

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3792

Appeal PA16-498

Ministry of Community Safety and Correctional Services

December 11, 2017

Summary: The ministry received an access request for a specific agreement between it and a named company pursuant to a specified RFP. It initially withheld some information pursuant to section 17(1) (third party information), and that decision was appealed. However, during the inquiry, the ministry issued a supplemental decision stating that it is no longer relying on section 17(1). In this order, the adjudicator 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 and Investigation Reports Considered: Orders PO-2632, PO-3266, PO-3499, MO-3175 and MO-3180.

BACKGROUND:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

The agreement entered between the Ministry and a [named company] pursuant to the Ministry's [specified RFP].

[2] The ministry, prior to issuing its decision, provided notice to an affected party pursuant to section 28 of the *Act*. The affected party consented to partial disclosure of

the record. The ministry subsequently issued its decision granting partial access. Access to some of the information in the record was denied pursuant to the mandatory exemption for third party information at section 17(1), and the mandatory personal privacy exemption at section 21(1) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision.

[4] During the course of mediation, the appellant advised the mediator that he was not pursuing access to the information that was severed on page 30 of the record pursuant to section 21(1) of the *Act*. Accordingly, this information is no longer at issue in this appeal.

[5] The appellant indicated that he is seeking access to all the withheld information on page 45.

[6] As no further mediation was possible, the appeal was moved to the next stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[7] During the inquiry, the ministry issued a supplemental decision letter, which stated that it would provide access to the withheld information contained on page 45 of the record, once the appeal has been resolved.

[8] I sought and received representations and reply representations from the affected party and the appellant. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, copies of the parties' representations were shared.

[9] In this order, I uphold the ministry's decision that the withheld information is not exempt under section 17(1) and should be disclosed.

RECORD:

[10] The record at issue is an agreement, specifically the withheld information on page 45.

DISCUSSION:

[11] The only issue in this appeal is whether the mandatory exemption for third party information at section 17(1) of the *Act* applies to the record at issue. It states:

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, if 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; or
- (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 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 10(1) will occur.

Part 1: type of information

[14] Past orders of this office have defined financial and commercial information as follows:

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

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.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.³

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

[15] Adopting this definition, from my review of the record, I find that the record contains information that qualifies as financial and commercial information for the purposes of section 17(1) of the *Act*. I note that the appellant and the affected party agree that the record contains financial and commercial information. Accordingly, the first part of the test for the application of section 17(1) has been met.

Part 2: supplied in confidence

Supplied

[16] 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.⁶

[17] 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

[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] 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

³ Order PO-2010.

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order MO-1706.

⁷ Orders PO-2020 and PO-2043.

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*).

inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.⁹ 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.¹⁰

Representations

[20] In its representations, the affected party submits that the withheld information was “supplied” to the ministry. It states that the withheld information was contained in its proposal to the RFP. The affected party also submits that it relies on the “inferred disclosure” exception as disclosure of the withheld information would permit accurate inferences to be made with respect to underlying non-negotiated confidential financial information supplied by it to the ministry.

[21] In his representations, the appellant submits that the withheld information has not been “supplied” to the ministry. He submits that there are a number of IPC orders which confirm that pricing and pricing schedules in a contract are not exempt under section 17(1), including Orders PO-3499, MO-3180, PO-3266 and PO-2632. He also submits:

[The affected party] baldly asserts that the information would “reveal or permit the drawing of accurate inferences with respect to the competitive pricing practices of [the affected party].” However, [the affected party] provided no evidence or representations to support or explain its self-serving conclusory statement.

[22] In its reply representations, the affected party submits that the withheld information was directly transposed from its proposal and was not a mutually generated product of negotiation. It states that there was no price negotiation between it and the ministry prior to the contract award.

Analysis and findings

[23] As seen above, the affected party argues that the withheld information was “supplied” to the ministry as it was directly transposed from the affected party’s proposal to the RFP and was not a mutually generated product of negotiation. It also argues that the “inferred disclosure” exception applies as disclosure of the withheld information would permit accurate inferences to be made with respect to underlying non-negotiated confidential financial information supplied by it to the ministry.

[24] Numerous orders of this office, including the four orders referenced by the

⁹ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹⁰ *Miller Transit*, above at para. 34.

appellant in his representations, state the following principles with respect to the "supplied" test in section 17(1):

... it is well established that the agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied" even when "negotiation" amounts to acceptance of the terms proposed by the third party [See Orders PO-2384, PO-2497 (upheld in CMPA) and PO-3157]. In Order MO-1706, Adjudicator Bernard Morrow stated:

... [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects the terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.¹¹

[25] For the purposes of this appeal, I adopt this office's approach to section 17(1) which has been repeatedly upheld by the Divisional Court, and find that the withheld information was not "supplied" to the ministry. I acknowledge that the withheld information was proposed by the affected party and was agreed to between the parties, but this still does not meet the criterion of having been supplied as the ministry had the option of accepting or rejecting the affected party's proposal.

[26] Finally, I have considered whether the "immutability" and "inferred disclosure" exceptions apply to the circumstances of this appeal. The affected party has not provided any representations on whether the "immutability" disclosure exception applies. Accordingly, there is no evidence before me suggesting that the withheld information is immutable or is not susceptible of change.

[27] 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.¹² It applies where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other, confidential, information belonging to the third party may be gleaned by reference to contractual information.¹³ I note that the affected party relies on this exception. However, it has not provided sufficient evidence or representations on how this exception applies. Based on my review of the withheld information, I am unable to find that disclosure of the withheld information would permit the accurate inference of

¹¹ See Order MO-3175.

¹² Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹³ See *Miller Transit*.

underlying non-negotiated confidential information supplied by the affected party.

[28] In summary, I find that the withheld information in this appeal was not "supplied" to the ministry for the purposes of section 17(1) and does not meet the second part of the three-part test for the third party information exemption in section 17(1). 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 or the harms contemplated in the third part. I find that section 17(1) does not apply and dismiss the appeal.

ORDER:

1. I uphold the ministry's decision to disclose the withheld information to the appellant.
2. I order the ministry to disclose the withheld information to the appellant by **January 22, 2018** but not before **January 17, 2018**.
3. I reserve the right to require a copy of the record disclosed by the ministry to the appellant to be provided to me.

Original Signed by: _____
Lan An
Adjudicator

December 11, 2017 _____