Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4263

Appeal PA19-00542

London Health Sciences Centre

May 25, 2022

Summary: London Health Sciences Centre (LHSC) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for pricing and conditions of an awarded contract. Following notification of two affected parties, LHSC issued its decision, granting partial access to the record and withholding the remaining portions under section 17(1) (third party information) of the Act. During adjudication, the affected party provided consent to disclose additional portions in the record. In this order, the adjudicator finds that the information remaining at issue in this appeal is not exempt under section 17(1) and orders LHSC 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).

Orders and Investigation Reports Considered: Orders MO-1706, PO-2010 and PO-2435.

OVERVIEW:

[1] By way of background, the Healthcare Materials Management Services (HMMS) is a joint venture between London Health Sciences Centre (LHSC) and St. Joseph's Health Care, London (SJHC), created to integrate and consolidate the functions of Purchasing, Contract Management, Accounts Payable and Inventory Management. HMMS has the authority to negotiate and sign contracts on behalf of LHSC and SJHC.[1] This appeal

[1] See https://www.lhsc.on.ca/about-lhsc/healthcare-materials-management-services.

arises out of a decision by HMMS to end its contract with one service provider and to award a five-year agreement to a new service provider for interpretation and translation services, following a request for proposals (RFP).

[2] LHSC received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "Pricing and conditions for the awarded contract for interpretation and translation services under HMMS Agreement number: [specified number]" (the agreement).

[3] LHSC notified SJHC and the service provider at the request stage. SJHC provided its consent to disclose the record, which consists of the agreement identified in the request. The service provider (referred to as the affected party in this order) consented to partial disclosure of the record relying on section 17(1) of the *Act* to object to disclosure of the remainder. LHSC issued its decision, granting partial access to the agreement and withholding the remaining portions under section 17(1) of the *Act*.

[4] The appellant appealed LHSC's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] During mediation, the affected party did not consent to disclose further portions of the agreement to the appellant and LHSC continued to rely on section 17(1) of the *Act*.

[6] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry.

[7] The adjudicator originally assigned to this appeal decided to conduct an inquiry under the *Act*. While she sought representations from the affected party and LHSC, she only received representations from the affected party. LHSC advised that it maintains its decision that section 17(1) applies to the record.

[8] This appeal was then transferred to me. After reviewing all file material and representations, I shared the affected party's representations with the appellant and sought representations from it. The appellant submitted representations. I then sought reply representations from the affected party and LHSC, but only received representations from the affected party, followed by sur-reply representations from the appellant. I sought additional representations from LHSC and the affected party in response to the appellant's sur-reply representations, as well as requesting a full copy of the agreement from LHSC. I received representations from the affected party and very brief representations from LHSC with a copy of the agreement. The representations of the parties were shared with one another in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In this order, I find that the information remaining at issue is not exempt under section 17(1) and order it disclosed to the appellant.

RECORD:

[10] The information at issue is found in Schedule 1 of the agreement between the affected party and HMMS (the agreement), which is comprised of pages 16-42. The appellant was provided with access to page 16 and the top portion of page 17 and therefore, these portions are not at issue in this appeal.[2] The pages at issue start on page 17 under the section called 'SERVICES' and include the full pages ending at page 42.

[11] During adjudication, the affected party provided consent to disclose the following sections of Schedule 1 to the appellant:

- Page 19 - The chart on this page for requesting services;
- Page 22-23 - The section that begins with "Our core training modules include…" and ends mid-page 23;
- Page 26 - Cancellations;
- Page 27 - Travel expenses; and
- Page 37 - Police checks.

[12] The remaining sections of Schedule 1 are at issue in this appeal (information at issue).

DISCUSSION:

[13] The sole issue is whether the mandatory exemption at section 17(1) applies to the information at issue.

[14] Section 17(1) of the *Act* states, in part:

> 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;

[2] While the affected party provides representations with respect to the Invoicing information and details section of the agreement on pages 16-17, I note that this information has already been disclosed to the appellant. LHSC confirmed this during adjudication. Accordingly, I have not considered the affected party's representations with respect to this information.

> (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…

[15] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

[16] 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.

[17] The affected party takes the position that information at issue was supplied by it in confidence to HMMS, the disclosure of which could prejudice its competitive position resulting in undue loss or gain. In contrast, the appellant takes the position that the second part of the three-part test has not been met because the pricing information in the agreement is considered to be negotiated and not *supplied*.

Part one: Does the information at issue contain trade secret, financial or commercial information?

[18] As explained below, I find that the information at issue contains commercial and financial information and therefore, it meets part one of the test.

[19] The types of information listed in section 17(1) have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or

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

information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(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.[5]

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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

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.[8]

Representations of the parties

[20] The appellant submits that the Services – Rates section of the agreement at pages 17-19 contains commercial information, while the remaining information at issue contains a trade secret, namely, the processes on pages 19-22, 22, 23-26, 39-41 and 41-42, the content on pages 27-28, 36-37 and 37-39 and the lists on pages 28-36.

[21] The affected party did not make specific representations on this part of the test.

Analysis and findings

[22] Based on my review of the record, I find that the information at issue contains commercial and financial information; however, I do not find that it contains a trade secret, as contemplated by section 17(1) of the *Act*.

[23] Based on my review of the information at issue, it contains the rates, and the terms and conditions, upon which the affected party has contracted with HMMS for the supply of interpretation and translation services, as specified in the agreement. I agree

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

with the affected party that the Services – Rates section of the agreement at pages 17-19 contains commercial information, however, this section also contains financial information. With respect to the remaining information at issue, it is my view that it contains commercial information.

[24] While the affected party states that several sections of the information at issue contain a trade secret, it has not provided me with any details or evidence to establish this position. Based on my review of this information and the criteria outlined in Order PO-2010, I do not find that these sections of the information at issue contain a trade secret.

[25] Accordingly, I find that the information at issue contains commercial and financial information, and part one of the three-part test has been met.

Part two: Was the information at issue supplied in confidence?

[26] The affected party submits that the information at issue was *supplied in confidence*, while the appellant submits that this information was not *supplied*. As explained below, I find that the affected party did not *supply* the information at issue to HMMS *in confidence*.

[27] Part two of the three-part test itself has two parts: the affected party must have *supplied* the record to HMMS, and must have done so *in confidence*, either implicitly or explicitly. I begin with the first part of the two-part test – *supplied*.

[28] 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]

[29] 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]

Representations of the parties

[30] The appellant submits that the affected party has not met part two of the three-part test. It submits that the pricing information in the agreement is the amount HMMS has now contracted with the affected party to provide services; as such, it is negotiated, not *supplied*. In support of this, the appellant refers to previous IPC orders finding that accepted bid prices, as reflected in a final agreement, are not *supplied* for the purposes of section 17(1) of the *Act*, including Order PO-3468.

[31] The appellant also submits that Order PO-3246 found that pricing information, which was provided in an RFP and ultimately led to an agreement for the provision of

[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.

goods and/or services, was not supplied within the meaning of section 17(1), and instead, the information at issue reflects the negotiated agreement between the vendor and the hospital. It further submits that Order PO-2453 found that bid information provided by a third party was not exempt because it was not supplied and the pricing information/bid quotation submitted became the essential terms of a negotiated contract.

[32] In reply, the affected party submits that it meets the second part of the three-part test because the pricing supplied to the HMMS was not negotiated. In support of this, the affected party provides me with screenshots from its bid submission to demonstrate that the rates it submitted via the Ontario Tenders Portal (OTP) at the closing of the RFP are the same as those in the agreement.

[33] In sur-reply, the appellant submits that the agreement contains the following:

- Articles 1.0 and 2.0 state that HMMS has negotiated and entered into the agreement with the affected party.
- Article 3 states that the terms and conditions of "this negotiated agreement" are set out in articles 3.0 to 27.3, including the attached schedules and appendices, which contain the services with pricing and conditions.
- Article 3.3 states that the affected party's bid proposal has been listed as the least important document to be considered in the event of a conflict, meaning that the agreement is a negotiated agreement, including pricing and conditions.
- Article 16.1 sets out that the affected party forfeited its right to have the information in its bid submission classified as confidential, including pricing and conditions.
- Article 27 speaks in general about the nature of the agreement as a negotiation between two parties.

[34] The appellant submits that the affected party and HMMS signed the agreement containing the above provisions, indicating that HMMS has negotiated and entered into the agreement with the affected party and that the affected party forfeited its right to have all information in its response to the RFP classified as confidential, including the pricing and conditions.

[35] The appellant also submits that the agreement was negotiated, as was the case with the previous contract HMMS had with the previous supplier. It submits that the agreement speaks to the transactional and negotiated nature of the relationship between the affected party and HMMS.

[36] LHSC provided me with a full copy of the agreement. It simply states that the affected party supplied the information at issue to HMMS, without details to support

this.

[37] In response, the affected party submits that articles 1.0 and 2.0 of the agreement do not say that HMMS has negotiated the agreement, as submitted by the appellant. In contrast, it submits that these articles indicate that HMMS *has the authority* to negotiate and sign contracts. With respect to the appellant's representations about the previous contract, the affected party submits that it was not privy to that contract, or what transpired then.

Analysis and findings – the information at issue was not supplied to HMMS

[38] Based on my review of the information at issue and the representations of the parties, I find that the affected party did not *supply* the information at issue to HMMS in confidence.

[39] I begin my analysis by considering whether the information at issue was supplied by the affected party to HMMS, in light of the fact that it is contained within the agreement between them.

[40] While I have reviewed the appellant's representations on certain provisions in the agreement, it is my view that the interpretation of these provisions is not directly relevant to determining whether the information at issue was *supplied* for the purposes of section 17(1) of the *Act*.

[41] As noted by the appellant, previous IPC orders have found that, except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be *supplied* for the purpose of section 17(1). 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).[11] 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.[12]

[42] 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 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 municipal equivalent of section 17(1)]. The terms of a contract have been found not to meet the criterion

[11] Orders MO-1706, PO-2371 and PO-2384.
[12] 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 having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.[13]

[43] For the current appeal, the RFP process involved HMMS issuing an RFP for services and the affected party submitting a bid submission in response, which HMMS then considered and accepted. The terms of that bid submission were then transferred into the agreement with a number of other terms, all of which was then read and signed by both parties. In my view, this indicates that the contents of the agreement were subject to negotiation because the information at issue forms part of the agreement between HMMS and the affected party. Accordingly, the principle that the contents of a negotiated contract does not meet the *supplied* requirement applies here. On this basis, I find that the information at issue was not supplied, but rather negotiated. The record at issue is part of the agreement. It is not the RFP itself, where different considerations apply.

[44] There are two exceptions to the general rule that information in an agreement is not "supplied." These exceptions 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.[14] 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.[15]

[45] The parties have not directly addressed the application of either exception to the information at issue. It is my view that there is nothing in the information at issue itself to establish that either exception to the general rule applies.

[46] However, the affected party has provided me with screenshots, showing that the rates of services included in its bid submission are the same as those listed in the agreement. While it uses this argument to demonstrate that this information was not negotiated and instead was supplied to HMMS, I will also consider whether this evidence supports the application of the immutability exception to the rates of services contained in the information at issue.

[47] In Order PO-2435, Assistant Commissioner Brian Beamish found that:

> If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR [Vendor of Record]

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[13] This approach was upheld by the Divisional Court in *Boeing Co.*, cited above; motion for leave to appeal dismissed, Doc. M32858 (C.A.).
[14] Order MO-1706, cited with approval in *Miller Transit*, cited above, at para. 33.
[15] *Miller Transit*, cited above, at para. 34.

> agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS [Management Board Secretariat which issued the RFP] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry…to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of these [named agreements], I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.
>
> In summary, I find that the [named agreements] are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1).

[48] I agree with and adopt former Assistant Commissioner Beamish's approach. First, the rates of services contained in the information at issue do "not represent a fixed underlying cost, but rather, it is the amount being charged by the [affected party] for providing [interpretation and translation] services" to HMMS. Second, if the rates of services contained in the affected party's bid submission were "judged to be too high, or otherwise unacceptable, [HMMS had] the option of not selecting that bid and not entering into a [contract] with [the affected party]". On this basis, the acceptance or rejection of the affected party's bid in response to the RFP issued by HMMS is a form of negotiation for the purposes of my analysis.

[49] Accordingly, it is my view that the RFP process itself was a form of negotiation between the parties. Therefore, I find that the immutability exception to the general rule does not apply to the rates of services. As noted above, I also find that there is nothing in the information at issue itself to establish that either exception to the general rule applies.

[50] Therefore, I find that the information at issue, which is part of the agreement between HMMS and the affected party, was mutually generated and the result of a negotiation process. Accordingly, it was not *supplied* within the meaning of that term in

section 17(1) and as a result, part 2 of the three-part test under section 17(1) is not met.

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

[51] As all three parts of the section 17(1) test must be met for the application of the exemption, I find that section 17(1) does not apply to the information at issue. For these reasons, I find that the information at issue is not exempt from disclosure under the mandatory third party exemption in section 17(1) of the *Act* and I do not uphold LHSC's decision.

ORDER:

1. I order LHSC to disclose the information at issue to the appellant by **June 29, 2022** but not before **June 24, 2022**. For clarity, LHSC will be disclosing pages 17 to 42 of Schedule 1 of the agreement to the appellant based on this order, as well as the affected party's consent provided during adjudication.

2. In order to verify compliance with Order provision 1, I reserve the right to require the commission to provide me with a copy of the records disclosed to the appellant.

Original Signed by: May 25, 2022

Valerie Silva
Adjudicator