met.

**Part 2: supplied in confidence**

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

***Supplied***

The requirement that information be supplied to an 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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.)).

The Ministry stated that it located vendor proposals showing the rates for six of the contracts listed in the record. It states that the rates in these proposals were accepted by the Ministry and incorporated into the six listed contracts. It was unable to find the source of the rates in two other listed contracts or to find documentary evidence to demonstrate that the per diem or hourly rates for the remainder of the listed contracts originated from vendor proposals. That said, the Ministry asserts that it is "likely" that this information originated from vendor proposals provided in response to a request for proposal (RFP). The Ministry argues that proposals submitted by potential vendors in response to Government RFPs, including per diem rates, are not negotiated because the Government either accepts or rejects the proposal in its entirety. In Order PO-2435, Assistant Commissioner Beamish rejected a similar argument. Assistant Commissioner Beamish observed that the exercise of the Government's option in accepting or rejecting a consultant's bid is a "form of negotiation". He wrote:

> 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. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

I agree with the Assistant Commissioner's analysis and adopt it for the purpose of this appeal.

It is clear that the withheld information in the record relates to hourly or per diem and/or terms, including renewal terms, that were established under an agreement for the provision of consulting services. I find that this information represents the agreed upon essential terms of a

contract, or its renewal, and that these terms are a product of a negotiation process. I find, therefore, that the withheld information was not "supplied" to the Ministry within the meaning of part 2 of the section 17(1) test.

As I have found that the withheld information was not "supplied" within the meaning of that part of the test, it is not necessary for me to consider the "in confidence" component of part 2 of the section 17(1) 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. In light of my finding that part 2 of the section 17(1) test has not been met, it is also unnecessary for me to consider the parties' submissions on part 3 of the test.

## ORDER:

1. I order the Ministry to disclose the record to the appellant by sending him a copy by June 28, 2007, but not before June 22, 2007.

2. I uphold the Ministry's fee claim of $150.00.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the record as disclosed to the appellant.

Original signed by: May 24, 2007

Steven Faughnan
Adjudicator