

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3638

Appeal PA15-112

Algonquin College of Applied Arts and Technology

July 26, 2016

Summary: A requester sought access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a transportation company's quote and invoices submitted to the college. The transportation company appealed the college's decision to grant the requester access to the responsive records on the basis that the records qualify for exemption under the third party information exemption under section 17(1). The adjudicator finds that the records do not meet the "supplied in confidence" component of the section 17(1) test. Accordingly, the college's decision is upheld and the records are ordered disclosed.

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

Orders and Investigation Reports Considered: Order PO-2806.

OVERVIEW:

[1] The requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Algonquin College of Applied Arts and Technology (the college) for records relating to transportation contracts awarded to transport companies for a specified period of time.

[2] The college located the responsive records and notified one transportation company under the notification provision in section 28(1). The transportation company (the appellant) objected to the release of any information contained in the records relating to its business.

[3] Initially, the college issued an access decision granting the requester partial access to the responsive records. However, the college subsequently issued a revised access decision on February 20, 2015 granting the requester full access to the responsive records.

[4] The appellant appealed the college's decision to this office and a mediator explored settlement with the parties. During mediation, the requester confirmed its interest in seeking access to the responsive records. As the appellant continues to object to the release of these records no further mediation was possible.

[5] The appeal was then transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, the college, requester and appellant were given an opportunity to provide written representations. However, only the appellant submitted representations. A complete copy of the appellant's representations was shared with the requester.

[6] In this order, I find that the third party information exemption does not apply to the records. As a result, the college's access decision is upheld and it is ordered to disclose the records to the requester.

RECORDS:

[7] The records at issue in this appeal consist of a Request for Quotation submission (11 pages) and 135 invoices.

DISCUSSION:

[8] The sole issue in this appeal is whether the third party information exemption under section 17(1) applies to the records. The appellant takes the position that the records qualify for exemption under sections 17(1)(a) and (c). These sections 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; or

(b) result in undue loss or gain to any person, group, committee or financial institution or agency.

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

institutions.¹Although 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

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

[10] The appellant submits that the records contains “commercial” information about its business. The appellant advises that it offers transportation services in exchange for monetary payments and states:

[that it] carries on business as a bus transportation supplier and the information provided to the College and received from the College, both by way of quote and by way of the invoices, sets out business information of a commercial nature.

[11] Commercial information has been defined in prior orders 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.³The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁴

[12] Having regard to the appellant’s submissions and the records, I am satisfied that the records contain “commercial information” within the meaning of that term defined by this office. The records contain information regarding the appellant’s response to the college’s request for a quotation and subsequent invoices submitted and paid by the college.

[13] Accordingly, I find that the first part of the three-part test has been met.

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.).

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

³ Order PO-2010.

⁴ Order P-1621

Part 2: supplied in confidence

[14] The appellant takes the position that it supplied the records in confidence to the college. In support of its position, the appellant states:

In submitting the documentation to the College and receiving the invoices, it was implicitly clear that the documentation would be submitted in confidence and the invoices paid in confidence. It was never intended that any other parties other than the College and the Appellant would receive the quotes or have privy to the invoices. This is not a normal tender situation where tenders are opened by the College on a specific date for all to see. The College requested quotations from certain named entities to which the Appellant responded. The information was submitted internally and not open to the public with no intention of the Appellant that it ever would be.

The documentation which is [compromised of] quotes and invoices of a commercial nature would normally be considered confidential. In a normal business relationship, the public would not be privy to this information and it was never the intention nor the expectation of the Appellant that this information would be publicly disclosed.

[15] The requirement that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁵

[16] 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.⁶

[17] 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.⁷

[18] 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 inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.⁸ The immutability exception

⁵ Order MO-1706.

⁶ Orders PO-2020 and PO-2043.

⁷ 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*).

⁸ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

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.⁹

[19] In order to satisfy the “in confidence” component of part two, the parties 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.¹⁰

Decision and analysis

[20] There are two types of records at issue in this appeal. First, there is the 11-page submission the appellant provided the college in response to its Request for Quotation. The appellant’s submission consists of a 3-page cover letter which identifies pricing information in addition to general information regarding the appellant’s company, such as its fleet and drivers. The rest of the submission consists of a copy of the college’s 4-page Request for Quotation with the appellant’s proposed pricing set out in the margins, and another 4 pages consisting of copies of the appellant’s Certificate of Liability Insurance and operating licences issued by the Ontario Government.

[21] The remaining records at issue consist of 135 invoices submitted by the appellant to the college for payment of transportation services rendered from March 1, 2012 to March 31, 2014.

[22] Having regard to the records, I am satisfied that some of the information contained in its quote was supplied to the college by the appellant. However, I find that the pricing information at issue does not meet the “supplied” test in section 17(1). In my view, the pricing information contained in the appellant’s quote reflect the mutually generated terms of the college’s and appellant’s contractual arrangement. As noted above, the provisions of a contract, in general, have been treated as mutually generated, rather than “supplied”, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.

[23] In making my decision I note that the college’s Purchasing Policies and Procedure Manual¹¹ found on its public website suggests that the appellant’s contract with the college was awarded as a result of a competitive bidding process. The manual indicates that the college has a number of procurement options available to it having regard to the estimated value of the contract. Here, the college selected an invitational competitive procurement process which requires that a minimum of three written quotes.¹² The process also requires that the value of the contract is between \$25,000.00 and \$99,000.00. I also reviewed the invoices and am satisfied that the

⁹ *Miller Transit*, above at para. 34

¹⁰ Order PO-2020.

¹¹ Revised and updated December 19, 2012.

¹² The college’s procedural manual acknowledges that in some instances certain goods or services are available from a sole/ single source supplier.

pricing information contained in the quote was accepted by the college and formed the basis of the contract between the parties.

[24] Having regard to the above, I find that the appellant's quote can not be said to have been "supplied" to the college by the appellant. This information was mutually generated as a result of a competitive bidding process in which the college accepted the appellant's quote.

[25] The appellant did not claim that the exceptions to the general rule that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). 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. In my view, the pricing information contained in the quote merely contains information regarding the amount of monies the college agreed to pay the appellant for transportation services pursuant to the terms of their contractual arrangement. I find that the circumstances in this appeal are similar to those in Order PO-2806 in which this office found that annual payments the Ontario Power Generation made to a company which could be "readily traced back" to the negotiated arrangement could not meet the "supplied" test in section 17(1).¹³

[26] For the "immutability" exception to apply there must be evidence that the pricing information in the quote is immutable or is not subject to change. The appellant did not claim that this exception applies and I am satisfied that it does not.

[27] Given my finding, it is not necessary that I also determine whether the pricing information contained in the quote also satisfies the "in confidence" component of part two of the test. Accordingly, I will order the college to disclose this information to the appellant.

[28] Though I am satisfied that remaining information contained in the appellant's quote about its company, licences and insurance in addition to the invoices meet the "supplied" test in section 17(1), I am not satisfied that a reasonable expectation of confidentiality extends to this information. In order to satisfy the "in confidence" component of section 17(1), the appellant must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. The appellant submits that since its quote was not submitted in a "normal tender situation" it had no expectation that the information could be subject to disclosure at the time it supplied it to the college. However, the appellant did not provide documentation which would demonstrate that its expectation of confidentiality is reasonable given the competitive bidding process.

[29] In my view, the appellant failed to adduce sufficient evidence to demonstrate that a reasonable expectation of confidentiality existed when it provided general

¹³ See also Orders MO-3223 and MO-3258.

information about its operations along with its insurance certificate and public operating licences to the college.

[30] Furthermore, given the fact that the contract monies the appellant received from the college were paid from public funds, I find that the appellant's expectation that the remaining information at issue contained in the quote along with the invoices submitted for completed work would be confidential is not reasonable.

[31] In summary, I find that the pricing information contained in the quote was not "supplied" to the college by the appellant for the purposes of section 17(1) and does not meet the first component in part 2 of the three-part test. Though I am satisfied that the remaining information contained in the quote along with the invoices at issue meets the "supplied" test, I find that there was no reasonable expectation that this information was "supplied in confidence". Accordingly, the remaining information at issue does not meet the second component in part 2 of the test in section 17(1).

[32] As all three parts of the section 17(1) must be met, it is not necessary for me to also review the harms contemplated in the third part of the test.

ORDER

I uphold the college's decision to disclose the records to the requester by **August 31, 2016** but not before **August 26, 2016** and dismiss the appeal.

Original Signed by: _____
Jennifer James
Adjudicator

_____ July 26, 2016