Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER PO-1791

Appeal PA-990458-1

Management Board Secretariat

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## NATURE OF THE APPEAL:

The appellant submitted a request to Management Board Secretariat (MBS) for access to a contract between MBS and a private contractor (the affected party) relating to the shredding and recycling of records. MBS notified the affected party of the request and provided it with an opportunity to make representations as to the disclosure of the document.

Subsequently, MBS provided a copy of the contract to the appellant, with the exception of certain information which was severed. MBS cited sections 17(1)(a),(b) and (c) of the Freedom of Information and Protection of Privacy Act (the Act) in support of its decision to sever the information.

The appellant has appealed the decision to sever information.

During mediation, the affected party was contacted by the mediator and provided with a form enabling it to indicate its consent to the release of the severed information. No consent has been received.

The inquiry in this matter was initiated when I sent a Notice of Inquiry to MBS and to the affected party, asking for their representations on the issues raised. I received representations from MBS by the date set in the Notice of Inquiry. No representations were received by the affected party by that date, and upon contact by this office, the representative of the affected party stated that he had not received the Notice of Inquiry. The Notice was therefore re-sent, with a new deadline for submission of representations from the affected party. This deadline has now passed, and again, no representations have been received from the affected party.

Because of the conclusions I have come to, I have decided that it is not necessary to ask for representations from the appellant. Accordingly, I have before me the representations of MBS only.

## THE RECORD:

The record at issue is a contract dated May 1, 1992 between Her Majesty in Right of Ontario as represented by the Minister of Government Services (now MBS), and the affected party. The contract describes the services to be provided by the affected party, which involve paper shredding and recycling. It states that the services provided by the company are to commence on May 1, 1992 and end on April 30, 1994 or earlier. The contract contains various other agreements between the parties, and also includes two appendices, Appendix B.1 and Appendix B.2. Section 1 of each of those Appendices, which has been disclosed, sets out the volume of records to be shredded and recycled in each year of the contract. Section 2 of each of those Appendices, which are the only portions of the contract which have not been disclosed, specifies the unit prices and total prices for each year of the contract.

## SYNOPSIS OF CONCLUSIONS:

I have concluded that since the representations fail to provide detailed and convincing evidence that one or more of the harms referred to in sections 17(1)(a)(b) and (c) can reasonably be expected to occur upon disclosure of the information, the contract ought to be released in its entirety to the appellant.

## DISCUSSION:

### Introduction

Section 53 of the Act states that where a head refuses access to a record or a part of a record, the burden of proof that the record or the part of the record falls within one of the specified exemptions in this Act lies upon the head. Affected parties who rely on the exemption provided by section 17 of the Act to resist disclosure of certain parts of a record share with the institution the onus of proving that this exemption applies (Order P-228).

Section 17(1) of the Act 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, 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;
>
> (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.

Section 17(1) has been the subject of much comment in prior cases. Previous decisions have established that for a record to qualify for exemption under section 17(1)(a),(b) or (c) the parties opposing 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; **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 (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, M-29, M-37, P-373]

I agree with the above approach. Before turning to a discussion of this three-part test, I note that the information which has been severed from the document disclosed to the appellant consists of two types of prices: unit prices, and total prices. The unit prices reflect the amount charged by the affected party per unit of work to be performed. The total prices reflect the total value of the contract. Many of the decisions of this office in this area focus on unit prices, since it is the potential disclosure of unit pricing information which typically gives rise to assertions of economic harm. To the extent that there may be a distinction drawn between unit prices and total prices in the application of section 17(1), this distinction is not meaningful in the case before me. Since the **volume** of work under the contract has already been disclosed, disclosure of the total prices would necessarily reveal the unit prices. In the discussion below, I have accordingly not distinguished between the different types of pricing information contained in this contract, but refer in general to unit pricing.

**Part One: Type of Information**

***Commercial Information***

As to the first part of the test, prior decisions have stated that commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order P-493). Since the prices which are the subject of this appeal relate to services purchased by MBS from the affected party, I am satisfied that they qualify as commercial information.

**Part Two: Supplied in Confidence**

***Supplied***

The second part of the test requires an analysis of the meanings of "supplied" and "in confidence". A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts will generally not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act. In general, for such information to have been "supplied" it must be the same as that originally provided by the affected party: see, for example, Orders P-36, P-204, P-251 and P-1105.

In this case, MBS has submitted that the Appendices to the contract with the affected party were drafted by the affected party and submitted to the MBS in response to its Request for Prices. More particularly, the unit price information contained in those Appendices were provided as a price quote.

On the basis of this information, I am satisfied that the prices severed from the Appendices were not the product of negotiation between MBS and the affected party, are the same as that originally provided by the affected party in response to the Request for Prices, and were therefore "supplied" by the affected party within the meaning of Section 17(1).

***In Confidence***

Previous orders dealing with the application of section 17(1) have required the demonstration of a "reasonable expectation of confidentiality" on the part of the supplier of the information, at the time it was provided: see, for instance, Order M-169 [dealing with the municipal equivalent to section 17(1)]. Some factors which are considered in determining whether an expectation of confidentiality is reasonable are whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

I agree with the above approach. In this case, MBS does not assert that an explicit assurance of confidentiality of pricing information was given to the affected party. Neither is it asserted that the pricing information was provided by the affected party on the explicit basis that it be kept confidential. MBS states, however, that its normal and consistent practice is to treat unit price quotations submitted in response to Requests for Prices as confidential information, both as a matter of principle and good business practice. Consequently, suppliers' quotes are submitted with the expectation that they will not be disclosed to the public. Further, MBS asserts that the only individuals who would have had knowledge of the information are the Records Centre operational management staff and Accounts Payable staff.

I accept that MBS treats unit price quotations as confidential information. It can be said, therefore, that **MBS** has an expectation of confidence in relation to this information. However, the decisions in this area have focussed on determining the expectations of the **supplier** of the information. In this case, the affected party has not made any submissions, and I do not therefore have evidence as to what its actual expectations were at the time that it provided its pricing to MBS. On balance, I have decided that I may infer a reasonable expectation of confidentiality, even in the absence of evidence from the affected party, on the basis of the information supplied by MBS as to its practice. I am satisfied that the practice of treating unit

price quotations as confidential, and restricting knowledge of this information to a limited circle of employees of MBS, would give rise to a general and reasonable expectation of confidentiality on the part of contractors providing such information to MBS. My conclusion is consistent with those decisions which have accepted the general proposition that bidders have a reasonably held expectation of confidentiality with respect to the financial details of their bid submissions, such as unit prices and other "proprietary" information: see Order PO-1722.

**Part Three: Harms**

**General**

Past decisions have stated that in order to discharge the burden of proof under the third part of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed: see, for example, Order P-373. Recently, the Court of Appeal for Ontario accepted the requirement for "detailed and convincing" evidence, stating, among other things that:

> [s]imilar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.
>
> [Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)]

In this case, in the absence of representations from the affected party, I must look to the submissions from MBS in order to determine whether there is detailed and convincing evidence to support the conclusion that the disclosure of the pricing information could reasonably lead to one or more of the harms described in section 17(1).

***Section 17(1)(a): Prejudice to Competitive Position***

MBS states that disclosure of the unit price could reasonably be expected to prejudice significantly the affected party's competitive position by disclosing to its competitors its best price for paper shredding services. This information could be used by competitors to undercut the affected party's bid in future contracts with the government.

A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records: Orders P-166, P-610 and M-250. Past orders have also upheld the application of section

17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.

In general, therefore, there are many cases where the exemption described in section 17(1)(a) has been applied to information which is similar to that at issue here. The difficulty with the case before me, however, lies with the scarcity of evidence on the specifics of this affected party's circumstances. I am left without any guidance, for example, as to whether unit pricing information is viewed as commercially-valuable information in the particular industry in which this affected party operates. As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.

In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

***Section 17(1)(b): Information No Longer Supplied***

Much of my discussion above also applies to the exemption established by section 17(1)(b). MBS has submitted that if it were known that unit price quotations submitted by potential bidders were available upon request to competitors or the public generally, bidders would in the future be reluctant to submit this information on government tenders. It states that contractors might either supply only bottom line figures, or simply decide not to do business with MBS for fear that their pricing structure may be released to their competitors. If fewer companies submit bids, this is a detriment to the public interest. Again, in the absence of any evidence as to whether unit price information is of any commercial value in this particular industry, I am unable to conclude that its disclosure could reasonably be expected to result in such information no longer being supplied to MBS in the future, by contractors in this industry.

Further, a decision in favour of disclosure in this case does not mean that unit price quotations supplied to MBS will be made generally available upon request to competitors or to the public. Each case must be determined on its own facts. There is simply a lack of evidence in the case before me, and as I have indicated, there have been many other decisions which have applied the exemptions in section 17(1) to unit price information, on other facts and in other circumstances.

***Section 17(1)(c): Undue Loss or Gain***

Again, I am left without detailed information as to the potential for disclosure of this information to result in undue loss or gain. MBS has submitted that releasing the affected party's pricing structure could ultimately result in undue financial loss to the company because it would undermine the third party's competitive position in future tenders. It states that conversely, disclosure would benefit the affected party's competitors, resulting in undue gain to them. As I have stated, I am not satisfied that I have detailed and

convincing evidence to support the assertion that unit pricing information is of commercial value in this industry, and that its release would undermine the affected party's competitive position .

In conclusion, I am not satisfied that the evidence before me supports the application of the exemptions described in section 17(1)(a)(b) and (c).

## ORDER:

1. I order the information severed from the contract between the affected party and MBS to be disclosed to the appellant by sending a copy of the complete contract to him by no later than **June 30, 2000**, but not before **June 23, 2000.**

2. In order to verify compliance with provision 1 above, I reserve the right to require MBS to provide me with a copy of the material sent to the appellant.

Original signed by: June 9, 2000
Sherry Liang
Adjudicator