

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4556

Appeals PA22-00576 and PA23-00010

University of Toronto

September 26, 2024

Summary: The requester sought access to financial information under the *Freedom of Information and Protection of Privacy Act* contained in contracts for caretaking and security services provided to the university. The university denied access to some of this information, relying on the mandatory third party exemption in section 17(1). Both the requester and one of the service providers appealed the university's decision to the IPC.

In this order, the adjudicator finds that the financial information in the contracts does not qualify as information subject to the exemption for third party information in section 17(1). She orders the university to disclose it to the requester.

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

OVERVIEW:

[1] This order considers access to financial information contained in contracts for caretaking and security services provided to a university.

[2] The University of Toronto (UT or the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records regarding third party agreements for food services, security, and caretaking services, as follows:

1. Tenders and Agreements From: University of Toronto Procurement Services:

- a. A list of all centrally managed third party agreements currently in place for food services, security, and caretaking services at UT St George [campus].
 - b. A list of all centrally managed third party agreements currently in place for food services, security, and caretaking services at UTM [UT Mississauga campus] and UTSC [UT Scarborough campus].
 - c. A list of third party agreements currently in place for food services, security, and caretaking services at: [UT's] Robarts Library, OISE [Ontario Institute for Studies in Education], Athletics Centre, and Bahen Centre.
2. Centrally held University Procurement Contracts/Agreements between the University of Toronto and [9 specified] subcontractors.
 3. Procurement Contracts/Agreements between the University of Toronto and the subcontractors noted in 1c above, if any of these 4 are not centrally held.
 4. Covid 19 Safety Forms:
 - a. Covid 19 Acknowledgement Form for centrally managed External Third Party Contractors Forms submitted by security and caretaking vendors at St. George, UTM and UTSC between March 2020 and present [October 22, 2021].
 - b. A list of centrally managed third party contractors engaged to perform the increased cleaning and disinfection as a result of the University of Toronto's caretaking strategy. Can be provided by: University of Toronto, Facilities & Services, [address].

[3] After identifying records responsive to the request, the university notified the third party contractors listed in the request under section 28(1) of the *Act* to obtain their views regarding disclosure of the records. The university received representations from some of those contractors objecting to the disclosure to some of the information contained in the records.

[4] The university then decided to grant partial access to the records. Access was denied to the withheld portions under section 17(1) (third party information) of the *Act*.¹

[5] A third party (the third party appellant) appealed the university's decision to the Information and Privacy Commissioner (the IPC). In response, the IPC opened Appeal PA23-00010 to address the third party's appeal.²

¹ In addition, some information was denied as not responsive to the request. The appellant is not interested in receiving access to the non-responsive information and it is not at issue in these appeals.

² Another third party also appealed, and the IPC also opened third-party Appeal PA22-00157, which was closed at mediation.

[6] The requester also appealed the university's decision and Appeal PA22-00576 was opened to address the requester's appeal.

[7] A mediator was assigned to attempt a resolution of the appeals.

[8] During mediation, the requester advised the mediator that he seeks access to specified information in records related to six third party contractors (third parties A, B, C, D and E) as well as the information denied under section 17(1) related to the third party appellant in Appeal PA23-00010.

[9] During mediation, the third party contractors were notified of the appeal. Third parties A and B consented to the disclosure of the records relating to them, in part. The university subsequently disclosed these portions to the requester. After receipt of the records, the requester advised the mediator that he was not pursuing access to the remainder of the information related to third parties A and B. As such, these records are no longer at issue. Consent was not obtained from third parties C, D, or E.

[10] The third party appellant in Appeal PA23-00010 confirmed that it continues to take the position that the third party information exemption applies to all the records related to it.

[11] The requester confirmed that he continues to pursue access to the records related to third parties C, D, and E and the third party appellant. As such, all of the information related to the third party appellant, as well as the information that the university claims is subject to section 17(1) for third parties C, D, and E, remained at issue in these appeals.

[12] As no further mediation was possible, both appeal files were moved to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry, and I sought the representations of the university, third parties C, D, and E, and the third party appellant, initially.

[13] I received representations from the third party appellant, third party C, and the university, which I provided to the requester. The third party appellant agreed to the disclosure of its records, except for the information that the university wants withheld and the signature of the individual who signed the agreements.³

[14] The university issued a third supplementary decision letter for the records at issue in Appeal PA23-00010 consistent with the third party appellant's representations and consent to disclose portions of its records. The university disclosed 62 pages of responsive records in part to the requester. It stated:

Portions of the records containing financial information that is not wage related have been marked "non-responsive"... It is the decision of the

³ The requester indicated that he does not want access to the signature. Therefore, the signature of the TPA's representative in the records is no longer at issue.

university to withhold detailed wage information pursuant to section 17, because it is comprised of commercial, financial and/or labour relations information, supplied to the university in confidence, where the disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the third parties and result in undue loss or gain. Where detailed breakdowns of wage or employment information have been withheld, it is the decision of the university to release the total costs in the contracts.

[15] I did not receive representations from third parties D and E. Third party D advised that it is up to university if it wants to disclose the information at issue. Third party E indicated that it objects to disclosure of its information in the records.

[16] In this order, I find that the information at issue, which is financial information contained in contracts between the university and the third parties, was not supplied and not exempt under section 17(1). I order the university to disclose it.

RECORDS:

The information at issue is pricing information relating to labour costs for security and caretaking services.⁴ Specifically, it consists of the following:

Record #	Party	Description of records	Information withheld from records
1	Third party appellant	Two contracts for security guard services	Employment pricing Information (total cost disclosed)
2	Third party C	A contract for security guard services	Total annual labour hours and rates for deliverables
3	Third party D	A contract for security guard services	Hourly rate to be paid for security guard services.
4	Third party E	Submission made in response to a Request for Proposals (RFP) incorporated into a contract for caretaking services	Labour and related costs

⁴ Although the request included food services contracts, due to access being granted at the request or mediation stages, food services contracts are not at issue in these appeals.

DISCUSSION:

[17] The sole issue to be determined in these appeals is whether the mandatory exemption at section 17(1) for third party information applies to the information at issue in the records, which is the price of labour and related services to be provided by the third parties.

[18] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,⁵ where specific harms can reasonably be expected to result from its disclosure.⁶

[19] The relevant portions of section 17(1) 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, 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;

(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

[20] For section 17(1) to apply, the party arguing against disclosure 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;
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.

⁵ *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.*).

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Representations

[21] The university submits that the withheld information is detailed pricing information related to labour costs set out in contracts with third parties for security and caretaking services. It states that it withheld this information pursuant to the mandatory exemption for third party information at section 17(1).

[22] The university submits that the records contain commercial, financial, and/or labour relations information that was supplied to the university by the respective third party contractors during the procurement process. It also submits that there was a mutually held expectation that the information was being received in confidence by the university.

[23] The university states that it was persuaded by the representations that it received from the third parties upon notification of the request that disclosure of the information at issue in these appeals would prejudice significantly the competitive positions of the third parties who provided the information, and/or result in undue financial loss to them.

[24] The third party appellant also submits that the withheld information should not be disclosed. It relies on sections 17(1)(a), (b) and (c).

[25] The third party appellant submits that the redacted information reveals the following confidential commercial and financial information: (1) fee breakdowns, (2) total bid amounts, and (3) pricing strategy. It states that this information was supplied in confidence to the university as part of private contract negotiations for the provision of security services and it expected that this information would be kept confidential and not disclosed to third parties. It states that this information is not available from another source or otherwise in the public domain.

[26] The third party appellant also made a number of arguments regarding the harm that would result if the information at issue was disclosed. Given my finding below, I do not set out those representations here.

[27] Other than the third party appellant, the only other third party that provided representations is third party C. It submits that the record that relates to it contains commercial information. It also submits that this information was supplied in confidence because it was:

- created, generated and provided by it with no collaboration with the university, and
- known by both parties to the agreement to contain sensitive information.

[28] Third party C also argued that disclosure of the information at issue would result in harm to its competitive position, undue loss to it and undue gain to its competitors. Again, given my findings below, I do not set out these representations here.

[29] The requester submits that neither the university nor the third parties that submitted representations provided detailed evidence about the risk of harm if the information at issue is disclosed. It submits that these third parties alleging general harms from disclosure, such as potentially being “undercut” by competitors or having to “adapt its services at greater costs” without detailed facts and data underpinning these claims does not constitute “detailed evidence” of real or potential harm.

[30] The requester submits that the third party appellant’s submission that it would have to become more competitive is not a harm and that the contract information and labour costs in the records from three years ago do not necessarily reflect current competitive costs. He states that labour costs in many of these documents are no longer a reflection of many vendors’ competitive pricing - they are out of date and are thus less likely to reflect current costs. As such, disclosure should not affect their current competitive costs.

Part 1 of the section 17(1) test: type of information

[31] From my review of the representations and the records themselves, I accept that the information that remains at issue in the records is pricing information, included in either contracts or in a response to an RFP for security guard services to be provided to various university properties.

[32] The IPC has described financial information as follows:

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁷

[33] As the information at issue in the records refers to specific data about the third parties’ pricing practices, I find that it is financial information as that term has been defined by the IPC.

[34] I also find that the information is commercial information as that term has been defined by the IPC, as it concerns the buying and selling of services. The IPC has defined commercial information as follows:

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.⁸ The fact that a

⁷ Order PO-2010.

⁸ Order PO-2010.

record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁹

[35] As I have found that the information at issue is both financial and commercial information, part 1 of the test under section 17(1) has been met.¹⁰

Part 2 of the section 17(1) test: supplied in confidence

Supplied

[36] The requirement that the information have been “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties

[37] 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.¹¹

[38] The contents of a contract between an institution and a third party will not normally qualify as having been “supplied” for the 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.¹²

[39] 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.¹³
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.¹⁴

In confidence

[40] The party arguing against disclosure must show that both the individual supplying

⁹ Order P-1621.

¹⁰ As I have found that the information at issue is both financial and commercial information, there is no need for me to consider whether it is also labour relations information under part 1 of the test under section 17(1).

¹¹ Orders PO-2020 and PO-2043.

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*).

¹³ Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

¹⁴ *Miller Transit*, cited above at para. 34.

the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.¹⁵

[41] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.¹⁶

Findings re part 2

[42] All of the information at issue in the records is information that is contained in contracts entered into between the university and the third parties.

[43] As noted above, the contents of a contract between an institution and a third party will not normally qualify as having been “supplied” for the 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.

[44] Although there are two exceptions to this general rule, the inferred disclosure and the immutability exceptions discussed above, none of the parties to these contracts found at records 1 to 4, argued that these exceptions apply. Nor do I find, based on my review of the records, that either exception applies. I do not accept that the pricing information is either information that was not negotiated between the parties nor do I accept that it is information which, were it disclosed, would permit someone to infer accurate information about non-negotiated information. Therefore, I find that the pricing information at issue in records 1 to 4 was not supplied to the university.

[45] In making this finding, I acknowledge that record 4 includes a submission made in response to an RFP. However, this submission is attached to and forms part of the contract entered into between the university and third party E. Therefore, the successful proponent’s submission was accepted by the university and its terms were then

¹⁵ Order PO-2020.

¹⁶ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

incorporated into a contract.

[46] I note that previous orders have found that where a bid document becomes the contract, it is considered to have turned into negotiated information "since its presence in the contract signifies that the other party agreed to it."¹⁷ I agree with this reasoning and adopt it for the purposes of this appeal. As a result, even though record 4 includes a submission made in response to an RFP, because the submission ultimately became part of the contract, the pricing information that was in the submission is information that has been negotiated between the parties and cannot be considered to have been supplied to the university.

[47] For these reasons, all of the information that is at issue in both appeals is negotiated information that was not supplied to the university within the meaning of part 2 of the test.

[48] As I have found that part 2 of the test that must be met for section 17(1) to apply, has not been met, I find that the pricing information at issue in the records is not exempt from disclosure under section 17(1). Accordingly, I order the university to disclose it to the requester. I dismiss the appeal.

ORDER:

1. I order the university to disclose to the requester all of the information at issue in the records **by November 4, 2024 but not before October 28, 2024.**
2. In order to verify compliance with this order, I reserve the right to require the university to provide me with a copy of the records disclosed to the requester.

Original Signed by: _____
Diane Smith
Adjudicator

_____ September 26, 2024

¹⁷ See for example Order MO-3530.