Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4012

Appeal PA18-00554

Ministry of the Solicitor General

December 6, 2019

Summary: A drone operated by the Ontario Provincial OPP (the OPP) disappeared on a specified date, and a media outlet made a request for records related to it (including make, model, and cost) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry), which oversees the OPP. The ministry identified the e-mail chain that it generated to respond to the request as the responsive record. Only cost-related information is at issue. The ministry issued an access decision to disclose information about the cost of the lost portion of the drone. The third party appealed that decision, relying on the third party information exemption at section 17(1) of the *Act*. The media requester raised the public interest override at section 23 of the *Act*. In this order, the adjudicator upholds the ministry's decision to disclose the responsive cost information.

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

Order Considered: Order PO-2435.

OVERVIEW:

[1] A drone operated by the Ontario Provincial OPP (the OPP) went missing, and the OPP sought the assistance of the public in finding it. A media outlet made a request to

the Ministry of the Solicitor General (the ministry),[1] which oversees the OPP, for information related to the lost drone, as follows:

> . . . information related to an Unmanned Aerial System (UAS) or drone that disappeared in Elgin, Southwold Township. OPP West Region first requested the public's assistance [on a specified date] and said the drone disappeared at [a specified time].
>
> This request includes but is not limited to:
>
> > All correspondence between officers from the time of disappearance to the present Purpose of UAS flight on [a specified date]
> >
> > Location of last sighting of UAV
> >
> > Cost, make and model of the missing UAV

[2] In response, the ministry asked the OPP for information about the make, model, and cost of the lost drone in question, by email.

[3] The OPP responded to the ministry with information about the make and model of the drone, as well as information relating to costs, some of which was responsive to the request, and some of which was not. After determining which cost-related information was responsive, the ministry notified the drone manufacturer (the third party) about the request,[2] seeking its views about disclosure of the responsive information. The third party did not object to the disclosure of information about make and model of the missing drone since that had already been released in the media. However, the third party objected to disclosure of information related to cost.

[4] The ministry issued a decision to grant full access to the responsive information.

[5] The third party, now the appellant, appealed the ministry's decision to this office, relying on the mandatory exemption in section 17(1) (third party information) of the *Act*.

[6] During mediation, the media requester added the issue of public interest override at section 23 of the *Act* to the scope of the appeal. Mediation could not resolve the dispute, and the appeal moved to adjudication, where a written inquiry is conducted by an adjudicator.

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[1] Formerly the Ministry of Community Safety and Correctional Services.
[2] Under section 28(1)(a) of the *Act*.

[7] I began an inquiry under the *Act* by seeking written representations from the appellant, as the party resisting disclosure.[3] I also sought and received written representations from the requester in response to the appellant's representations. The non-confidential portions of the parties' representations were shared amongst them, on consent, in accordance with this confidentiality criteria of this office.[4] The appellant provided representations in response to the requester's.

[8] For the reasons that follow, I uphold the ministry's decision to disclose the responsive information found in the record. As a result, it is not necessary to consider the public interest override at section 23 of the *Act*, and I dismiss the appeal.

RECORD:

[9] The responsive record consists of portions of pages 7 and 8 of an e-mail chain provided to this office, between the ministry and the OPP.[5]

DISCUSSION:

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

[10] The ministry decided that the mandatory exemption at section 17(1) does not apply to the responsive information and, for the reasons that follow, I uphold that decision.

[11] The relevant portions of section 17(1) 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;
>
> . . .

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[3] These representations refer to ones previously made in filing its appeal, which were also provided to me. I will be referring to both sets of representations collectively as the appellant's representations.
[4] *Practice Direction 7* of the IPC's *Code of Conduct*.
[5] The remaining pages of the email chain do not constitute the responsive record.

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

[12] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[6] 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.[7]

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

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

[14] The information at issue meets the first part of the test because it is commercial and/or financial information, two of the types of information listed under section 17(1), as set out below. The IPC defines these types of information 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.[8] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[9]
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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

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[6] *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.*).
[7] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[8] Order PO-2010.
[9] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[10]

[15] Based on my review of the record, I find that it contains a dollar-amount figure (relating to the commercial contract between the appellant and the OPP), which qualifies as commercial and financial information. Since the information at issue is commercial and/or financial, it meets part one of the test.

Part 2: Supplied in confidence

[16] 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 part three) of the test. For the reasons that follow, the dollar-amount figure does not meet part two of the test.

[17] 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.[11]

[18] 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.[12]

[19] The contents of a contract – including pricing information – 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.[13]

[20] However, as mentioned, the record at issue in this appeal is not a contract but an email between the ministry and the OPP.

[21] The information at issue is nevertheless a price that, by the appellant's own admission, was "signed/agreed to" by the OPP. The price was the result of negotiation between the parties. Once the parties entered into a contract for the drones, the price

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[10] Order PO-2010.
[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] 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*).

of the drones became negotiated, rather than supplied.[14] The appellant's representations do not establish that the dollar-amount figure was "supplied," so part two of the test is not met. Although all three parts of the test must be met for section 17(1) to apply, I will also explain why the dollar-amount figure for the lost drone does not meet part three of the test either, below.

Part 3: harms

[22] A party resisting disclosure (the appellant, in this case) must provide evidence about the potential for harm, demonstrating 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.[15]

[23] The failure of a party resisting disclosure to provide sufficient evidence demonstrating a reasonable expectation of the harms contemplated in section 17(1) 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*.[16]

[24] In its non-confidential representations, the appellant explains that it is a Canadian manufacturer of a relatively new technology, and has built its reputation from the start on the uniqueness and customizable nature of its products, providing technology and support at levels that did not exist with its competitors, with a customer-centric approach. It states that it has invested heavily to build the goodwill associated with its brand and to distinguish its brand from "off the shelf" drones. The appellant submits that the price of its drones varies with the level of customization, based on customer requirements and the particular circumstances of supply. Pricing can also change according to the regulations in an area, in order to be compliant with those regulations. It argues that these considerations would make disclosure of cost-related information misleading. The appellant also submits that the fact that its pricing model has since changed from the time that it had contracted with the OPP for the drone, would also lead to misleading information being disclosed. Furthermore, the appellant submits that it competes against much larger, more established companies in a very competitive, technical, and price-sensitive market, so its commercial information is extremely valuable to its competitors. It submits that the disclosure of its commercial information would result in prejudice to its competitive position (under section 17(1)(a))

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[14] Order PO-2384.
[15] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.
[16] Order PO-2435.

and undue loss to itself (under section 17(1)(c)).

[25] I do not accept the appellant's position regarding the dollar-amount figure that the ministry decided should be disclosed. The appellant argues that disclosing the dollar-amount figure would allow its much larger competitors to capitalize on its confidential pricing/bundling offers made to the OPP for the particular drone in question and obtain an unfair advantage in future bidding opportunities. However, in line with previous orders from this office, I find that the fact that the appellant may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice its competitive position or result in undue loss to it.[17]

[26] Furthermore, I do not accept the appellant's argument that disclosing a dollar-amount figure regarding one customer would create expectations with other customers and could reasonably be expected to prevent the appellant from making sales, or would hamper sales, at commercially viable pricing levels. As the requester argues, the highly customizable nature of the products and pricing, as well as the changed pricing structure, are considerations that weigh against accepting that argument. I find that customizable nature of the products and pricing, and the fact that the pricing structure has changed, are facts that diminish from the notion that other customers could expect similar pricing for their orders from the appellant, or that the appellant could reasonably be expected to otherwise be harmed by disclosure.

[27] For these reasons, I find that there is insufficient evidence that disclosing the dollar-amount figure could reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c), as claimed. As a result, this information does not meet part 3 of the test, and it will be ordered disclosed. Accordingly, it is not necessary to discuss the possible application of the public interest override at section 23 of the *Act*.

ORDER:

1. I uphold the ministry's decision to disclose the responsive information regarding make, model and cost to the requester. I order the ministry to disclose highlighted portions of pages 7 and 8 of the email exchange provided to this office by **January 14, 2020** but not before **January 7, 2020**.

2. For clarity, a highlighted version of pages 7 and 8 of the email exchange is enclosed with the ministry's copy of this order. The highlighted information is to be disclosed.

Original signed by December 6, 2019

[17] Order PO-2435.

Marian Sami
Adjudicator