Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4536

Appeal PA22-00155

Fanshawe College of Applied Arts and Technology

July 25, 2024

Summary: A union asked Fanshawe for a contract between it and a language academy. Fanshawe decided that the whole contract could be provided to the individual. The language academy opposed disclosure of parts of the contract to the individual because it consists of information supplied in confidence to Fanshawe that would cause certain harms (the section 17(1)) if disclosed. The adjudicator finds that these parts of the contract must be disclosed under the *Act*.

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

OVERVIEW:

[1] A union made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Fanshawe College of Applied Arts and Technology ("Fanshawe") for access to the contract between Fanshawe and the language academy.[1]

[2] After initially withholding portions, Fanshawe's (revised) decision was that the contract should be disclosed in full.[2] This appeal by the language academy to the

[1] The request was initially broader, but narrowed in this way during the request processing stage.
[2] Initially, it decided to withhold portions of the contract under various exemptions in the *Act*. This led to an appeal by the union (the requester) involving the exemptions at sections 17(1) (third party information) and section 18(1) (economic or other interests), and the public interest override at section 23 of the *Act*. However, the union's appeal was resolved (by letter, without an order) after the language academy agreed

Information and Privacy Commissioner of Ontario (IPC) pertains only to certain parts of the contract. The language academy opposes the disclosure of these parts of the contract under the mandatory exemption at section 17(1) (third party information) of the *Act*.

[3] I conducted a written inquiry under the *Act* and received representations from all parties,[3] as well as a copy of Fanshawe's revised decision to disclose the whole contract.

[4] For the reasons that follow, I uphold Fanshawe's decision and dismiss the appeal.

RECORD:

[5] The record at issue is a 45-page agreement (the contract) between Fanshawe and the language academy named in the request.

[6] The information at issue in this appeal is the information that the language academy opposes the disclosure of:

- parts of pages 5, 7, 8, 14, 17, 18, 28, 35, 36, and 40, and
- pages 40-45, in full.

DISCUSSION:

[7] The only issue in this appeal is whether the information at issue in the contract is exempt from disclosure under the mandatory exemption at section 17(1) of the *Act*.

[8] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[4] where specific harms can reasonably be expected to result from its disclosure.[5]

[9] For section 17(1) to apply, the party arguing against disclosure (in this case, the language academy) 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;

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to the disclosure of some portions of the *Act* and I subsequently asked Fanshawe to disclose those portions of the contract to the union.

[3] Before the union's appeal was resolved, I had received representations through a joint inquiry, in which I sought and received representations about issues in each appeal. Section 17(1) was the issue common to both appeals. After Fanshawe issued a revised decision, I gave the language academy an opportunity to provide further representations in light of the different circumstances, but it declined to do so.

[4] *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.*).

[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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 10(1) will occur.[6]

[10] All three parts of the test must be met for section 17(1) to apply. Given my finding below, that part two does not apply, I do not need to discuss the other parts of the test.

Part 2: supplied in confidence

[11] Part two of the three-part test itself has two parts: the information at issue must have been "supplied" to the institution, and must have been supplied "in confidence," either implicitly or explicitly. If the information was not supplied to the institution, section 17(1) will not apply and there will be no need for me to decide whether the "in confidence" element of part two of the test is met. That is the case here.

Supplied

[12] The requirement that the information have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[7]

[13] 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.[8]

[14] There is no dispute between the parties that the record at issue is a contract.

[15] This characterization of the record is important because of the long-standing treatment of contracts requested under the *Act*: the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the

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[6] For reference, sections 17(1) states:

> 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,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[7] Order MO-1706.

[8] Orders PO-2020 and PO-2043.

purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[9]

[16] There are two exceptions to this general rule:

1. **the "inferred disclosure" exception**. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non- negotiated confidential information supplied to the institution by a third party.[10]

2. **the "immutability" exception.** This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[11]

[17] The language academy states that it "generally agrees with" the general rule that contracts are not considered "supplied," and that there are two exceptions to this rule. However, it states that it "wishes to expand on the exception as articulated in [the Notice of Inquiry]." The language academy does not elaborate further on this point. In any event, the IPC's approach to contracts is longstanding and has been upheld by was approved by the Divisional Court in *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*)[12] and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*[13] There is no basis for departing from this approach, and I decline to do so.

[18] The union's position is that the contract was negotiated, not "supplied." It submits that the representations of the language academy do not provide details to establish otherwise.

[19] I agree with the union's position, having reviewed the language academy's representations, the confidential affidavit evidence that it directed me to in support of its position, and the contract itself.

[20] The language academy asserts that one of the exceptions to the general rule about contracts applies (the inferred disclosure exception) stating: "disclosure of a good portion of the record . . . would permit someone to draw accurate inferences about non-negotiated confidential information supplied by [the language academy] to Fanshawe."

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[9] 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*).
[10] Order MO-1706, cited with approval in *Miller Transit*, *supra*.
[11] *Miller Transit*, *supra*.
[12] [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[13] *Miller Transit*, *supra*.

The language academy then directs me to see its affidavit evidence.

[21] However, I am not persuaded by the evidence before me that the inferred disclosure exception applies. Simply asserting that the inferred disclosure exception applies does not establish that it does. It is also not clear to me which specific "good portion[s]" of the information at issue the language academy refers to in asserting that the exception applies. The affidavit evidence that the language academy leads me to in the context of its assertion is also not helpful or persuasive.

[22] While I cannot elaborate in this order on the contents of the confidential affidavit, I can refer to them generally. Most significantly, the affidavit largely addresses other aspects of the three-part test for section 17(1),[14] not whether the information at issue was "supplied." The affidavit was brief and, in some cases, silent or contradictory on the question of whether the information was "supplied" within the meaning of section 17(1), so I am unable to conclude from it that any of the information at issue was "supplied" to Fanshawe. For example, the affidavit specifically describes some information at issue has having been "negotiated" – undermining the language academy's position that the information at issue was "supplied." Some statements do not correspond to the information at issue in the pages described and do not establish that the information was "supplied." In my view, neither the confidential affidavit nor the language academy's representations, sufficiently establish that any of the information at issue is the "informational asset" of the language academy, or is otherwise proprietary to it, for me to conclude that the information was "supplied" to Fanshawe.

[23] In addition, I find that Fanshawe's revised decision that the contract is not exempt under section 17(1) weighs against accepting that any of remaining parts of the contract that are at issue were "supplied."

[24] Finally, I also considered the content of the information at issue itself. I find that all of it consists of agreed upon terms between the two contracting parties.

[25] For these reasons, based on the evidence before me, I find that the information at issue in the contract was not "supplied" and, therefore, does not meet part two of the test for section 17(1). As a result, I uphold Fanshawe's revised decision and will order it to disclose the information at issue to the union.

ORDER:

1. I uphold Fanshawe's decision to disclose the information at issue, and dismiss the appeal.

[14] That is, part three of the test (harms) and the second part of part two of the test ("in confidence").

2. I order Fanshawe to disclose the information at issue to the requester by **August 30, 2024** but not before **August 26, 2024**.

3. I reserve the right to require Fanshawe to provide me with a copy of the record that is disclosed to the requester.

Original signed by: July 25, 2024

Marian Sami
Adjudicator