Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3204

Appeals PA12-46 and PA12-65

Ministry of Government Services

May 29, 2013

Summary: A request was made to the Ministry of Government Services for access to information relating to temporary workers. The ministry located the responsive record and, in accordance with section 28(1), notified recruitment agencies that might have an interest in the disclosure of the information. Subsequently, the ministry granted the requester partial access to the responsive record, denying access to portions of it pursuant to section 21(1) (personal privacy). Three of the recruitment agencies appealed the ministry's decision, objecting to the partial disclosure of the information on the basis that it is exempt pursuant to section 17(1) (third party commercial information). The requester did not appeal the ministry's decision. In this order, the adjudicator finds that section 17(1) does not apply to exempt the information at issue from disclosure and upholds the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

Orders Considered: Order PO-2435.

OVERVIEW:

[1] A request was submitted under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Government Services (the ministry) for access to information related to temporary workers. Specifically, the requester sought access to the following information:

> A summary of all contract awards under VOR OSS 07080 from January 1, 2011, to September 30, 2011, including the relevant information:
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> > Vendor, ministry, region, role, from date, to date, contact first name, contact last name, temp first name, temp last name, assignment number, hourly rate, regular hours, total amount.

[2] The ministry located one responsive record, a spreadsheet, and determined that it would grant the requester partial access to it, severing only the temporary workers' assignment numbers along with their first and last names, pursuant to the mandatory exemption at section 21(1) (personal privacy) of the *Act.* The ministry issued a decision to the requester advising that it was prepared to disclose the record, in part, subject to any appeals to this office initiated by third parties whose interests might be affected by the disclosure. The ministry then notified the recruitment agencies identified in the record and advised them that they could request a review of the decision by filing an appeal with this office.

[3] The requester did not appeal the ministry's decision to withhold some of the information pursuant to section 21(1). As a result, the temporary workers' names and assignment numbers are not at issue in these appeals. However, three recruitment agencies appealed the ministry's decision to disclose the remainder of the information, claiming that it is third party commercial information that is exempt from disclosure pursuant to the mandatory exemption at section 17(1) of the *Act*.

[4] One of the three appeals was resolved during the mediation stage of the appeal process. The remaining two appeals will be dealt with jointly in this order. The third parties that initiated the appeals will be referred to as "the recruitment agencies" for the remainder of this order.

[5] As the appeals could not be resolved during mediation, they were transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to these appeals began the inquiry by sending a notice of inquiry setting out the facts and issues to the ministry and the two recruitment agencies, initially. The representations of the ministry and one recruitment agency were shared with the requester in accordance with the practices of this office. The other recruitment agency's representations were briefly summarized in the amended notice of inquiry. Representations were then sought from the requester. The requester chose not to submit representations.

[6] These appeals were transferred to me to complete the inquiry. The sole issue to be determined is whether the information that remains at issue qualifies as third party commercial information and is subject to the mandatory exemption at section 17(1) of the *Act*.

RECORDS:

[7] The responsive record consists of a spreadsheet detailing information about temporary workers sent by recruitment agencies used by the government to complete various assignments. The information that remains at issue is that which is found under the following headings: vendor, ministry, region, role, from date, to date, ministry contact first name, ministry contact last name, hourly rate, regular hours and total amount.

DISCUSSION:

Does the mandatory exemption at section 17(1) apply to the information remaining at issue in the record?

[8] The relevant portions of section 17(1) state:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[9] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[2] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

[10] 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

[11] The types of information listed in section 17(1) have been discussed in prior orders. The types that may be relevant in the circumstances of this appeal have been defined as follows:

> *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.[3] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[4]
>
> *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 cost.[5]

[12] One of the recruitment agencies submits the information at issue includes financial information as it includes pricing practices, as included in the definition of that term.

[13] The other recruitment agency submits that the information at issue consists of commercial information, but does not provide any further explanation as to how the information fits into the definition of that term.

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[3] Order PO-2010.
[4] Order P-1621.
[5] Order PO-2010.

[14] In its representations, the ministry does not specifically address the type of information contained in the record.

[15] I have reviewed the record and the parties' representations and find that the information at issue consists of commercial information, as it relates to the exchange of services. The recruitment agencies supply temporary workers to the ministry and the ministry provides the temporary workers with temporary work with the Ontario government.

[16] I also find that some of the information qualifies as financial information, as it relates to money and its use or distribution. The record includes the hourly rates and total amounts paid by the government to the various recruitment agencies for the services provided by the temporary workers that it has supplied.

[17] Accordingly, I find that part 1 of the section 17(1) test has been established.

Part 2: supplied in confidence

Supplied

[18] 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.[6]

[19] 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.[7]

[20] 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)*.[8]

[21] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate

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[6] Order MO-1706.
[7] Orders PO-2020, and PO-2043.
[8] *Supra* at note 1*;* 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.).

inference to be made with respect to underlying non-negotiated information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as operating philosophy of a business, or a sample of its products.[9]

In confidence

[22] In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[10]

[23] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[11]

Representations

[24] One of the recruitment agencies submits that all of the information that is at issue in the current appeal was supplied in confidence to the ministry as it is not otherwise available from sources to which the public has access. It explains that its rate bid form submission for the contract identified by the original requester was preceded by the following proviso:

> This proposal contains information that [named recruitment agency] considers to be confidential and proprietary in nature. The proposal is intended to be strictly confidential and to be used only for the purposes of evaluating its contents as a basis for a contract award. In the event of

[9] Orders MO-1706, PO-2384, PO-2435 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, *supra* at note 8.
[10] Order PO-2020.
[11] Orders PO-2043, PO-2371, and PO-2497.

> any discrepancy between the terms of the proposal and any resulting agreement, the terms and provisions of the resulting agreement shall govern. No part of this proposal may be disclosed to any third party or reproduced by any means without the prior written consent of [named affected party]…

[25] The other recruitment agency's submissions relate to the fields that identify the ministry contact's first name and last name. It submits that contact names are supplied in confidence and are not available to the general public. It submits that disclosure of the information would potentially harm the contact due to unwanted and inappropriate inquiries and, therefore, there is an implied, if not explicit, expectation of confidentiality to the contact names.

[26] The ministry submits:

> The government requires vendors to submit information with respect to the usage of temporary services contracted for in the spreadsheet. This information is vendor populated and it is created for the ministry's administrative use.
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> The information in the spreadsheet is derived from invoices provided to the vendors on the relevant Vendor of Record list. In this regard, the name of the vendor and the amounts the government has paid a vendor is information that the government routinely discloses. For example, aggregate payments to vendors each fiscal year (by ministry) are available in Volume 3 of the Public Accounts, published annually by the Ministry of Finance.

[27] The ministry also submits that the spreadsheet contains the hourly rate paid to each vendor for the services of each temporary worker that it supplied. It submits:

> This information is based on the contract negotiated between the ministry and each vendor on the temporary help agency vendor of record. In this regard, the ministry followed prior decisions of [this office] indicating that negotiated information between a third party and an institution typically does not qualify as having been supplied to the institution.

[28] The ministry concludes its representations by submitting that, in making its decision to disclose the information that remains at issue, it found that the information was not "supplied in confidence" within the meaning of part 2 of the section 17(1) test. It states that in reaching this conclusion it considered Orders P-36, PO-2496, MO-2117, MO-2233, and PO-2620 where it was held that information that amounts to the product of "negotiation" between a third party and an institution will not normally qualify as information that is "supplied" to an institution.

Analysis and finding

[29] Based on my review of the record and the representations of the parties, I find that the information that is at issue in this appeal was not "supplied" by the recruitment agencies to the ministry "in confidence."

[30] As mentioned above, the responsive record is a spreadsheet which, based on the representations, is created by the ministry for its own use in tracking work assignments that have been executed under vendor of record agreements with the recruitment agencies. The majority of the information is factual information that cannot be said to have been "supplied in confidence" to the ministry by the recruitment agencies.

[31] The first field on the spreadsheet identifies the vendor, that is, the temporary recruitment agency, vendor of record. As the name of vendors on the vendor of record lists who are pre-qualified to do business with the Ontario government are routinely disclosed, even if it can be argued that their names were "supplied" to the ministry, I do not accept that the recruitment agencies had any expectation of confidentiality with respect to this information.

[32] Some of the other fields on the spreadsheet are the following: the ministry field which identifies the name of the ministry for which the work has been done, the region field which indicates the region in which the work assignment takes place, and the role field which identifies the temporary worker's assignment by job title. The spreadsheet also contains fields that list the first and last names of the government contacts with whom the particular recruitment agency is to liaise for each temporary assignment. In my view, all of this information originates with the ministry who has prepared this spreadsheet to document the temporary work assignments and cannot be said to have been "supplied" by the recruitment agencies, let alone "in confidence."

[33] The remaining fields on the spreadsheet include the dates on which the temporary worker performed the assignment, their hourly rate, their regular hours, and the total amount paid to that temporary worker for that specific assignment. The ministry submits that the information on the spreadsheet originates from invoices provided to the recruitment agencies by the government. However, the ministry also submits that the hourly rate is based on the contract negotiated between the ministry and each recruitment agency, and therefore, it cannot be considered to have been "supplied" to the ministry within the meaning of that term as contemplated in part 2 of the section 17(1) test.

[34] As indicated above, this office has held on numerous occasions that, except in unusual circumstances, the provisions of a contract are considered to be 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.[12]

[35] Additionally, in Order PO-2435, Assistant Commissioner Brian Beamish rejected the position taken in that appeal by the Ministry of Health and Long-Term Care that per diem rates submitted by vendors on proposals in response to government Request for Proposals are not negotiated because the government either accepts or rejects the proposal in its entirety. 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 stated:

> 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 negotiations.

[36] In my view, the hourly rates at issue in this appeal are analogous to the per diem rates considered by Assistant Commissioner Beamish in Order PO-2435.

[37] Based on the previous orders issued by this office, my review of the record, as well as the representations of the parties, I find that the hourly rates are agreed-upon essential terms of contracts or agreements, which were the products of a negotiation process and therefore cannot be said to have been "supplied" to the ministry by the recruitment agencies, even if the "negotiation" amounts to acceptance of the terms proposed by the agencies.[13] Even if the current agreements between the recruitment agencies and the ministry are based on standard form agreements developed by the recruitment agencies of the proposals they submitted, I find that the ministry's

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[12] Orders MO-1706, MO-1735, PO-2435, MO-2330, MO-2179, PO-2438, PO-2483, PO-2384, and MO-2627.

[13] Orders PO-2384 and PO-2497, upheld in *CMPA v. John Doe, supra* at note 8.

acceptance of those agreements or proposals, including the hourly rates to be paid to temporary workers located by the recruitment agencies, amounts to negotiation.

[38] Additionally, based on the information that is before me, I find that I have not been provided with sufficiently detailed and convincing evidence to show, that the hourly rates are "immutable," as described above, or that their disclosure would permit accurate inference to be made with respect to underlying, non-negotiated, confidential information supplied to the ministry by the recruitment agencies.

[39] Accordingly, I accept the ministry's position that the hourly rates as they appear on the responsive record were reached through negotiation by both parties and therefore, that they were not "supplied" to the ministry by the recruitment agencies in the manner contemplated by that term in part 2 of the section 17(1) test.

[40] Regarding the remaining fields at issue on the responsive records, none of the parties have made submissions with respect to the origin of the information found in the fields detailing the dates of the assignment, the temporary worker's regular hours and the total amount that it paid to that worker. Nevertheless, I do not accept that any of this information was supplied in confidence to the ministry by the recruitment agencies. Given that the government was the party that was seeking temporary workers to complete certain assignments for certain durations, it is reasonable to conclude that this information, which identifies the dates, hours, and ultimately the total amounts paid for each assignment, originates from the ministry and was not supplied in confidence by the recruitment agencies. I acknowledge that it is possible that this information results from agreements negotiated between the ministry and the recruitment agency for the fulfillment of each individual temporary work assignment. However, if this is the case, for the reasons outlined above, the information in these fields would amount to negotiated information which, as previously explained, does not qualify as having been "supplied" for the purposes of part 2 of the section 17(1) test.

[41] As I have found that none the information that is at issue has been "supplied in confidence" by the recruitment agencies, the second requirement for the application of section 17(1) has not been established. As all three requirements of the section 17(1) test must be met, it is not necessary for me to continue my analysis to determine whether the third requirement of the test, that disclosure of the information could reasonably be expected to result in the harms contemplated by sections 17(1)(a), (b), (c), or (d), has been established. Accordingly, I find that none of the information at issue qualifies for exemption under section 17(1) of the *Act*.

[42] As no other exemptions were claimed for the information at issue in this appeal, I find that it should be disclosed to the appellant.

ORDER:

I uphold the ministry's decision.

Original signed by: May 29, 2013
Catherine Corban
Adjudicator