

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4662

Appeal PA22-00107

Ministry of Economic Development, Job Creation and Trade

June 5, 2025

Summary: An individual asked the Ministry of Economic Development, Job Creation and Trade for records about the Government of Ontario's investment in a facility to manufacture N95 respirators. The ministry partially disclosed to the individual the two responsive records it located, a conditional grant agreement and a letter of offer. It withheld some information in the records under the mandatory third party information exemption.

In this order, the adjudicator finds that the withheld information is not exempt because it was a product of negotiations between the ministry and an affected party. The adjudicator orders the ministry to disclose the withheld information to the individual.

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

Orders Considered: Orders PO-2435, PO-3158, MO-4514, PO-4610, MO-4588, and MO-4396.

Cases Considered: *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

OVERVIEW:

[1] This order considers whether the withheld information in a conditional grant agreement and a letter of offer is exempt under the mandatory third party information exemption at section 17(1) of the *Freedom of Information and Protection of Privacy Act*

(the *Act*).

[2] The appellant submitted a request under the *Act* to the Ministry of Economic Development, Job Creation and Trade (the ministry) for access to the following information:

all agreements, contracts, term sheets, memorandums of understanding or other contractual documents, whether in draft or final form, in respect of the Government of Ontario's investment of approximately \$23 million in the expansion of the manufacturing facility of [named company] in [specified location], Ontario to produce N95 respirators, including but not limited to any partnership agreement, contribution agreement or other agreement of a similar nature between the Government of Ontario, Government of Canada and [named company] or any of its affiliates [abbreviation of the company]. Time period: January 1, 2020 to October 4, 2021.

[3] The ministry identified two responsive records: a conditional grant agreement between the ministry and the company (the affected party), and a letter of offer from the ministry to the affected party.

[4] The ministry notified an affected party about the request and sought its position on disclosure of the records at issue. After considering the affected party's position, the ministry issued an access decision granting the appellant partial access to the responsive records. The ministry claimed the third party information exemption in section 17(1) to withhold some information.

[5] The appellant was dissatisfied with the ministry's decision to withhold some information and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The affected party did not appeal the ministry's decision. Thus, only the withheld information is at issue in this appeal.

[6] The IPC attempted to mediate the appeal. A mediated resolution was not achieved, and the appeal was moved to adjudication. An IPC adjudicator decided to conduct an inquiry under the *Act* and sought representations from the ministry and an affected party. The appeal was then transferred to me to continue the inquiry.

[7] For the reasons that follow, I find that the section 17(1) exemption does not apply to the withheld information, and I order the ministry to disclose all withheld information to the appellant.

RECORDS:

[8] At issue is the withheld information in two records, the conditional grant agreement between the ministry and the affected party, effective August 1, 2020, and the letter of offer (and term sheet) from the ministry to the affected party, dated August

20, 2020. Both records concern a conditional grant from the ministry to the affected party to assist it with financing the construction of a facility to manufacture N95 respirators in Ontario.

DISCUSSION:

[9] The sole issue in this appeal is whether the withheld information qualifies for exemption under section 17(1) of the *Act*. The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,¹ where specific harms can reasonably be expected to result from its disclosure.² The ministry relies on sections 17(1)(a) and (b) to withhold the information and the affected party argues that sections 17(1)(a), (b) and (c) apply.

[10] These parts 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[.]

[11] For section 17(1) to apply, the ministry and the affected party, who are 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

¹ *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.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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), and/or (c) of section 17(1) will occur.

Part 1 of the test: the withheld information is commercial information

[12] The ministry and the affected party submit that the withheld information is commercial information because it relates to the buying, selling or exchange of merchandise or services. I agree. The conditional grant agreement and the letter of offer concern the buying and selling of N95 respirators. Thus, I find that the withheld information is commercial information, in satisfaction of the first part of the test.

Part 2 of the test: the withheld information must have been supplied in confidence

Supplied

[13] The requirement that the information has been “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.³ 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.⁴

[14] IPC orders have consistently held that 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 a 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.⁵

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

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.⁶

the “immutability” exception. This exception applies where the contract contains non-negotiable information supplied by the third party. Examples

³ Order MO-1706.

⁴ Orders PO-2020 and PO-2043.

⁵ 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*).

⁶ Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

are financial statements, underlying fixed costs and product samples or designs.⁷

The ministry's representations

[16] The ministry submits that the withheld information in the conditional grant agreement falls within the “immutability” exception because the information was supplied to the ministry by the affected party and the ministry did not change it. The ministry says that its role with respect to the affected party’s project was limited to providing financial assistance. It explains that, generally, in reviewing a business plan and other project-related information submitted by a third party, it does not try to change the third party’s business fundamentals. In this case, the ministry says that it did not seek to change the affected party’s fixed and non-negotiable information – annual production capacity, milestones, deliverables and timelines table, and project investment commitment budget table. It adds that, given its role in this type of transfer payment transaction is limited to providing financial support to a funding recipient to carry out its own project, it did not seek to change the quantity, timing or pricing of the affected party’s products, the milestones, deliverables and timelines table or overall project budget as these captured business and financial considerations and reflected business decisions made by the affected party.⁸ The ministry says that the only negotiated terms were the requirements that the affected party invest in its own project and create jobs.

[17] To support its position that the withheld information is “immutable”, the ministry relies on Order PO-3158, which addressed information in a similar conditional funding agreement between the ministry and a grant recipient. The ministry says that the adjudicator in Order PO-3158 found that detailed information about a funding recipient’s year-to-year business plan – which revealed its current and projected activities, hiring patterns, timetable for the various stages of the project, budget and sources of financing – was immutable. In addition, the ministry says that the adjudicator agreed that the ministry’s role as funder did not encompass the type of input that, for example, a potential business partner may have.

[18] Regarding the withheld information in the letter of offer and term sheet, that is also withheld in the conditional grant agreement, the ministry submits that it is “immutable” because the ministry did not negotiate it. The ministry explains that the affected party submitted detailed information about its production capacity, project milestones, deliverables and timelines table, project investment commitment budget, unit price and commitments in relation to its source of interim product supply and supply chain, which was incorporated into the term sheet attached to the letter of offer. The ministry argues that despite the production capacity, updated version of the milestones, deliverables and timelines table, and updated version of the project investment

⁷ *Miller Transit*, cited above at para. 34.

⁸ The ministry provided an affidavit from its former Assistant Deputy Minister of the former Pandemic Response Secretariat to support its representations.

commitment budget being incorporated into the final conditional grant agreement, the withheld information is “immutable” because it is fixed and non-negotiable.

[19] The ministry notes that the unit acquisition price to be paid to the affected party and the affected party’s commitments in relation to its source of interim product supply and supply chain are included in a non-binding annex attached to the term sheet. It states that the non-binding annex was not incorporated into the conditional grant agreement, the final legally binding agreement between the parties. It submits that this information is analogous to the content of tender submissions – proposals and bids – that did not result in a successful contract and should be considered to have been “supplied.” The ministry cites Order MO-1450 as an example of an appeal in which the IPC found such information to have been “supplied” by a third party.

The affected party’s representations

[20] The affected party explains that discussions between it and the ministry did not occur as part of a standard competitive process. The affected party says it engaged in discussions with the ministry in response to the Covid-19 pandemic and the urgent need to equip front-line and health care workers with personal protective equipment (PPE). The affected party states that during these discussions, it provided confidential information to the ministry, including information about its operations, capabilities, methods, products, underlying fixed costs and processes.

[21] The affected party claims that the immutability and inferred disclosure exceptions apply. It argues that section 17(1) is meant to protect third party information that is not susceptible to change in the negotiation process. It submits that overall manufacturing capacity at its facility cannot be changed. It also notes that its unit pricing and interim monthly supply commitment, which were made separately from the agreement and attached to the offer letter, were not susceptible to change in the negotiation process. The affected party argues that disclosure of the unit pricing and interim monthly supply commitment would allow accurate inferences to be made about underlying non-negotiated confidential information it supplied to the ministry.

[22] With respect to the milestones, deliverables and timelines table and project investment commitment budget, the affected party submits that this information was not negotiated.

Analysis and findings

[23] Having considered the ministry’s and the affected party’s representations, I am not satisfied that the second part of the test is met. The parties’ representations, the contents of the records and the context of the negotiations that took place between the ministry and the affected party, all lead me to conclude that the records are contracts, and the withheld information is contract provisions that were mutually generated and, therefore, not “supplied” as required to meet the second part of the test.

[24] Both records are contracts because they set out the terms accepted by the ministry and the affected party. The ministry offered the affected party a grant to assist it with financing the construction of a facility to produce N95 respirators. The ministry's offer was contained in the terms set out in the term sheet attached to the letter of offer, and it was subject to the parties' entering into a binding conditional grant agreement. The affected party accepted the offer. The parties subsequently executed a binding conditional grant agreement.

[25] The ministry claims that the non-binding annex attached to the letter of offer is not a contract because it was not incorporated into the conditional grant agreement. I acknowledge that the letter of offer says that the annex does not form part of the letter of offer and should not be used to interpret it. However, the content of the information and not the form must be considered in determining whether the information was "supplied."⁹ The evidence before me is that several ministries were involved in discussions with the affected party about the supply of N95 respirators, and that these discussions resulted in a series of agreements between various ministries and the affected party regarding the supply of N95 respirators. I understand from the conditional grant agreement that the terms and conditions set out in the non-binding annex were incorporated into one of the agreements signed between the parties.

[26] As noted above, previous IPC orders have consistently found that the contents of a contract will not normally qualify as "supplied" for the purpose of the third party information exemption, unless they fall within one of two exceptions: "immutability" or "inferred disclosure." The parties argue that the immutability exception applies because the ministry did not change the withheld information provided by the affected party and because that withheld information was not susceptible to change. The ministry and the affected party identify this immutable information as the production capacity of the facility, project milestones, deliverables and timelines table, project investment commitment budget, unit acquisition price and commitments in relation to the affected party's source of interim product supply and supply chain. They assert that this information is fixed and non-negotiable and, therefore, immutable. Although I accept that this information originated with the affected party, I am not persuaded that it is immutable.

[27] As noted by the Divisional Court at paragraph 34 of *Miller Transit*:

The immutability exception arises in relation to information actually supplied by a third party which appears within a contract but which is not susceptible to change in the give and take of the negotiation process such as financial statements, underlying fixed costs and product samples or designs.

[28] In my view, the withheld information is the result of the give and take of the negotiation process and therefore is mutually generated. I consider the ministry's decision

⁹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

to incorporate the withheld information – into its letter of offer (including the term sheet and non-binding annex) and the conditional grant agreement without changing it – to be a form of negotiations similar to IPC orders that have held that acceptance or rejection of a term is a form of negotiations.¹⁰

[29] I disagree with the ministry's argument that the finding in Order PO-3158 that the immutability exception applied to the funding recipient's year-to-year business plan applies to the records before me in this appeal. Although the agreement addressed by Order PO-3158 was similar to the conditional grant agreement in this appeal, the assessment of whether the contents of a contract are immutable is fact specific. In this appeal, it is clear from the terms of the conditional grant agreement that the production capacity of the facility to be constructed, the affected party's commitment to construct it in accordance with the specific budget, project milestones, deliverables and timelines table, unit acquisition price, and the affected party's commitments about the source of interim product supply and supply chain were essential to the ministry's decision to accept the affected party's proposal. In Order PO-3158, the Senior Adjudicator held that "agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied", even if the "negotiation" amounts to acceptance of the terms proposed by the third party."

[30] Finally, the withheld information is not immutable in the way that financial statements, underlying fixed costs and product samples or designs are. Prior IPC orders have held that prices agreed to in a contract are by their nature a product of negotiation, even if one party accepts the offer from the other party without changing it.¹¹

[31] I have also considered whether the inferred disclosure exception applies. I find that it does not. The ministry and the affected party did not provide me with sufficient evidence to establish that the disclosure of the withheld information would permit the drawing of accurate inferences about underlying non-negotiated confidential information provided by the affected party to the ministry.

[32] Given my reasons above, I find that the withheld information was negotiated by the parties and, therefore, is not "supplied." I also find that neither of the exceptions apply. As part 2 of the section 17(1) test is not met, the withheld information is not exempt under the mandatory third party information exemption.

ORDER:

1. I allow the appeal and order the ministry to disclose to the appellant the withheld information by **July 11, 2025**, but not before **July 7, 2025**.

¹⁰ Orders PO-2435 and MO-4514.

¹¹ Orders MO-4514, PO-4610, MO-4588, and MO-4396.

2. To ensure compliance with paragraph 1, I reserve the right to require the ministry to send me a copy of the pages of records as disclosed to the appellant.

Original Signed by: _____

Anna Kalinichenko

Adjudicator

June 5, 2025