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

ORDER PO-2843

Appeal PA07-414

McMaster University

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NATURE OF THE APPEAL:

McMaster University (the University) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the contract between the University and a named private company relating to parking fine debt collection services. The University issued a decision and granted access to the record in part.

The University's decision letter advised that portions of the record were being withheld pursuant to section 18(1)(c) of the *Act*, which provides that a head may refuse to disclose a record that contains information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

The requester (now the appellant) appealed the University's decision to deny access to the severed portions of the record.

In his letter of appeal, the appellant clarified that he was seeking access to the "complete details of [the University's] contractual arrangements with [the named company] including any new or changed provision as part of the extension of the contract beyond the stated expiry date of August 31/2007."

The Appeal was initially assigned to a Mediator, who had discussions with both the appellant and the University with a view to clarifying the positions of both parties and to attempt a resolution of the appeal. At that time, the University confirmed to the Mediator that the contract had been renewed and that all terms and conditions remained the same.

As mediation did not settle the appeal, it moved on to the adjudication stage of the appeal process, in which an inquiry is conducted under the *Act*. I began my inquiry by issuing a Notice of Inquiry to the University inviting it to submit representations. I received representations from the University. I then issued a Notice of Inquiry inviting the appellant to submit representations in response and I provided the appellant with the relevant portions of the University's representations. I received representations from the appellant.

RECORDS:

The record consists of a contract between the University and a named party relating to the collection of outstanding debts. The severances at issue have been made from Schedules A and B of the contract and deal primarily with the financial terms of the contract, such as the number of files to be handled by the named party, the length of time that files will remain at any given stage of the collection process, pricing amounts and anticipated total volume of the contract, expressed in dollar figures.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

McMaster relies on section 18(1)(c) to deny access to the portions of the record it seeks to withhold. This section states:

Section 18(1) states:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

In its representations, McMaster refers to the above principles, as set out in Orders P-1190 and PO-2014-I. It also refers to Order PO-1745. In that order, former Senior Adjudicator David Goodis upheld a claim under section 18(1)(c) by the Ontario Casino Corporation (OCC) to deny access to information about slot machines. The withheld information revealed "the average percentage of money that the slot machines of a given type at a given casino 'held back' during the given month." In upholding the OCC's decision to deny access, the Senior Adjudicator stated:

> Notwithstanding my reluctance to find a reasonable expectation of the harm alleged on the basis of the evidence before me, I am prepared to infer that such harm could reasonably be expected to result based on my independent analysis of the facts and circumstances.
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> …

> In short 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.
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> …
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> The information at issue, the "hold percentages", describes the pricing practices and/or strategies of the casinos for specific types of slot machines at specific locations. This information reveals how patrons, as an overall group, are "charged" on a monthly basis for the use of the machines, expressed as a percentage of amount wagered rather than as a dollar figure. Disclosure of this information could well increase competition by setting off a price or "winnings" war among casinos within Ontario, as well as between Ontario casinos and those in border states such as Michigan and New York.
>
> … [C]ompetition from disclosure could reasonably be expected to produce lower revenues or profits for Ontario casinos, which in turn would prejudice the economic interests of the OCC. While I have not been presented with detailed and convincing evidence to demonstrate the degree of likelihood of increased competition of the sort described (which would have made this decision much easier), I am prepared in the circumstances to accept that this kind of competition among casinos serving a common market is, on balance, more likely than not to occur, with resulting prejudicial consequences to the economic interests of the OCC.

Referring to the severances at issue in this appeal, the University provides the following representations in support of its position that disclosure would result in the identified harms:

> The Record responsive to the request is a commercial agreement between McMaster and the Service Provider in respect of parking fine debt collection services. Prejudice to McMaster's economic interests and competitive position can reasonably be expected to occur in two general instances, namely during negotiation of new agreements. By revealing detailed negotiated financial terms contained in the Record such as charges and fees for services, McMaster's negotiating position is severely compromised when negotiating new agreements.
>
> For example, if certain commercial terms of an agreement between McMaster and a Service provider are released and subsequently, McMaster attempts to negotiate an agreement with a competitor of such Service Provider, McMaster would be severely prejudiced in attempting to negotiate that most favourable terms possible because the competitor would have knowledge of the actual pecuniary and commercial terms negotiated between McMaster and the original Service Provider. A precedent of a "floor" or ceiling would be established for any prospective supplier in advance of negotiations.

In his representations, the appellant disagrees with this position, and states:

> McMaster further claims that attempts to negotiate more favourable terms with an alternate Service Provider (in respect of parking fine debt collection services) would be severely compromised if the financial details of the original agreement were known to the alternative bidders for their business. In fact, the opposite outcome is far more reasonable. What kind of Service provider would be willing to participate in a tendering process where the incumbent Service Provider is in possession of critical financial details that are denied to them?

Analysis and Findings

Having considered the representations of the University and the appellant and carefully reviewed the records, I do not accept the argument put forward by the University. In my view, the University's position ignores the reality of how a competitive marketplace functions. In such a marketplace, the disclosure of the rates of an existing service provider would more likely lead to a competitor lowering its rates in order to secure a new agreement. The new lower cost would then be an economic benefit to the University.

Senior Adjudicator Higgins, in addressing a similar argument by the University in Order PO-2758, stated:

> McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

In addition, I am satisfied that the fact situation dealt with in Order PO-1745 bears no similarity to this appeal. In Order PO-1745, former Senior Adjudicator Goodis was dealing with the gaming industry, where casinos are in direct competition with each other for customers. The operation of parking lot services by a university, including the collection of outstanding charges, lacks any similar element of competition.

In the circumstances of this appeal, I find that I have not been provided with sufficiently detailed and convincing evidence that disclosure of the complete terms of the parking debt collection contract would increase the cost of future negotiated contracts for the University. Accordingly, I find that disclosure of this information cannot reasonably be expected to prejudice the economic interests of the University or its competitive position. I find the section 18(1)(c) does not apply to the information at issue.

Although not raised by the University, I have also considered the possible application of the mandatory exemption for third party information provided by section 17(1) of the *Act*. That exemption only applies to information "supplied in confidence" by the third party to the University.

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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No.3475 (Div Ct.)]

It is clear that the information at issue in this appeal was mutually generated, and for this reason, the mandatory section 17(1) exemption cannot apply.

Accordingly, I will order that the severed information be disclosed to the appellant.

ORDER:

1. I order McMaster University to disclose the withheld portions of the record at issue to the appellant by **December 16, 2009** but not before **December 10, 2009**.

2. To verify compliance with this order, I reserve the right to require McMaster University to send me a copy of the records disclosed pursuant to order provision 1.

Original signed by: November 10, 2009
Brian Beamish
Assistant Commissioner