Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3835

Appeal PA16-467

Ryerson University

April 27, 2018

Summary: The requester sought access to copies of any contracts between the university and a named provider of standardized test preparation courses. The university identified six purchase orders as responsive to the request. Following notification of the provider, the university issued a decision granting access to the records, in their entirety. The provider appealed the university's decision to disclose the records claiming that the exemption for third party information at section 17(1) applies to the records, in their entirety.

This order finds that the records were not "supplied" to the university for the purposes of section 17(1) and the exemption does not apply. Accordingly, the adjudicator orders the records disclosed and dismisses the appeal.

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

Orders Considered: Orders MO-3062, PO-3347, PO-3517, and PO-3518.

OVERVIEW:

[1] Ryerson University (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of any contracts between the university and a named provider of standardized test preparation courses. The requester stated that he was filing the request in the public interest.

[2] The university located responsive records and pursuant to section 28(1) of the *Act*, notified the provider of the courses of the request who provided submissions

advising that it did not consent to the disclosure of the requested information. Following receipt of the provider's representations, the university issued an access decision to the requester (and the provider) advising that it was prepared to grant full access to the responsive records.

[3] The provider (now the appellant), appealed the university's decision to grant the requester access to the requested records objecting to the disclosure of the records, in their entirety.

[4] The sole issue to be determined is whether the exemption for third party information at section 17(1) of the *Act* applies to the responsive records.

[5] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from the appellant, initially. I then sought representations from the university and the requester, providing them with a copy of the appellant's non-confidential representations. Both the university and the requester provided representations, non-confidential portions of which were shared with the appellant who was given an opportunity to provide a reply, which it did.

[6] In this order, I find that the purchase orders are not "supplied" within the meaning of that term in part two of the section 17(1) test and the exemption does not apply. I order the university to disclose the records to the requester and dismiss the appeal.

RECORDS:

[7] The records at issue consist of six purchase orders dated January 5, 2012; June 6, 2012; September 30, 2013; January 28, 2014; February 25, 2014; and July 7, 2015.

DISCUSSION:

Do any of the mandatory exemptions at section 17(1)(a),(b), or (c) apply to the records?

[8] The appellant submits that the records are exempt from disclosure, in their entirety, pursuant to sections 17(1)(a), (b) and/or (c) of the *Act*.

[9] Sections 17(1)(a), (b) and (c) 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;
>
> (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;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[10] 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]

[11] 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

[12] The appellant claims that the records contain commercial and financial information. The types of information that are listed in section 17(1) have been discussed in prior orders. Specifically, commercial and financial information have been described 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

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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.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] Order PO-2010.

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

[13] I adopt these definitions for the purposes of this appeal.

Representations

[14] The appellant states that the records contain both commercial and financial information and that the Supreme Court of Canada has considered both of those terms and has held that they should be given their ordinary dictionary meaning.[6] The appellant submits that the records are "plainly comprised of, and permit inferences about, commercial and financial information." It submits that "[t]here is no dispute that invoices and purchase orders (including banking information) relate to the buying and selling of goods and services, and to money and its use [or distribution], squarely within the meaning of 'commercial information' and 'financial information."

[15] The university concedes that the records contain information that qualifies as either "commercial" or "financial information."

[16] The requester submits that as he has not seen copies of the records, he cannot state definitively whether or not the records contain commercial or financial information but concedes that previous decision have found that purchase orders contain information that qualify as either commercial or financial information.

Analysis and finding

[17] Having considered the parties' submissions as well as having reviewed the records themselves, I am satisfied that the purchase orders that make up the records at issue contains "commercial information" and/or "financial information" within the meaning of those terms as defined by this office. The appellant provides standardized test preparation services for the university and the records relate to the buying and selling of those services ("commercial information"). The records also breakdown the financial costs for those services ("financial information"). As a result, I find that the first part of the section 17(1) test has been established.

Part 2: Supplied in confidence

[18] In order to satisfy the second part of the section 17(1) test, the appellant must have supplied the information to the university in confidence, either implicitly or

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[4] Order P-1621.
[5] Order PO-2010.
[6] *Mecrk Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at paras 136-140.

explicitly.

[19] 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.[7] 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.[8]

[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.[9]

[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 inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[10]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.[11]

[22] 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.[12]

[23] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality

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[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] 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*).
[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.
[12] Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[13]

Representations

[24] The appellant submits that the information in the records, which includes information relating to total pricing, unit prices, course descriptions, volume/frequency of courses, vendor number and related matters described in the records, is "inherently confidential, and has been treated and protected as such by both itself and the university. It submits that the "circumstances of the relationship between the parties in relation to this information are such that confidentiality was implied, if not express." The appellant submits that the information that the records contain is not publicly available and is "precisely the type of information that organizations and businesses reasonably protect as confidential...."

[25] The appellant further submits that the purchase orders are "revealing of, and would permit inferences about, information which [the appellant] supplied to [the university] regarding its services." The appellant identifies this information as pricing, unit prices, course descriptions and volume/frequency of courses.

[26] The university submits that the information contained in the purchase orders was not "supplied" to it. In support of its position it points to Order PO-3607 in which Adjudicator Justine Wai stated:

> 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.

[27] The university submits that the purchase orders were issued by the university and set out the price payable for certain standardized test preparation services provided by the appellant. The university submits that relying on Order PO-3607 quoted above, it takes the position that the pricing information that is set out in each of the purchase orders is a negotiated term of the agreement between the parties for the services, rather than information that was supplied directly to the university by the appellant.

[28] The university also submits that in determining whether or not the purchase orders were "supplied" within the meaning of part two of the section 17(1) test, it considered the "inferred disclosure" exception to the general rule that provisions of a contract are generally regarded as mutually generated rather than supplied by one party.

[29] The university submits that it is not aware of any non-negotiated confidential

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[13] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

information supplied to the university by the appellant in the purchase orders and therefore, that it takes the position that the inferred disclosure exception does not apply to the purchase orders.

[30] With respect to the confidentiality of the records, the university submits that the purchase orders are prepared by the university and issued to the appellant. It submits that the purchase orders "are not, on their face, confidential documents" and that the appellant could not have had a reasonable expectation of confidentiality in the information contained in purchase orders issued by the university. It further submits that it is not aware of any communications from the appellant that identified the negotiated pricing information as confidential information of the appellant.

[31] Regarding the "supplied" component of part two of the three-part test, the requester submits that previous orders issued by this office have consistently found that purchase orders and contracts prepared and issued by government institutions to a service provider do not meet the "supplied" component of the test in section 17(1). He submits that the provisions of purchase orders which he submits "presumably dictate the amount invoiced," have been treated in past decisions as information that has been mutually generated, rather than supplied.[14] The requester further submits that "the mere delivery of a document containing payment information does not mean that information was supplied in confidence." He submits that previous orders have found that "the terms of a financial agreement, be it contained in a contract or invoice 'have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third part and agreed to with little discussion.'"[15] He further submits that "[e]ven if the amount paid for services was accepted with no discussion, the act of choosing to accept means the information was negotiated by both parties and not supplied in confidence."[16]

[32] With respect to whether the information can be said to have been supplied "in confidence," the requester submits that the content of the records is "not inherently confidential in nature." He submits that the records reveal routine transactions between an institution and a company providing services.

[33] The requester also submits that there is insufficient evidence to support an argument that the "inferred disclosure" or "immutability" exceptions apply in the circumstances.

Analysis and finding

[34] From my review of the records and having considered the circumstances of this appeal, I am not satisfied that the purchase orders meet the "supplied in confidence" requirement of part two of the section 17(1) test.

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[14] The appellant cites Orders PO-3347 and MO-3062 in support of his position on this point.
[15] The appellant cites Orders PO-3345 and PO-1545 in support of his position on this point.
[16] The appellant cites Order PO-2453 in support of his position on this point.

[35] Having considered the purchase orders themselves, these are records that were clearly prepared and issued by the university. In my view, they contain information about the mutually agreed upon price the university agreed to pay for the appellant's services. Accordingly, I find that they cannot be considered to have been supplied by the appellant within the meaning of that term in the second part of the section 17(1) test.

[36] This is in keeping with the reasoning in a number of previous orders issued in this office that have consistently found that purchase orders prepared and issued by government institutions to a service provider do not meet the "supplied" component of part two of the test in section 17(1).[17]

[37] Additionally, from my review of the content of the purchase orders and the parties' representations, I do not accept that any of the information contained therein meet either of the "inferred disclosure" or "immutability" exceptions described above. In my view, there is insufficient evidence before me to support that that the information contained in the purchase orders could either permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the university. In my view, there also is insufficient evidence to suggest that the purchase orders contain information that is not susceptible to negotiation. Furthermore, from the evidence before me, I do not accept that disclosure would reveal any information that can be described as having been supplied in confidence by the appellant.

[38] As a result, I find that the purchase orders created by the university were not "supplied" for the purposes of section 17(1).

Summary

[39] In summary, I find that the records were not "supplied" to the university for the purposes of section 17(1) and do not meet the second part of the three-part test for the exemption to apply. As all three parts of the section 17(1) test must be met it is not necessary for me to also review the confidentiality requirement of the second part of the test or the harms contemplated in the third part.

[40] I find that section 17(1) does not apply to the records and I dismiss the appeal.

ORDER:

1. I uphold the university's decision to disclose the records.

2. I order the university to disclose the records, in full, to the requester by **June 5, 2018** but not before **May 30, 2018**.

[17] Orders PO-3347, PO-3517, PO-3518 and MO-3062.

3. In order to verify compliance with order provision 2, I reserve the right to require that a copy of the records disclosed by the university to the requester to be provided to me.

Original signed by
Catherine Corban
Adjudicator

April 27, 2018