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

ORDER PO-2018

Appeals PA-010205-1 and PA-010353-1

Management Board Secretariat

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NATURE OF THE APPEAL:

These are two appeals from a decision of Management Board Secretariat (MBS), concerning the same record and arising out of the same request. One appeal is by an affected party which was notified by MBS of its intention to disclose part of a record in which it has an interest. The other appeal is by the requester, and relates to the severance of certain information in the record by MBS.

As background, the requester sought access to the complete final agreement between MBS and a named company (the affected party) resulting from a Request for Proposal (RFP) process. The contract relates to the provision of integrated network services. Under the contract, the affected party was retained to engage, manage and be accountable for private sector vendors who deliver network access services to the Ontario Public Service and to certain broader public sector organizations. MBS notified the affected party of the request and gave it an opportunity to make representations on whether the contract ought to be disclosed. In response, the affected party objected to the release of the agreement, providing submissions to MBS in support of its position.

In its decision, MBS granted access to some parts of the requested record, and denied access to other parts in reliance on the mandatory exemption in section 17(1) of the *Act* (section 65(6) was also cited in the decision but this is no longer an issue). MBS also noted that it would wait thirty days before disclosing the record to give the affected party an opportunity to appeal this decision. The affected party did appeal the decision, and Appeal No. PA-010205-1 was opened. Subsequently, MBS sent the requester the portions of the record the affected party did not object to releasing. The requester has in turn appealed the decision to withhold parts of the record, and Appeal PA-010353-1 was opened.

During mediation certain issues were resolved or clarified. The affected party maintains its objection to the intended release of the dollar amounts contained in Article 11.7(a) and (b) of the contract (Limitation of Liability). The requester seeks access to all of Article 11.7(a) and (b), and as well challenges the decision by MBS to withhold access to Articles 8.5(d) (General Consequences of Termination of Agreement), 12.1(a) and (c) (Intellectual Property Rights) and certain definitions in Schedule "A". The affected party supports the decision by MBS to withhold access to these additional articles.

I sent a Notice of Inquiry to MBS and to the affected party initially, inviting them to make representations on the facts and issues raised by the appeals. Their representations were then sent to the requester (with certain portions severed for confidentiality reasons), along with the Notice of Inquiry, and the requester was also invited to submit representations, which it has.

RECORD:

The information at issue is contained in a contract titled "Integrated Network Agreement", effective February 15, 2001, as between Her Majesty the Queen in Right of Ontario as represented by the Chair of MBS, and the affected party. The portions of the contract which remain in dispute are:

- Article 8.5(d) (General Consequences of Termination of Agreement). This article describes the government's right to acquire licenses for network integration materials upon the termination of the agreement, and the obligations of the affected party in respect of this. It also outlines how the license fee for integration materials acquired by the government on termination of the agreement will be established, and the affected party's rights and obligations thereunder.

- Articles 11.7(a) and (b) (Limitation of Liability). These articles establish the amount of damages for which either party to the contract is liable to the other party for any claim arising out of or in connection with the agreement, in dollar amounts. Only the dollar amounts are at issue.

- Articles 12.1(a) and (c) (Intellectual Property Rights). These articles establish the intellectual property rights of the parties to the agreement and the parties' rights to use the contract materials during the term of the agreement and after termination. The articles also deal with license fees to be paid for network integration materials upon termination of the agreement.

- Seven definitions found in Schedule "A". Six of these definitions describe processes or systems used by the affected party. The remaining definition identifies a subcontractor to the affected party.

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1) of the *Act* provides:

> 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) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. It has been described as designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions" (see Order PO-1805).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

In applying section 17(1), prior orders have sought to strike a balance between the public policy in favour of public scrutiny of government activities, and third party economic interests. Prior orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish 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 10(1) will occur.

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

Part 1: Type of Information

Commercial information is information which relates to the buying, selling or exchange of merchandise or services (Orders 47, 179 and P-318). On my review of the record, I am satisfied that all of the information which has been severed from the document constitutes commercial information, since it pertains to the terms of a commercial contract between MBS and the affected party.

Part 2: Supplied in Confidence

The second part of the three-part test set out above in turn encompasses two components: it must be shown that the information was "supplied" to the institution, and that the supply of the information was "in confidence".

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects, once again, the purpose in section 17(1) of protecting the informational assets *of the third party*. As stated in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of this *Act*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
> (pp. 312-315) [emphasis added]

Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the *Act*. Records of this nature have been the subject of a number of past orders of this office. In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party.

The fact, however, that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 17(1). The terms of a contract have been found not to meet the criterion of having been "supplied" by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).

Representations

MBS submits that during the RFP process, MBS provided proponents with a proposed pro-forma agreement containing expected contractual terms. If proponents wished to change any of the pro-forma contractual terms, they were asked to outline the reasons why they requested changes, and provide proposed contractual language for consideration by MBS.

In general, MBS submits that although the record at issue is contained in a contract between MBS and the affected party, which is the result of negotiations between the parties, portions of sections 8.5(d) and 12.1(a) and (c), and the definitions in Schedule "A" are either identical to the language proposed by the affected party or are in substance identical to terms confidentially supplied to the Ministry by the affected party in its proposal.

More specifically, MBS submits that in the affected party's proposal, it proposed changes to the wording of pro-forma clauses 8.5(d) and 12.1(a) and (c). MBS states that in the final agreement, Article 8.5(d) has been altered from the pro-forma version to include revisions proposed by the affected party. Although the wording of Article 8.5(d) in the final agreement is not identical to the wording initially supplied by the affected party, amendments to section 8.5(d) are in substance identical to the amendments supplied by the affected party.

Further, MBS submits that the affected party proposed changes to Article 12.1(a) and (c) in the pro-forma agreement as part of its RFP response. The language of Article 12.1(a) and (c) in the final agreement substantively incorporates these proposed amendments, and in places, includes the exact language supplied by the affected party in its proposal. It is submitted that although the wording in the final agreement is substantially similar (but in some instances not identical) to the wording initially supplied by the affected party, amendments to section 12.1(a) and (c) in the final agreement are in substance identical to amendments supplied in confidence by the affected party in its RFP proposal.

With respect to the definitions in Schedule "A", MBS submits that these were not originally contained in the pro-forma agreement and were supplied by the affected party in its RFP proposal and incorporated into the final agreement.

MBS also submits that if it is determined that the above information was not "supplied" by the affected party, it nevertheless ought not to be disclosed because it would "reveal" information supplied in confidence to MBS. The clauses at issue in the final agreement substantially reveal information supplied by the affected party in confidence during the RFP process.

MBS has provided no specific representations with respect to the information in Articles 11.7(a) and (b).

In general, the affected party submits that it does not object to disclosure of the provisions of the final agreement that were mandated by the government and of which other bidders would reasonably be expected to be aware. It is concerned only with those provisions of the agreement where it made a competitive decision or where it negotiated terms that reveal its competitive strategy.

The affected party submits that it provided its position to MBS on Articles 11.7(a) and (b). These articles indicate the amount of risk it is prepared to accept in entering into a contract. This is sensitive commercial information, especially in the government sector where responding to a request for proposal is a normal method of winning business. In preparing their responses, companies will react to the anticipated position of other parties.

For the other portions of the record in dispute, the affected party states that it supplied MBS with wording in its proposal and throughout the negotiation process.

In response, the requester disputes that the affected party supplied the wording of the articles in dispute in the final agreement, and relies on the submissions by MBS that the wording supplied by the affected party is different from the final wording in the agreement.

Both MBS and the affected party provided me with copies of the portions of the affected party's proposal pertaining to Articles 8.05(d), 11.7(a) and (b), 12.1(a) and (c). As well, the affected party provided portions of the RFP.

Analysis

As indicated above, this element of the three-part test under section 17(1) has been the subject of a number of prior orders, most of which have concluded that contracts between government and private businesses do not reveal or contain information "supplied" by the private businesses. These findings reflect the common understanding of a contract as the expression of an agreement between two parties. Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered a type of "informational asset" which qualifies for exemption under section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.

Consistent with this general approach, certain cases have recognized that the absence of negotiations does not in itself lead to a conclusion that the information in the contract was "supplied" within the meaning of section 17(1). In Order P-1545, for instance, the evidence of the parties was that a consultant was asked to set out the terms and conditions of a consulting contract, which became the basis of the contract. In that decision, Assistant Commissioner Tom Mitchinson concluded:

> Although some of the terms of the contract, and perhaps the contract as a whole, may have been agreed to with little discussion or the more extensive negotiation process normally associated with this type of agreement, I find that the record nonetheless represents a negotiated arrangement between Hydro and the affected person. In its representations on section 18(1)(c), quoted earlier in this order, Hydro appears to acknowledge that there is an element of negotiation to this type of contract when it argues that disclosure of the record could result in a potential future candidate choosing to "negotiate more advantageous terms". I find that the

> contract was the result of negotiations, however minimal, and that the record was not "supplied" for the purposes of section 17(1).

MBS has referred to Orders P-1611 and P-1605 in support of its position on this issue. These orders must be considered in the context of their facts. In both, certain information in the contracts at issue was said to be proprietary in nature, revealing unique methods or strategies in which the businesses had a proprietary interest. In Order P-1611, the company asserted that it had a copyright in the information, and in Order P-1605, the information was found to constitute a trade secret. The findings therefore do not apply broadly to the terms of contracts between government institutions and third parties. However, they are useful, in that they reinforce the theme that section 17(1) is about the protection of the "informational assets" of third parties. Although the general terms of contracts are not exempt under section 17(1), in that the terms are the product of negotiation (which may be minimal), specific provisions may be exempt if they can be said to contain the "informational asset" of a third party.

Applying the above to the facts of this case, I find that the information in or revealed by Articles 8.5(d), 11.7(a) and (b), 12.1(a) and (c) was not "supplied" by the affected party, within the meaning of section 17(1) of the *Act*. Although they reveal the terms of the bargain the affected party agreed to when it entered into the contract, this is not in itself information "supplied" to MBS. Rather, the terms were mutually generated, as the product of negotiation. This is so regardless of the fact that some of the language in these provisions is substantially based on proposals of the affected party.

It should be noted that even the representations of the MBA acknowledge that the final wording of Articles 8.5(d), 12.1(a) and (c) does not mirror the proposals submitted by the affected party. Indeed, a comparison of the RFP, the proposals by the affected party and the final wording reveals the existence of some level of exchange between the parties as to the final wording. I also have regard to the representations of the affected party referring to the negotiations on these issues.

MBS expresses a concern that even if the information in Articles 8.5(d), 12.1(a) and (c) is found not to have been "supplied" by the affected party, the disclosure of these terms would result in *revealing* information supplied confidentially to MBS during the RFP process. MBS submits that a comparison of the terms of the pro-forma agreement against the terms of the final agreement would allow the requester to determine substantially all of the information in the affected party's proposal.

In my view, this concern is not a basis for exempting the information at issue from disclosure. If it were, then I would see no reason to distinguish the information in the specific articles in dispute, from the rest of the contract which has been disclosed to the requester. As a general proposition, this interpretation of section 17(1) would result in the exemption from disclosure of the terms of any number of contracts awarded through a similar process to that used in this case. Such a result would clearly not be in keeping with the intent of the *Act*. In any event, the disclosure of the final terms of a contract, and the comparison of those terms with the terms of a pro-forma agreement, would only indicate the starting point and concluding point of negotiations. It would not, with any precision, reveal all of the details of the two parties'

positions during those negotiations and the various proposals, counterproposals and changes to positions that might have been involved.

In sum, I find that the information in Articles 8.5(d), 11.7(a) and (b) and 12.1(a) and (c) was not "supplied" by the affected party within the meaning of section 17(1), nor does it reveal information supplied by the affected party.

I find, however, that the definitions in Schedule "A" were "supplied" within the meaning of section 17(1). They are not based on any of the provisions of the pro-forma agreement, but were proposed by the affected party. Further, to the extent that they describe materials the affected party intends to use, or refer to its service methodology, the definitions are more about the affected party's business, than about the mutual obligations of the contracting parties.

I also find for the same reasons that the name of the affected party's subcontractor, as contained in one of the definitions in Schedule "A", is information "supplied" by the affected party.

In confidence

MBS describes its practice on the confidentiality of the proprietary business and financial information supplied by bidders in an RFP process. Further, it sets out the terms of the confidentiality assurance given to bidders during this RFP, and the explicit confidentiality provision included with the affected party's proposal.

The affected party also describes the measures it typically takes to ensure the confidentiality of its proposals, and the explicit manner in which the issue of confidentiality was addressed between it and MBS.

Based on the representations of the parties, I am satisfied that the severed portions of Schedule "A" were supplied in confidence.

Harms

Because of my findings above, Articles 8.5(d), 11.7(a) and (b) and 12.1(a) and (c) do not qualify for exemption under section 17(1). It is therefore only necessary to consider the third part of the section 17(1) test in relation to the severed portions of Schedule "A".

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party or parties with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

MBS submits that disclosure of the information severed from the agreement could reasonably be expected to prejudice the affected party's competitive position in the industry because it would reveal the details of specific terms and conditions under which the affected party agreed to provide network access services. Relying on Order PO-1818, it submits that the disclosure of an affected party's methodology outlined in its proposal, the actual description of how they perform the work required, could result in prejudice to their competitive position, as competitors could make use of the methodologies and tailor their own proposal to imitate those of successful bidders.

With respect to Schedule "A", MBS submits that by obtaining access to the definitions, a sophisticated competitor would be able to ascertain the materials the affected party proposes to use in meeting its contractual obligations, as well as its service methodology. Disclosure of the identity of the subcontractor could as well indicate to a competitor the affected party's methodology in administering the contract.

The affected party submits that a competitor would be able to review the information in the records and use the affected party's solution in formulating its own proposals. This could be done by copying the affected party's solution, comparing the solution to its own in order to pinpoint strengths and weaknesses in them both, or attempting to discredit the affected party's solution in its own bids. In general, competitors would have the undue benefit of knowing the affected party's way of doing business, allowing it to more readily undercut or replicate its approach. This is an obvious windfall and could potentially deprive the affected party of an opportunity to provide services.

The requester states simply that it does not understand how the disclosure of a definition of a term in an agreement can lead to harm to the affected party.

Prior orders, such as Order PO-1818, have accepted that harm within the meaning of section 17(1) can reasonably be expected to ensue from the disclosure of a contractor's business methodologies. To the extent that the definitions in Schedule "A" describe some of the affected party's business methodologies, I accept that disclosure of this information could reasonably be expected to lead to harm to its competitive position.

Prior orders have also considered whether disclosure of the identities of subcontractors could reasonably be expected to lead to the harm contemplated by section 17(1), and have generally found a lack of evidence to support this conclusion: see Order PO-1722 and the cases cited therein. Although each case is contingent on the evidence presented in the appeal, I find the information before me on this issue unconvincing as well.

In conclusion, I find that all three components of the section 17(1) test for exemption have been met with respect to the six definitions in Schedule "A", but not with respect to the definition identifying a subcontractor. In the result, only the six definitions are exempt from disclosure.

A final issue to be addressed is the affected party's request that I place restrictions on the use of the information, should I order it to be disclosed. It has been said in prior orders that disclosure

of general records under the *Act* is considered to be "disclosure to the world" (see Orders MO-1243 and P-1499, for example). There is no authority for conditional disclosure under the *Act*, save for the provisions in section 21(1)(e), relating to disclosure for research purposes, which do not apply here.

I therefore decline the request by the affected party.

ORDER:

1. I order MBS to disclose to the requester Articles 8.5(d), 11.7(a) and (b) and 12.1(a) and (c) of the final agreement between it and the affected party, as well as the definition in Schedule "A" pertaining to the identity of a subcontractor.

2. I uphold the decision of MBS to deny access to the six definitions in Schedule "A" which are highlighted on the copy of Schedule "A" which I have provided to MBS with a copy of this order.

3. I order disclosure to be made by sending the requester a copy of the information ordered to be disclosed by no later than **June 27, 2002** but not before **June 20, 2002**.

4. In order to verify compliance with the terms of Provision 1, I reserve the right to require MBS to provide me with a copy of the material which it discloses to the requester.

Original signed by: May 30, 2002
Sherry Liang
Adjudicator