Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4345

Appeal PA21-00389

Ontario Clean Water Agency

January 30, 2023

Summary: The Ontario Clean Water Agency (OCWA) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a list of all OCWA customers and related contract end dates. The OCWA issued a decision denying access in full to the information under section 18(1) (economic and other interests) of the *Act*. The appellant appealed the OCWA's decision to the IPC. In this order, the adjudicator upholds the OCWA's decision, and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 18(1)(a).

Orders Considered: Order PO-2308.

OVERVIEW:

[1] The Ontario Clean Water Agency (OCWA) is a crown agency of the Government of Ontario that provides water and wastewater operation and maintenance services, and manages treatment facilities on behalf of municipalities, governments and institutions, First Nations communities, and commercial organizations. The OCWA is self-funded. The OCWA states that it operates in a highly competitive market, and is consistently subject to intense private sector competition. To that end, the OCWA states that it has developed and implemented a dedicated client service and sales team and marketing department to maintain its client base and to actively pursue new business opportunities. This order determines the issue of access to the OCWA's client list.

[2] The OCWA received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to a list of all OCWA customers and associated contract end dates.

[3] The OCWA issued a decision denying access in full under sections 18(1)(a) and (c) (economic and other interests) of the *Act*.

[4] The appellant appealed the OCWA's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry by inviting representations from the OCWA, initially. I received representations from the OCWA, which I shared with the appellant. I invited and received representations from the appellant, which I shared with the OCWA. I then sought and received reply representations from the OCWA.

[6] In this order, I uphold the OCWA's decision and dismiss the appeal.

RECORD:

[7] The record at issue in this appeal is a 7-page client list with client names and contract end dates (client list).

ISSUES:

A. Does the discretionary exemption at section 18 for economic and other interests of the OCWA apply to the client list?

B. Did the OCWA exercise its discretion under section 18? If so, should I uphold the exercise of discretion?

DISCUSSION:

Issue A. Does the discretionary exemption at section 18 for economic and other interests of the OCWA apply to the client list?

[8] The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental

organizations.[1]

[9] The OCWA argues that sections 18(1)(a) and (c) apply. In the discussion that follows, I find that section 18(1)(a) applies. Because I find that section 18(1)(a) applies, I only set out the OCWA's section 18(1)(c) arguments to the extent that they may apply to section 18(1)(a).

[10] Section 18(1)(a) states:

> A head may refuse to disclose a record that contains,
>
> > (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

Section 18(1)(a): information with monetary value that belongs to government or an institution

[11] The purpose of this section is to permit an institution to refuse to disclose information where its disclosure would deprive government or the institution of its monetary value.[2]

[12] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to the Ontario Government or an institution; and
3. has monetary value or potential monetary value.

Part 1: type of information

[13] The types of information listed in section 18(1)(a) have been discussed in prior orders. The type that is relevant to this appeal is:

> ***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[3] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[4]

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[1] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[2] Orders M-654 and PO-2226.
[3] Order PO-2010.
[4] Order P-1621.

Representations, analysis and findings

[14] The OCWA submits that the client list contains commercial information because it lists the names of the OCWA's clients and their contract end dates. The OCWA explains that when a contract is awarded to it, it enters key information, including client names and contract end dates into its database. The OCWA submits that the information in its client list relates exclusively to various business arrangements entered into by the OCWA and its clients for the purchase and sale of water and wastewater services.

[15] The appellant does not specifically address what type of information is contained in the client list.

[16] Based on my review of the client list and the representations of the parties, I find that the client list contains commercial information because it contains information relating to the purchase and sale of water and wastewater services. Therefore, I find that the client list contains commercial information within the meaning of section 18(1)(a) of the *Act*.

[17] As part 1 of the three-part test under section 18(1)(a) is met, I must now consider whether the information contained in the client list belongs to the OCWA.

Part 2: belongs to

[18] For information to "belong to" an institution, the institution must have some proprietary interest in it, either:

- "intellectual property" in the information, such as copyright, trade mark, patent or industrial design, or
- another type of proprietary interest that the law says could be damaged if another party were to misappropriate the information.

[19] The type of information "belonging" to an institution is information that has monetary value to the institution because it has spent money, skill or effort to develop it. Some examples are trade secrets, business-to-business mailing lists,[5] customer or supplier lists, price lists, or other types of confidential business information. If this information is consistently treated in a confidential manner, and its value to the institution comes from its not being generally known, the information will be protected from misappropriation by others.[6]

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[5] Order P-636.

[6] Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

Representations, analysis and findings

[20] The OCWA submits that the information in the client list belongs to it because it generated the list using its own resources and contractual agreements, and has a proprietary interest in protecting both client and contract information from misappropriation by another party, namely, its competitors, which it says includes the appellant.

[21] The appellant does not specifically address whether the information in the client list belongs to the OCWA. However, the appellant argues that his company is not a competitor of the OCWA. He submits that his company has never bid on municipal water and wastewater operations contracts and there is no evidence that his company is a competitor in the municipal water/wastewater operations.

[22] Based on the evidence before me, I find that the information contained in the client list belongs to the OCWA. The client list is a list of the OCWA's customers along with the related contract end dates. I find that these contracts and relationships were generated by OCWA for the purpose of its business operations and not for the fulfilment of a legislative requirement. I find that the OCWA has used its own resources, such as time and money, in order to gather this information and the OCWA has a proprietary interest in protecting it from disclosure. Therefore, I find that the information in the client list belongs to the OCWA and part 2 of the section 18(1)(a) test has been met.

[23] As noted, the appellant says that his company is not a competitor of the OCWA, and as I understand the argument, that therefore the OCWA does not need to protect the client list from disclosure to him. Previous IPC orders have held that disclosure under the *Act* is disclosure to the world,[7] which includes the OCWA's competitors. Therefore, I find that whether the appellant's company is a competitor to the OCWA or not is not a relevant consideration.

[24] As part 2 of the three-part test under section 18(1)(a) is met, I must now consider whether the information contained in the client list has monetary value.

Part 3: monetary value

[25] To have "monetary value," the information itself must have an intrinsic value. The mere fact that the institution spent money to create the record does not mean it has monetary value for the purposes of this section.[8] Nor does the fact, on its own, that the institution has kept the information confidential.[9]

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[7] See for example Order MO-1719.
[8] Orders P-1281 and PO-2166.
[9] Order PO-2724.

Representations of the parties

[26] The OCWA argues that the client list has inherent monetary value. The OCWA submits that the appellant could attempt to create his own list of the OCWA's clients, addresses, telephone numbers, key contacts, and financial value of the contract by contacting every municipality in the province of Ontario. The OCWA submits, however, that this would require a significant amount of resources (estimated at more than $50,000) that he could avoid if the client list were disclosed. The OCWA further submits the management and operation of water and wastewater treatment facilities is a very competitive industry, which was accepted by the adjudicator in Order MO-1609, and disclosing the client list would jeopardize the OCWA's profitability.

[27] The OCWA states that Order PO-2308, also involving the OCWA, deals with a similar request for its client list, although with a broader scope, and former Assistant Commissioner Tom Mitchinson found that the OCWA's client list has monetary value.

[28] The OCWA submits that the appellant attempts to distinguish between the monetary value of obtaining the information and the monetary value of the information itself. The OCWA submits that the use of the term "monetary value" in section 11(a) of the *Act* requires that the information itself have an intrinsic value, and the purpose of section 11(a) is to permit an institution to refuse disclosure where it would deprive the institution of the monetary value of the information.

[29] The OCWA states that there is obvious intrinsic value in its client list and contractual end dates which would be lost were such information disclosed. The OCWA states that it is the largest supplier of outsourced water and wastewater services in Ontario, and that it competes with private companies for contracts, which often entail competitive bid processes. The OCWA argues that its competitors would use the client list to contact the OCWA's clients to entice them to switch service providers, which would erode the OCWA's client base. The OCWA further argues that the contract end dates would allow its competitors to specifically target OCWA clients near the end of their contract, who might have renewed with the OCWA without going to a competitive bid.

[30] The appellant submits that the information he is seeking access to is publicly available information, and he argues that a simple search using terms such as "OCWA agreement operate" reveals over 12 active municipal agreements, including the client name and contract end date.

[31] The appellant explains that he is not requesting contact information, and that therefore the commercial value of the information in the client list is diminished. The appellant further submits that the value estimated by the OCWA is related to the act of calling clients to gather information and not the monetary value of the list itself. He submits that the monetary value of the list should be based on the requester's needs.

[32] As noted, the appellant disputes that his company is a competitor of the OCWA in the municipal realm. The appellant concedes that his company may be considered a competitor on non-municipal work, but notes that they have never competed against the OCWA.

[33] The appellant disputes that Order PO-2308 applies to his request, and he disagrees with former Assistant Commissioner Tom Mitchinson's analysis in that order.

[34] The OCWA disagrees that the information sought by the appellant has diminished commercial value because he does not seek contact information. The OCWA submits that the argument may have had merit in the past, but now, it argues, anyone can easily obtain contact or other information from the internet. The OCWA further submits that the key information of value being requested is the contract end dates, as that information would inform competitors of the timing of when to approach the OCWA's customers.

[35] The OCWA notes that the appellant's company website specifically states that his company has "supported over 250 treatment systems (municipal and industrial) across Canada…" The OCWA submits that if the OCWA client list were disclosed, it would reveal all of the OCWA's clients including non-municipal ones.

Analysis and findings

[36] Based on my review of the client list and the representations of the parties, I find that the information contained in the client list has monetary value for the purpose of section 18(1)(a) of the *Act*. My reasons follow.

[37] In Order PO-2308, cited by the OCWA, former Assistant Commissioner Tom Mitchinson dealt with a similar request made to the OCWA. However, the request was broader in scope and also included contact information (address and phone number and contact person's name and phone number), the start date of the contract, the services provided, and the financial value and projected revenue received for each contract. Having found the other information exempt under section 18(1)(c), the former Assistant Commissioner found that the types of information, such as client names, contact information, and services provided, contained in the OCWA's client list had monetary value under section 18(1)(a). He stated:

> Although the OCWA does not argue that its client list has been sold to others, or that it has the intention of pursuing potential purchasers or disseminating the requested information in a way that would generate income, I accept that the client name and contact information has potential commercial value that may be exploited if made available to OCWA's competitors. Therefore, I find that the client names and contact information contained in the record have potential monetary value as contemplated by part three of the section 18(1)(a) test.

[38] I agree with former Assistant Commissioner Mitchinson's analysis and adopt it in this appeal. As noted above, the client list contains a list of the OCWA's clients along with their contract end dates. I find that the information in the client list has inherent monetary value because I accept that the OCWA operates in a highly competitive market and the disclosure of the client list would allow its competitors to contact the OCWA's clients to entice them to switch service providers. I also find that the contract end dates in the client list would allow the OCWA's competitors to specifically target OCWA clients near the end of their contract, which may subject the OCWA to more competition for its existing contracts.

[39] The appellant argues that the monetary value of the client list is diminished by the fact that he is not requesting contact information of the OCWA's clients. I am not persuaded by this argument. I accept the OCWA's submission that in the internet age that we live in, contact and other information of the OCWA's clients can easily be obtained from the internet if the client list were disclosed.

[40] The appellant also argues that since he is not a competitor of the OCWA, the client list does not have monetary value. In order to have monetary value for the purpose of section 18(1)(a) of the *Act*, the information from the client list itself must have intrinsic value. Therefore, the appellant's status as a competitor (or not) is not relevant to whether the client list has monetary value.

[41] Based on the reasons above, I find that the client names and contract end dates have monetary value as contemplated by section 18(1)(a) of the *Act,* establishing part 3 of the test.

[42] The OCWA has established that the client list has monetary value, and I accordingly find that it is exempt from disclosure under section 18(1)(a) of the *Act*. Because the section 18(1) exemption is discretionary, I will consider the OCWA's exercise of discretion below.

Issue B. Did the OCWA exercise its discretion under section 18? If so, should I uphold the exercise of discretion?

[43] The section 18 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[44] In addition, I may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or

- it fails to take into account relevant considerations.

[45] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[10] I cannot, however, substitute my own discretion for that of the institution.[11]

[46] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[12]

- the purposes of the *Act*, including the principles that:
    - information should be available to the public,
    - individuals should have a right of access to their own personal information,
    - exemptions from the right of access should be limited and specific, and
    - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking his or her own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person, the age of the information, and
- the historic practice of the institution with respect to similar information.

Representations, analysis and findings

[47] The OCWA submits that it properly exercised its discretion to withhold the client list under section 18(1)(a) of the *Act*. The OCWA submits that it considered many

[10] Order MO-1573.
[11] Section 54(2).
[12] Orders P-344 and MO-1573.

factors in exercising its discretion, including:

- The proprietary value of the information.
- Its view that the appellant is a direct competitor of the OCWA, and the likelihood that the appellant will contact the OCWA's customers to entice them to switch service providers.
- Whether this information ought to be made available to the public.
- That the OCWA has consistently denied access to its client lists to protect its legitimate business interests.

[48] The appellant did not specifically make representations about the OCWA's exercise of discretion.

[49] After considering the representations of the parties and the circumstances of this appeal, I am satisfied that the OCWA did not err in its exercise of discretion with respect to its decision to deny access to the client list under section 18(1)(a) of the *Act*.

[50] I am satisfied that the OCWA exercised its discretion and in doing so considered only relevant factors. I am also satisfied that it did not exercise its discretion in bad faith or for an improper purpose. Accordingly, I uphold the OCWA's exercise of discretion.

ORDER:

I uphold the OCWA's decision and dismiss the appeal.

Original Signed by:	January 30, 2023

Anna Truong
Adjudicator