Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3965

Appeal PA18-00652

Ministry of Education

June 11, 2019

Summary: The Ministry of Education (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*, or the *Act*) for access to three specified types of contracts, within a certain time period, between the ministry and a specified company (an affected party). The ministry located responsive records, including the three contracts at issue in this appeal. The ministry notified the affected party about the request, seeking its views about disclosure. The affected party resisted disclosure. The ministry issued an access decision to the requester and the affected party, withholding a portion of the information in the records under the mandatory third party information exemption at section 17(1) of the *Act*, but otherwise granting disclosure of the responsive records. The requester did not appeal the ministry's decision to withhold information under section 17(1), but the affected party appealed the ministry's decision to disclose other information. During mediation, the affected party consented to further disclosure, but not to disclosure of specified portions of the contracts relating to fees payable by the ministry to the affected party. In this order, the adjudicator upholds the ministry's decision because she finds that the section 17(1) exemption does not apply to the information at issue. She orders the ministry to disclose the information 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 PO-2435, MO-3290, and MO-3577.

OVERVIEW:

[1] The Ministry of Education (the ministry) received a request under the *Freedom of*

Information and Protection of Privacy Act (*FIPPA*, or the *Act*) for access to the following records:

- Signed Contracts – last 5 contracts available between the Ministry of Education and [a named company] e.g. 2017, 2012, 2007, etc.
- License Agreement – current license agreement signed by the Ministry of Education for [the named company's] software or last 5 available (if part of Contracts)
- Annual License Fees paid for [the named company's] software over the past 5 years.

[2] The ministry located responsive records, including the three contracts, which contain the information at issue in this appeal.

[3] Before issuing its decision, the ministry notified the named company of the request pursuant to section 28(1) of the *Act* and sought their representations on disclosure of the records. The named company (an affected party) responded, resisting disclosure.

[4] The ministry then issued a decision to both the requester and the affected party granting partial access to the responsive records, and withholding some information under the mandatory exemption at section 17(1) (third party information) of the *Act*. The ministry held the records from release to allow the affected party an opportunity to appeal.

[5] The company (now the appellant) appealed the ministry's decision to this office. The requester did not file an appeal, so the information withheld by the ministry under section 17 is not at issue in this appeal.

[6] At the outset of mediation, the mediator held discussions with the appellant, the requester, and the ministry. During mediation, the mediator sought consent from the appellant to allow the ministry to disclose further information from the records to the requester. The appellant granted the ministry partial consent to do so. Given that consent, the ministry released this information to the requester.

[7] The requester informed the mediator that he wished to pursue certain additional information from the records for which consent had not been granted. The mediator discussed this with the appellant and further consent could not be obtained. The requester informed the mediator that he wished to pursue this information at adjudication. Accordingly, the appeal moved to the adjudication stage of the appeal process.

[8] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the appellant. I sought

and received written representations in response. Having reviewed the appellant's representations, I determined that it was not necessary to seek representations from other parties.

[9] For the reasons that follow, I uphold the ministry's decision and dismiss this appeal.

RECORDS:

[10] There are three records at issue, all of them contracts. The information at issue relates to fees payable by the ministry to the appellant under each respective contract.

Information remaining at issue in the three specified contracts

2007 contract	2012 contract	2017 contract
Redacted paragraph at 3.0 PURCHASE OF KITS AND RELATED LICENSES under Consideration and Payment (Pages 4 and 5 of 17).	Redacted information in chart at Item Number 17: information below "Total Amount Payable by Ministry is" (Page 3 of 23, APPENDIX A – Form of Agreement).	Redacted information in chart at Item Number 12. [Page 2, Agreement Details (2017)].

DISCUSSION:

Does the mandatory third party exemption at section 17(1) apply to the information at issue in the records?

[11] The ministry decided that the mandatory exemption at section 17(1) does not apply to the portions of the records at issue, and for the reasons that follow, I uphold the ministry's decision.

[12] The appellant resists disclosure of the portions of the records noted above. The only issue in this appeal is whether those portions of the records are exempt under section 17(1) of the *Act*. Specifically, the appellant argues that sections 17(1)(a) and 17(1)(c) apply to the information at issue.

[13] Sections 17(1)(a) and (c) say:

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

[14] 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]

[15] For section 17(1) to apply, the appellant must prove that each part of the following three-part test applies to the information at issue:

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

[16] The appellant submits, and I find, that the records contain commercial and financial information. These types of information have been defined by this office:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services.
>
> *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.[3]

[17] Since the contracts reflect the ministry's commercial relationship with the

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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.

appellant for its software services, the records contain commercial information. The records also include the prices/fees that the ministry was to pay the appellant under the contracts, which is financial information. Accordingly, the records meet part one of the test.

Part 2: supplied in confidence

[18] For the reasons that follow, I find that the information at issue was not "supplied" by the appellant to the ministry, so the records do not meet part two of the test.

[19] Part two of the three-part test itself has two parts: the information at issue must have been "supplied" to the ministry by the appellant, and the appellant must have done so "in confidence", implicitly or explicitly. If the information was not supplied, section 17(1) does not apply, and there is no need to decide the "in confidence" element of part two, or the harms requirement in part three of the test. That is the case here.

[20] 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.[4]

[21] 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.[5]

[22] As mentioned, in this case, all of the records are contracts.

[23] 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.[6]

[24] Based on my review of the records, I find that the ministry's position about the pricing information must be upheld. In my view, each contract reflects the agreed-upon terms that were the result of negotiation between the parties. Once the ministry accepted the appellant's pricing, the information became negotiated, rather than

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[4] Order MO-1706.
[5] Orders PO-2020 and PO-2043.
[6] 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*).

supplied.[7]

Does an exception apply?

[25] There are two exceptions to the general principle that information within contracts is not "supplied": the "inferred disclosure" and "immutability" exceptions. The appellant argues that the inferred disclosure exception applies to the information at issue, but I find insufficient evidence of that.

[26] 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 [emphasis added].[8]

[27] Having reviewed the appellant's representations and the records themselves, I find that there is insufficient evidence to accept that the information at issue would reveal underlying non-negotiated confidential information that the appellant provided to the ministry. The appellant submits that, if disclosed, the pricing information at issue would be highly valuable to the appellant's competitors and current or potential customers (other than the ministry). The appellant asserts that negotiations with customers are primarily driven by price, product functionality, other services to be provided, and other commercial terms. It argues that the prices that it is prepared to provide its different services at, and other commercial terms it is agreeable to, are driven by its "overall product/pricing strategy." The appellant also highlights the disclosure it has already consented to about its services and commercial terms that it is prepared to accept. It argues that the already disclosed information and the pricing information at issue is reasonably likely to allow a competitor or customer to infer commercially valuable information about the appellant's overall product/pricing strategy. Accordingly, the appellant argues that the "inferred disclosure" exception applies.

[28] Having considered the appellant's representations and the records themselves, I am not persuaded that the pricing information at issue is "underlying non-negotiated confidential information." There is insufficient evidence before me to do so. The argument that the disclosed information and the pricing information at issue would allow accurate inferences about what the appellant is willing to supply at what price (its "overall product/pricing strategy") is not persuasive. In my view, "overall product/pricing strategy" is too vague to be considered the appellant's non-negotiated information. What a third party will provide in products and/or services to an institution and at what price is the kind of information that would be found in most, if not all,

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[7] Order PO-2384.
[8] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

contracts.[9] This is not enough to establish that the "inferred disclosure" exception would apply.

[29] Without specific evidence of non-negotiated information that would be revealed by disclosure of the pricing information at issue, I find that pricing information is the type of information that is negotiable between contracting parties, as many IPC orders have held.[10] Therefore, I find that the "inferred disclosure" exception does not apply to the information at issue.

[30] The "immutability" exception has not been claimed, and from my review of the records, I find that it does not apply.

[31] Because neither exception applies to the general rule that the information contained in contracts is negotiated and not "supplied", the information at issue does not meet the "supplied" element of part two of the test. This means that it is not necessary to examine the "in confidence" element of part two, or the harms-related third part of the test.

[32] Since the information at issue does not meet part two of the test and all three parts of the test must be met for the section 17(1) exemption to apply, I find that the section 17(1) exemption does not apply to the information at issue and will order it disclosed to the requester.

ORDER:

1. I uphold the ministry's decision and dismiss the appeal.

2. I order the ministry to disclose the information remaining at issue in the three contracts by **July 17, 2019** but not before **July 12. 2019**.

Original signed by
Marian Sami
Adjudicator

June 11, 2019

[9] Order MO-3290.
[10] See, for example, Orders PO-2435 and MO-3577.