Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4191

Appeal PA19-00545

Brock University

September 28, 2021

Summary: This appeal deals with an access request received by the Brock University (the university) pertaining to a particular Request for Proposal related to a construction project. After notifying an affected party, the university granted full access to four records and partial access to three records. Relevant to this appeal are the severances made to one of the three records pursuant to the section 17(1) (third party information) exemption of the *Act*, to which the appellant seeks access. In this order, the adjudicator finds that section 17(1) does not apply to the withheld information and orders the university to disclose it to the appellant.

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

OVERVIEW:

[1] Brock University (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to a specified Request for Proposal (RFP), along with a copy of the letter of intent and/or award, and copies of score cards, minutes of meetings, audio, evaluation notes and interview notes, from all submissions received pertaining to the decision of the award.

[2] Following third party notification, the university issued a decision on seven records that it identified as responsive to the request. The university decided to grant full access to four of the records and partial access to three of the records. Severances

were made to the three records pursuant to the exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*.

[3] The appellant appealed the university's decision to the Office of the Information and Privacy Commissioner (the IPC).

[4] A mediator was appointed to explore the possibility of resolving the appeal. During mediation, the appellant confirmed her interest in pursuing access to specific pages of the responsive records. The mediator conveyed this information to the university and an interested affected party. The affected party objected to the disclosure of the information sought by the appellant and the university confirmed that it would not change its decision.

[5] The appellant advised the mediator that she continues to pursue access to the information that was withheld on four pages of records 1, 2, and 6 under section 17(1) of the *Act*.

[6] Further mediation was not possible and this appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[7] An adjudicator was assigned to this appeal and she decided to conduct an inquiry under the *Act*. She sought and received representations from the appellant, the university and the affected party in the inquiry. Pursuant to the IPC's *Code of Procedure and Practice Direction 7*, the complete representations of the university (including the affected party's response to the university during notification) and the severed representations of the affected party were shared with the appellant. During adjudication, the appellant advised that she is no longer interested in records 2 and 6 and she is only interested in pursuing access to the information withheld in Record 1. This appeal was then transferred to me to continue with the adjudication of the matter.[1] In this order, I find that section 17(1) does not apply to the withheld information in the record and I order the university to disclose it to the appellant.

RECORD:

[8] The information remaining at issue in this appeal is pages 17-18 of Record 1, entitled *Construction Management Workplan and Approach*, which the affected party provided to the university as part of the RFP process. The university withheld this information under section 17(1)(c) of the *Act*.

[1] I have reviewed the appeal file, including all of the representations submitted to date, and determined that I do not need further information before rendering a decision.

DISCUSSION:

[9] The sole issue in this appeal is whether the mandatory exemption for third party information at section 17(1) of the *Act* applies to the information remaining at issue in Record 1. While the university's Index of Records indicates that it relies on section 17(1)(c) to withhold portions of pages 17-18 of Record 1, the representations of both the university and the affected party refer to both sections 17(1)(a) and (c) of the *Act*.

[10] Sections 17(1)(a) and (c) of the *Act* 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;…
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or…

[11] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

[12] For section 17(1) to apply, the parties claiming the application of the exemption, in this case, the university and the affected 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.

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part one: Type of information – does the record contain trade secrets or technical, commercial, financial or labour relations information?

[13] As set out below, I find that pages 17-18 of Record 1 contain commercial information and therefore, they meet part one of the test.

[14] The university takes the position that the record contains commercial information, while the affected party submits that the record contains technical information akin to a trade secret. Past IPC orders have defined the types of information listed in part one of the test. The three types of information raised in this appeal are:

> *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]
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[6]
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> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7]

[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.
[7] Order PO-2010.

Representations of the parties

[15] The university submits that the information at issue contains commercial information related to services to be provided by the affected party and purchased by the university as part of a commercial arrangement. It explains that pages 17-18 of Record 1 detail the affected party's *Construction Management Workplan and Approach*, with seven core areas in which the affected party's staff will be involved. While the university explains that it severed the paragraphs explaining the workplan and approach,[8] it did not sever the seven headings.

[16] The affected party submits that the information at issue in Record 1 is technical information that can be classified as a trade secret. It submits that its approach and methodology for managing projects differ from that of its competitors and has been refined over many years in the construction business. It also submits that its approach is proprietary to its company and that clients routinely engage with it due to this proprietary approach.

[17] The appellant did not provide representations on the specific parts of the test and instead provided general representations, which are summarized further below.

Analysis and findings – the information at issue is commercial information

[18] Based on my review of the information severed from pages 17-18 of Record 1, I am satisfied that it constitutes commercial information. The information redacted is a description of the services to be provided by the affected party to the university under a proposed commercial arrangement between them. I therefore find that part 1 of the test under section 17(1) is satisfied.

[19] For the sake of completion, I will also address the affected party's submission that the withheld information is technical information that can be classified as a trade secret because it outlines how it manages projects and differs from that of its competitors. Based on my review of the information at issue, I find that it is neither technical information nor a trade secret. The affected party has not established that the withheld information is information that belongs to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Further, I do not accept that the withheld information is not generally known in the construction business or that it has economic value from not being generally known. Accordingly, I also find that the withheld information on pages 17-18 of Record 1 does not reveal information that is a trade secret or technical information.

[8] Despite the university's representations, the seventh paragraph was not redacted, like the other six paragraphs on pages 17-18 of Record 1.

Part two: Supplied in confidence – was the information supplied in confidence?

[20] The affected party and the university share the position that part two of the test – that the information was supplied to the university in confidence – applies to pages 17- 18 of Record 1. As set out below, I agree that it does.

[21] Part two of the three-part test itself has two parts: the affected party must have *supplied* the information to the university, and must have done so *in confidence*, either implicitly or explicitly.

Supplied

[22] 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.[9]

[23] 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.[10]

In confidence

[24] 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.[11]

[25] 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[12]

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[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] Order PO-2020.
[12] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

Representations of the parties

[26] The university submits that the affected party supplied the information in Record 1 directly to the university as part of a confidential procurement process, which gives all of the proponents a reasonable expectation of confidentiality. The RFP advised proponents: "The confidentiality of such information will be maintained by the [u]niversity, except as otherwise required by law or by order of a court or tribunal." It further submits that consistent with this assurance, all submissions were treated as confidential by the university, are stored in a secure site with strict access controls and are only reviewed by the RFP evaluation team.

[27] In addition, the university submits there was a strong expectation of confidentiality. In support of this, it refers to Order PO-3647-I, which found:

> The appellant's position is that there is insufficient evidence to establish that "significant, independent steps" were taken during the RFP process to preserve confidentiality – merely marking documents as confidential and relying on section 3.8.1 of the RFP does not support a reasonable expectation of confidentiality. However, based on the evidence provided by [the institution], by the other parties and by the contents of the records themselves, I am satisfied that the withheld information was, in fact, treated in a manner that supports a conclusion that it was communicated to the institution on a confidential basis. I accept [the institution]'s evidence that its practice is not to disclose proprietary proposal information.

[28] Based on all of the above considerations, the university explains that it concluded that the affected party supplied the records in confidence, either explicitly or implicitly, as an expectation of confidentiality existed and the affected party had a reasonable basis for it.[13]

[29] The affected party submits that it provided the information at issue to the university in good faith and expected the details of the information provided to remain private between it and the university. The affected party also submits that its clients routinely engage with its company due to its proprietary approach outlined on pages 17- 18 of Record 1, which it supplied to the university in confidence.

[30] Again, the appellant did not provide specific representations related to this part of the test.

Analysis and findings – the record was supplied to the university in confidence

[31] Based on the representations of the parties, I am satisfied that the withheld information on pages 17-18 of Record 1 was supplied to the university by the affected

[13] Orders M-169 and P-1605.

party in confidence.

[32] I am satisfied that the information remaining at issue in this appeal was supplied by the affected party to the university as part of a confidential RFP procurement process. In accordance with this confidential process, I accept that RFP submissions received by the university were treated as confidential by it, stored in a secure site with strict access controls and only reviewed by the RFP evaluation team. I have considered the confidentiality statement used as part of the RFP process and agree that it would provide the affected party and other bidders with the expectation that the confidential portions of their RFP submissions would not be publicly disclosed, except as required by law or order. I also accept that the affected party reasonably expected that the information it supplied to the university would be treated in a confidential manner by the university.

[33] As a result, I find that pages 17-18 of Record 1 meet part two of the test.

Part three: Harms – could disclosure of the record reasonably be expected to cause the harms in sections 17(1)(a) and (c)?

[34] The position of the university and the affected party is that disclosure could reasonably be expected to result in harm to the affected party's competitive position under section 17(1)(a) and/or undue harm or gain under section 17(1)(c) of the *Act*. For the reasons set out below, I find that the withheld information on pages 17-18 of Record 1 does not meet part three of the test.

[35] As the parties resisting disclosure, the university and the affected party have the burden of proving a risk of harm from disclosure of the record that is well beyond the merely possible or speculative. However, they did not need to prove that disclosure will in fact result in such harm.[14] In the Notice of Inquiry sent to the university and the affected party, they were advised to provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[15] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or 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]

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[14] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

[15] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.

[16] Order PO-2435.

Representations of the parties

[36] The university submits that disclosure of the withheld information could reasonably be expected to work to the detriment of the affected party's competitive position and enable the affected party's competitors to exploit its competitive information in future procurement processes.

[37] The university refers to PO-3420, which held that:

> Accordingly, I accept the affected party's position that disclosure of the information in these portions of the records would provide a detailed description of its business practices and approach to this type of work. I am satisfied that disclosure of this information would enable its competitors to make use of the affected party's methodology in order to undercut the affected party when responding to similar RFPs.[17]

[38] The university also submits that its position is consistent with the findings in PO-3974, which recognizes that by having access to successful bids, competitors could gain undue insight into how to write better Expressions of Intent (EOIs). That order found that:

> …part 3 of the test under section 17(1)(c) applies to this information as disclosure could reasonably be expected to result in undue loss to the affected parties or undue gain to their competitors. The affected parties' competitors could reasonably be expected to gain valuable information about how to respond to [institutions'] EOIs from the affected parties' EOI submissions at no cost resulting in undue gain [to] the affected parties' competitors.[18]

[39] Finally, the university submits that while it decided to release most of the affected party's successful bid, the portions of the *Construction Management Workplan and Approach* that have been severed in Record 1 are the very heart of its submission and give a step-by-step account of how the affected party will do the required work. It explains that this information is valuable information to a competitor and that its disclosure could reasonably be expected to result in harm similar to that recognized in Orders PO-3420 and PO-3974. The university believes that its decision balances the value of transparency in its decision making with the need to protect the affected party's confidential information.

[40] The affected party submits that the construction industry is fiercely competitive with only a select number of competitor contractors of the affected party's size. It explains that it routinely bids against these contractors on other projects to win business and relies on its unique workplan and approach to differentiate itself from its

[17] At paragraph 55.
[18] At paragraph 106.

competitors and to win business. It further explains that the release of the information at issue could cause harm to its future ability to win business as its competitors can copy this information.

[41] The appellant submits that she suspects the information at issue is a major part of the affected party's proposal that helped it win the bid. She also submits that the information at issue seems to be minimal and an overview of the affected party's more detailed approach. She further submits that she has received this type of information in response to other access requests.

Analysis and findings - disclosure of the record could not reasonably be expected to cause the harms in sections 17(1)(a) and (c)

[42] As explained below, I find that part 3 of the test is not met.

[43] To find that any of the section 17(1) harms are present, I must be satisfied on a balance of probabilities that there is a reasonable expectation of the harm. I can reach this conclusion either on the basis of the information remaining at issue in the record itself or the representations made by the party resisting disclosure (in this case, the university and the affected party).[19]

Prejudice to competitive position - section 17(1)(a) of the Act

[44] The university argues that disclosure of the severed portions of the *Construction Management Workplan and Approach* could reasonably be expected to work to the detriment of the affected party's competitive position. In addition, the affected party argues that it relies on its unique workplan and approach to differentiate itself from its competitors and that disclosure of this information could harm its ability to win business in the future.

[45] Based on my review of pages 17-18 of Record 1, I do not find that this record is of a nature that competitors could obtain a description of the affected party's workplan and approach sufficient to enable it use it to undercut the affected party when responding to similar RFP's. From my review of the record, I do not find it outlines a unique approach to managing a project; in my view, it provides a general outline of how the work is to be completed. In my view, the information remaining at issue is of a general nature and is not of the level of detail and specificity that one would expect to see in a workplan and approach that differentiates the affected party from its competitors. I am not convinced that the release of could reasonably be expected to be detrimental to the affected party's competitive position. I have considered the withheld information itself, the surrounding circumstances and the representations made by the university and the affected party with respect to the harms in section 17(1)(a). The withheld information is not of such a nature that I can reasonably conclude that its

[19] *Accenture,* cited above; *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674 at paras 40-41.

disclosure could reasonably be expected to result in any prejudice to the competitive position of the affected party, let alone *significant* prejudice, as required by section 17(1)(a) of the *Act*. While I have carefully read and considered the representations of the university and the affected party, I do not believe they are reflective of the general nature of the information contained in pages 17-18 of Record 1.

[46] In conclusion, I am unable to find that disclosure of the information on pages 17-18 of Record 1 could reasonably be expected to prejudice *significantly* the competitive position as required by section 17(1)(a) of the *Act,* given the general nature of the information remaining at issue.

Undue loss or gain - section 17(1)(c) of the Act

[47] The university and the affected party both argue that the release of the information at issue could enable competitors to exploit the affected party's competitive information in future procurement processes, thereby reducing the affected party's ability to win future business against its competitors.

[48] With respect to the arguments that competitors could use the severed information in future proposals, for reasons similar to those set out above, I am not satisfied that the disclosure of the general information in the affected party's workplan and approach could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

[49] In the circumstances of this appeal, I am unable to accept these arguments because they are too speculative or lacking in detail to establish the harm in section 17(1)(c) of the *Act*. I have not been provided with sufficient evidence to find on a balance of probabilities that such harm could reasonably be expected to occur from the disclosure of the information remaining at issue. I find that the submissions of the affected party and the university amount to general assertions and speculation about how the affected party's workplan and approach could be used by its competitors in future bids.

[50] This is especially the case given the general nature of the information remaining at issue, as already noted above. I do not find that pages 17-18 of Record 1 are of a nature that competitors could gain meaningful insight into how to write better bid proposals. In my view, the disclosure of information of this nature could not reasonably be expected to result in undue loss or gain, as contemplated by section 17(1)(c).

[51] Accordingly, I am unable to find that disclosure of the withheld information on pages 17-18 of Record 1 could reasonably be expected to result in undue loss or gain, as required by section 17(1)(c) of the *Act*.

Conclusion – the mandatory exemption at section 17(1) does not apply to the record

[52] In conclusion, I find that disclosure of the information remaining at issue could not reasonably be expected to result in the harms identified in sections 17(1)(a) or (c) of the *Act* and therefore, it does not meet the third part of the test. As all three parts of the test under section 17(1) must be met for the exemption to apply, the information at issue in the record does not qualify for exemption under section 17(1).

[53] For these reasons, I find that pages 17-18 of Record 1 are not exempt from disclosure under section 17(1) of the *Act* and I will order the university to disclose these pages to the appellant.

ORDER:

1. I order the university to disclose pages 17-18 of record 1 in full to the appellant by **November 2, 2021**, but not before **October 28, 2021**.

2. In order to verify compliance with this order, I reserve the right to require the university to provide me with copies of the records disclosed to the appellant.

Original signed by: September 28, 2021
Valerie Silva
Adjudicator