

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3513-I

Appeal PA14-497

Ministry of the Environment and Climate Change

July 27, 2015

Summary: The appellant, a third party, appealed a decision of the Ministry of the Environment and Climate Change (the ministry) to partially disclose agreements and reports in response to a request for records about payments made to the appellant to administer a funding program for municipal hazardous waste management. The appellant claimed the mandatory exemption at section 17(1) (third party information) of the *Freedom of Information and Protection of Privacy Act* to block disclosure of the requested information. In this order, in the absence of evidence from the appellant (the sole party resisting disclosure), the adjudicator dismisses its claims in respect of section 17(1). She orders the ministry to disclose the information at issue to the requester, with the exception of certain information for which consideration is deferred.

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

OVERVIEW:

[1] The appellant is a non-profit organization that contracted with the Ministry of the Environment and Climate Change (the ministry) in 2012 to administer a program to transfer provincial funds to municipalities to ensure the proper collection and management of certain household hazardous wastes. The program ended on October 1, 2014.

[2] A requester sought information from the ministry, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), about payments made to the appellant in relation to the program. With the requester's agreement, the original request (set out in the form of four questions) was clarified as a request for records relating to the amounts and purpose of all transfers, grants or payments made by the ministry to the appellant in 2011, 2012 and 2013.

[3] The ministry identified 489 pages of records responsive to the request. It notified the appellant of the request in accordance with section 28 of the *Act*. The appellant made no submissions to the ministry in response to this notice. After the lapse of the legislated notice period, the ministry issued a decision to grant partial access to the requester, with severances of certain personal information pursuant to the mandatory exemption at section 21 (personal privacy) of the *Act*. In its decision letter, the ministry also explained that it is of the view that the mandatory exemption at section 17 (third party information) does not apply to the records.

[4] The appellant appealed the ministry's decision to this office. In its letter of appeal, the appellant stated that some of the information in the records is proprietary and some is sensitive.

[5] A mediator from this office sought clarification from the appellant on which records or parts of records it believes should be withheld under section 17(1). The appellant did not provide the mediator with any details of the nature of its appeal.

[6] The requester confirmed to the mediator that he continues to seek access to the records. The requester also confirmed that he does not challenge the ministry's section 21 severances to the records. As a result, the sole issue in this appeal is the appellant's objection to disclosure on the basis that section 17(1) applies to some information in the records.

[7] As mediation did not resolve the appeal, it was transferred to the adjudication stage of the appeal process. I began my inquiry by seeking representations from the appellant as it is the party resisting disclosure in this appeal, and bears the burden of establishing that the information at issue falls within one of the exceptions to access specified in the *Act*. The appellant did not provide any representations, although I provided it with a number of opportunities to do so.

[8] In this order, I dismiss the appellant's claim regarding section 17(1). I therefore order disclosure of most of the information at issue in this appeal, with the exception of certain information described below.

INFORMATION AT ISSUE:

[9] The information at issue is contained in 489 pages of records, including an agreement, two amending agreements, reports and cheque requests.

[10] The ministry's severances to the records based on section 21 are not at issue in this appeal.

DISCUSSION:

[11] The sole issue in this appeal is whether section 17(1) applies to the information at issue. This section provides a mandatory exemption from disclosure where certain conditions are met. It reads:

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;
- (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.

[12] 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

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.) (*Boeing Co.*).

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

[13] 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.

[14] The ministry is of the view that section 17(1) does not apply to the records. The appellant resists disclosure on the basis of section 17(1), but has not specified what information in the records it believes qualifies for exemption, or on which paragraphs of section 17(1) it relies. As section 17(1) is a mandatory exemption, I have considered whether the information at issue qualifies under any of sections 17(1)(a), (b), (c) or (d).

[15] The records consist of an agreement between the ministry and the appellant, two amendments to the agreement, and a number of reports and other documents submitted by the appellant to the ministry in accordance with their agreement. The records relate to the provision of funds in exchange for services, and activities undertaken by the appellant further to its agreement with the ministry. On my review of the records, I accept that they contain commercial and financial information, as these terms have been defined in prior orders of this office:

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

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ Order PO-2010.

⁴ Order P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁵

[16] As a result, part one of the three-part test for the application of section 17(1) is established.

[17] Part two of the test requires the information to have been “supplied in confidence” to the institution. The requirement that the information be “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁶ In order to satisfy the “in confidence” component of part two, the party resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[18] 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.⁸

[19] This office’s approach to the second part of the test for the application of the third party exemption to executed contracts has been upheld by the Divisional Court on a number of occasions.⁹

[20] From my review of the records, I find no basis for concluding that the information in the agreement and two amendments to it qualifies for either the “inferred disclosure”¹⁰ or the “immutability”¹¹ exceptions to this general rule. As a

⁵ Order PO-2010.

⁶ Order MO-1706.

⁷ Order PO-2020.

⁸ This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

⁹ In addition to *Boeing Co.* and *Miller Transit*, cited above, see also: *Grant Forest Products Inc. v. Caddigan*, 2008 CanLII 27474; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario*, 2012 ONSC 3496 (CanLII); *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (Can LII); and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392 (CanLII).

¹⁰ The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution (Order MO-1706, cited with approval in *Miller Transit*, above, at para. 33).

result, I am not satisfied the agreements qualify as having been “supplied in confidence” to the ministry in satisfaction of part two of the test.

[21] Other records, comprising reports made by the appellant to the ministry further to their agreement, may qualify as having been “supplied in confidence” for the purposes of section 17(1). However, in light of the agreement’s explicit acknowledgment that any information provided to the ministry in connection with the program (or otherwise) may be subject to disclosure under the *Act*, and in the absence of representations from the appellant to show this information was “supplied in confidence” for the purposes of the exemption, I am unable to conclude that this information meets part two of the test. In any event, even if this information were “supplied in confidence,” I find below that the harms part of the test has not been made out.

[22] In order to meet part three of the test for the application of section 17(1), the party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹²

[23] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1).¹³

[24] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁴

[25] On my review of the records, I find no basis to conclude that disclosure could reasonably be expected to yield any of the harms contemplated in paragraphs (a), (b), (c) or (d) of section 17(1). These records are reports that the appellant was required to prepare under the agreement to update the ministry on financial and other progress of the program. These reports include details of program achievements, variances from the agreed-upon schedule and program expenditures, including procurement processes

¹¹ The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs (*Miller Transit*, above, at para. 34).

¹² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹³ Order PO-2435.

¹⁴ Order PO-2435.

undertaken by the appellant to engage third parties for services relating to the program. I note that this program ended in October 2014, and that the ministry does not consider this information to be subject to the third party exemption in section 17(1). Without any evidence from the appellant to show how disclosure of this information could reasonably be expected to cause significant prejudice or undue loss or gain, or any of the other harms specified in section 17(1), and without being able to infer any of these harms from disclosure from my review of the records, I find the third part of the test has not been met. The information sought to be exempted under section 17(1) will therefore be ordered disclosed to the requester, with two exceptions.

[26] The first exception is information in the records that identifies some third party service providers with whom the appellant contracted, independently of the ministry, to provide professional services to the appellant for program purposes. References to these third party service providers appear in the records in discrete portions of the appellant's reports to the ministry. While it appears that the identity of at least some of these service providers is publicly known, and although the harms from disclosure of this information is not self-evident from the records, these third parties have not been notified of this appeal. In these circumstances, I will defer making a finding at this time on the information relating to these third parties.

[27] The second exception is information on page 433 of the records that specifies the date on which a named individual began full-time work in a position relating to the program. On its face, this information constitutes personal information under section 2 of the *Act*, and therefore may qualify for exemption under the mandatory exemption for personal privacy at section 21(1). I note the requester did not take issue with the ministry's other severances to the records on the basis of section 21.

[28] It is unclear to me that either category of information described in the two preceding paragraphs is of interest to the requester. The information disclosed to him as a result of this order should satisfy his request for the amounts and purpose of all transfers, grants or payments made by the ministry to the appellant over the specified three-year period. The information for which I am deferring consideration relates only indirectly to the transfers, grants or payments made by the ministry to the appellant. It also appears from the records that payments made by the appellant pursuant to the separate agreements between the appellant and third parties are accounted for in the appellant's reports to the ministry setting out program expenditures and other updates.

[29] For the reasons given above, I dismiss the appellant's claim made in respect of section 17(1). I order disclosure of most of the information at issue, with the exception of some discrete portions for which consideration is deferred on the terms set out below.

ORDER:

1. I order disclosure of all the information at issue in this appeal, except for the following categories of information:

- Names of third party service providers appearing in the records.

I have enclosed with this order some sample pages with the type of information to be withheld highlighted in yellow. The ministry is to sever similar information in all the records before disclosing them to the requester.

- The date a named individual began full-time employment in a specified role, appearing on page 433 of the records.

I have enclosed a copy of this page with the information to be withheld highlighted in yellow.

- The ministry's severances to the records made on the basis of section 21, which are not at issue in this appeal.

The remainder of the information is to be disclosed to the requester by **September 1, 2015** but not before **August 26, 2015**.

2. My consideration of the application of section 17 and/or section 21 of the *Act* to the information described in the first two bullet points under order provision 1 is deferred. If the requester wishes to pursue access to either category of information, he is to notify me, in writing, by **August 26, 2015**.

3. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide this office with copies of the information disclosed to the requester.

4. I remain seized of this appeal.

Original Signed By:
Jenny Ryu
Adjudicator

July 27, 2015