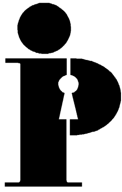

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2228

Appeal PA-030029-1

Centennial College of Applied Arts and Technology

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NATURE OF THE APPEAL:

Centennial College of Applied Arts and Technology (the College) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> Details of the contract(s) regarding the acquisition and implementation of the Fully Relational Enterprise Database (FRED) including the HRIS, FIS and SIS systems and more specifically:
>
> (a) all companies and contract individuals, agents and other third parties involved in the purchase and implementation of the systems
> (b) details of all deliverables and schedule of delivery
> (c) cost of acquisition and cost of implementation including capital and operational expenditures
> (d) source of funding for the expenditures including details of any borrowed money and repayment schedule
> (e) schedule of payments to companies and individuals involved in the purchase and implementation of the above systems

The College identified a number of responsive records and, pursuant to section 28 of the *Act*, notified a total of seven companies and individuals who may have an interest in the disclosure of the records (the affected parties). Two of the affected parties contacted by the College objected to the disclosure of the records.

The College then issued a decision letter to the appellant denying access to the responsive records in their entirety, claiming the application of the mandatory exemption in section 17 of the *Act* (third party information) and the discretionary exemption in section 18 of the *Act* (economic and other interests of an institution).

The requester (now the appellant) appealed the decision.

During the mediation stage of the appeal, the College specified that it is relying on sections 18(1)(c) and (e) to deny access to the records at issue in this appeal, in addition to section 17(1). Also during mediation, one of the affected parties consented to the disclosure of portions of Record 1 to the appellant. The College disclosed this information to the appellant.

Following the conclusion of the mediation stage, the College advised that it had located two additional records (Records 13 and 14) responsive to part (d) of the appellant's request. Access to these records was denied pursuant to sections 17(1), 18(1)(c) and (e) and 12(1) (Cabinet records) of the *Act*. The appellant indicated that he is interested in appealing the College's decision respecting access to these records as well.

As further mediation was not possible, the matter was moved into the adjudication stage of the appeal process. I decided to first seek representations from the College and seven affected parties. I received representations from the College and one of the affected parties and shared them, in their entirety, with the appellant, along with a Notice of Inquiry. The appellant also made representations that were shared with the College, referring to a possible public interest in the disclosure of the information contained in the records. I then invited the College to respond

to the appellant's arguments, asking that it specifically address the application of section 23 of the *Act,* the "public interest override" provision to the records. In response, the College made additional submissions.

I note that the College has not made representations with respect to the application of any exemptions to Records 9, 10 and 11. I have reviewed these documents and find that they do not contain information that is subject to a mandatory exemption. As a result, I will order that they be disclosed to the appellant.

RECORDS:

The records at issue in this appeal are described below.

1. The undisclosed portions of Professional Services Statement of Work for Fixed Price Deliverables
2. Change Request
3. Amendment to Maintenance Agreement
4. Statement of Work for Server Relocation
5. IDT Contract - Consulting
6. Work Order – Service Agreement
7. IDT Contract - Consulting
8. Consulting Master Agreement
9. Employee contract
10. Employee contract
11. Offer of employment
12. Project and Operating Cost Details
13. Action and Recommendation Form
14. May 22, 2002 Minutes of Board of Governors Meeting

DISCUSSION:

CABINET RECORDS

The College argues that Records 13 and 14 are exempt from disclosure under the mandatory exemptions in sections 12(1)(b) and (a) respectively. It submits that the College's Board of Governors should be considered to be an "Executive Council" for the purposes of the *Act* as it represents the "governing body" of the College.

In my view, the position taken by the College is not in accordance with a plain reading of section 12. The Executive Council referred to in sections 12(1)(a) and (b) is the Cabinet of the Government of Ontario and cannot be considered to extend to the College's Board of Governors. Accordingly, I find that the mandatory exemption in section 12 has no application in the present appeal.

THIRD PARTY INFORMATION

General principles

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the College and/or the affected parties 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part one: type of information

Representations of the parties

The College submits that:

> Records 1, 5, 7 and 8 represent contracts between the institution and the affected third parties. Records 2 and 3 represent amendments to the original contracts. Record 4 is a 'statement of work' prepared by the affected third party (relating to Record 1) to describe the work to be done for the College. It does not represent a contract. Record 6 is an invoice. It does not represent a contract. Records 12 and 14, while generated by the institution will reveal the substance of pricing information relating to third parties. The Commissioner has previously found that records relating to the sale and purchase of goods/services by an institution are 'commercial information' (see Orders P-91 and P-408). The Commissioner has also found that records generated by an institution which reveal the substance of third party information are subject to the section (see Order P-1085).
>
> In the alternative it should be noted that Record 4 (statement of work) does not represent a negotiated contract per se but rather a description of services provided by the affected party. Record 6 is simply an invoice. The Commissioner has

> previously found similar records to be exemption [sic] from access under section 17 (see Order M-258).

The affected party who made representations in response to the Notice of Inquiry argues that Records 1, 2 and 4 contain technical, commercial and financial information, as well as the personal information of its staff.

The appellant's representations do not specifically address this aspect of the test under section 17(1).

Findings

The meaning of the terms "commercial information", "financial information" and "technical information" have been addressed in previous orders of this office. These terms have been defined as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I have reviewed the contents of the records and make the following findings:

1. Records 1, 2, 3, 4, 5 and 7 contain information that meets the definition of "technical information" for the purposes of section 17(1). Each of these records outline, using technical language, the actual information technology work to be performed, the time frame for its conclusion and the cost to the College.

2. Records 1, 2, 3, 4, 5, 6, 7, 8, 12 include "commercial information" within the meaning of that term in section 17(1). The information relates directly to the selling of information technology services to the College by the service providers.

3. Records 12, 13 and 14 contain "financial information" for the purposes of section 17(1). These records examine in some detail the financing arrangements entered into by the College in order to finance the work to be performed.

Part two: supplied in confidence

General principles

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- 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

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [PO-2043]

Representations of the parties

The College submits that:

> . . . contracts with third parties such as those enumerated above are the products of 'supplied' information from the third parties. This information may take one of several forms. Firstly, the contracts contain information supplied in proposals created by the third parties. Where negotiation of the contracts include proposals from the College, the third party must still 'supply' consent to any such proposals. Thirdly, the records in question were prepared by the third parties and, ultimately supplied to the College.
>
> Furthermore, the College submits that the supply of the information was 'in confidence'. The Commissioner has previously determined that the understanding that information is provided in confidence may be based on express assertions or implicit from the context. The College submits that contract negotiations, by their very nature, are highly sensitive since they deal with competitive pricing and service information and therefore should implicitly be considered to be dealt with in confidence. In addition, it should be noted that Record 1 page 3 contains a specific non-disclosure term (which also references Record 4 in its text). It must also be assumed to apply to Record 2 which represents an amendment to the main contract contained in Record 1. These records are not by their nature place[d] in the public domain (see Order P-561).

The affected party submits that:

> When the records were provided to [the College] they were provided in confidence. [The affected party] strives to maintain its technical and commercial advantage in the market place by consistently adopting practices intended to maintain confidentiality in its trade secrets, and its scientific, technical, commercial, financial and labour relations information. This information is consistently provided in confidence by [the affected party] because disclosure can significantly prejudice our competitive position. If [the affected party] felt that the confidentiality of its information would not be protected from disclosure it may be reluctant to participate in the provision of services to entities such as [the College].

The appellant takes the position that the documents were not "supplied" to the College by the third parties. Rather, he argues that they "are a product of negotiations between the College and the service providers".

Findings

Records 1, 2, 3, 4, 5, 6, 7 and 8 represent contracts or amendments to contracts entered into between the College and various service providers for the supply of information technology services. These agreements describe the work to be performed and the payment required by the College to the provider of that work.

In Orders MO-1705 and MO-1706, Adjudicator Bernard Morrow examined in detail the treatment of contract documents under section 10(1) of the municipal *Act*, the equivalent provision to section 17(1) of the *Act*. Addressing the "supplied" aspect of the second part of the test in Order MO-1706, Adjudicator Morrow stated:

> A number of previous orders of this office have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was "supplied" within the meaning of section 10(1). Because the information in a contract is typically the product of a negotiation process between two parties, the contents of contracts involving an institution and an affected party will not normally qualify as having been supplied (see, for example, Orders P-36, P-204, P-251, P-1545 and PO-2018).
>
> In addition, the fact 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 10(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).
>
> . . .
>
> As stated above, past decisions of this office have established that the terms of a contract between an institution and affected party will not normally be considered to have been "supplied" within the meaning of section 10(1). This is the case even where the contract substantially reflects terms proposed by a third party.
>
> In this case, there would appear to be consensus between the parties that the terms of the Contract were negotiated over a fairly lengthy period of time. However, both the affected party and the Board take the position that the severed information in the Contract was not the result of a negotiation process since the severed information is identical to the information contained in the Proposal. I disagree. In general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. Except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret), agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied".
>
> . . .

> . . . I find that the withheld information in the Contract that comprises the essential terms of an agreement between the Board and affected party cannot be considered to meet the "supplied" test in section 10(1) and, therefore, part two of the three-part test has not been met in regard to this information.

In Order PO-2200, Assistant Commissioner Tom Mitchinson reached a similar conclusion with respect to information relating to the status of various leasing contracts between the Government of Ontario and a private sector service provider. Assistant Commissioner Mitchinson determined that:

> The remaining three portions relate to leasing agreements between the named company and three ministries of the Ontario government, including MBS. In each case, the withheld text describes the basis for calculating leasing costs for these agreements. Although MBS takes the position that this information was provided by the named company in its bid proposals for the various leasing contracts, in my view, it comprises an essential term of any agreement for leasing services of this nature, and is properly characterized as having been "negotiated" not "supplied" for the purposes of section 17(1) of the *Act*. While the named company may have proposed the specified leasing cost basis, the Government of Ontario was not bound to accept it. If the proposed term remained unchanged in the leasing agreements themselves, it is reasonable to conclude that the Government considered the proposal put forward by the named company in each instance and found it to be acceptable. In my view, a process of this nature is a negotiation, regardless of whether any actual discussion on the proposed term took place, or whether the contract contains the same wording as the named company's bid proposal.
>
> Accordingly, I find that the financial information concerning the three ministries contained on pages 3 and 4 of Record 6 was not "supplied" for the purposes of section 17(1), and fails to meet the requirements of part two of the test without any need for me to consider the parties' submissions on the "in confidence" component of the test.

I adopt the findings and the reasoning of the Assistant Commissioner and Adjudicator Morrow for the purposes of this appeal.

Applying these principles to the records at issue in the present appeal, I find that the commercial and technical information contained in Records 1 through 8 was not supplied to the College by the service providers for the purposes of section 17(1). As noted above, each of these records represent contracts entered into between the College and various service providers for the provision of information technology services. In accordance with the findings in Orders MO-1706 and PO-2200, I find that the information contained in the contracts which comprise Records 1 to 8 was the product of negotiation, whether or not any discussion of details of the contracts actually took place. The information in Records 1 to 8 was not, therefore, supplied to

the College as is required under the second part of the test under section 17(1). As all three parts of the section 17(1) test must be satisfied, I find that Records 1 to 8 do not qualify for exemption under this section.

Record 12 appears to be an internally-prepared memorandum produced by the College describing the project cost details respecting the work to be performed under the contracts set forth above. The College has not provided me with sufficient evidence to enable me to make a finding that Record 12 contains information which was supplied to it by the affected parties. As a result, I find that section 17(1) has no application to this record.

The College has also claimed the application of section 17(1) to the information contained in Record 14, the minutes of an in camera session of the College's Board of Governors held on May 22, 2002. Based on my review of those minutes, I find that they do not contain information that was provided to the College by the affected parties. The information relates to the financing of the information technology work to be performed but does not include a description of that work or any other proprietary information of the affected parties to the contracts in Records 1 to 8. Accordingly, I find that section 17(1) does not apply to the information in Record 14.

In conclusion, I find that section 17(1) has no application to Records 1 to 8, 12 or 14.

ECONOMIC OR OTHER INTERESTS

The College argues that Records 1 to 8, 11, 12, 13 and 14 qualify for exemption under sections 18(1)(c) and/or (e), which read:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

The College submits that:

> Records 1 - 8 relate to contracts between the College and third party providers for computer services. Record 12 contains financial information relating to the costs of the affected project. Release of this financial data can reasonably be expected to undermine the College's ability to obtain competitive bids for computer services in the future.

> As a user of computer services, it will be necessary for the College from time to time to go out to market. In releasing competitive costing and service information obtained in the contract documents (records 1-8 and referenced in record 12) the ability of the College to obtain the best possible price is reasonably undermined.
>
> A similar concern arises with respect to record 13 and 14. Both records discuss in detail the proposed financing arrangements (and in the case of record 13 – the proposed terms upon which arrangements may be made). Revelation of such financing arrangement will make it more difficult for the College to obtain the best possible financing arrangements in the future since competitors will not be 'blind' to existing financial arrangements.

The appellant submits that:

> Any negative impact on the College's future economic interests from release of the documents is speculative at best. Pricing is highly volatile in the computer services market. Contracts often depend on general market conditions rather than services rendered per se. During 'Y2K' and the 'Dot.com' bubble services were very expensive due to the shortage of skilled personnel. Now with the market downturn and highly trained programmers demoted to staffing 'help desks' services are much cheaper. And as stated above, no two contracts are the same. This is a purchase of computer services where the same 'service' is defined only after the project begins.

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words 'could reasonably be expected to' appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated 'harms' [including section 18(1)(c)]. In the case of most of these exemptions, in order to establish that the particular harm in question 'could reasonably be expected' to result from disclosure of a record, the party with the burden of proof must provide 'detailed and convincing' evidence to establish a 'reasonable expectation of 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.)].

In my view, the College has not provided me with the kind of "detailed and convincing" evidence required to establish a reasonable expectation of harm under section 18(1)(c). The evidence tendered by the College in support of its argument that the records are exempt under this section does not describe in sufficient detail how the disclosure of the information contained in these records could reasonably be expected to result in the harm envisioned by section 18(1)(c). I find that the College has failed to make the necessary evidentiary link between the disclosure of the records and the harm contemplated by the section 18(1)(c) exemption. As a result, I find that this section has no application to the records at issue.

In order to qualify for exemption under subsection 18(1)(e), the institution must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; and

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and

3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

[Order P-219]

Similarly, based on the evidence presented by the College, I am unable to find that the records contain information which may be described as "positions, plans, procedures, criteria or instructions" which it intends to apply to current or future negotiations. I accept the arguments of the appellant that any future negotiations for the contracting of information technology services will entail different considerations from those existing at the time of the negotiation of these contracts. In my view, the records do not contain information relating to the conduct of current or future negotiations. Any suggestion of harm to the College's negotiating position as a result of the disclosure of the records is purely speculative.

Accordingly, I find that the exemption in section 18(1)(e) also has no application to the records at issue.

The affected party which made representations in response to the Notice of Inquiry raised the possible application of the mandatory exemption in section 21(1) of the *Act*, arguing that because Records 1, 2 and 4 contain the "personal information" of its employees, the disclosure of this information would result in an justified invasion of their personal privacy.

I specifically find that Records 1, 2 and 4 do not contain "personal information" within the meaning of that term in section 2(1) of the *Act*. Record 1 contains information respecting the identities of certain key staff of both the affected party and the College. In my view, this information relates to these individuals solely in their professional, as opposed to their personal, capacities. Accordingly, as the information does not qualify as "personal information" under section 2(1), it cannot be exempt from disclosure under section 21(1).

Because of the manner in which I have addressed the application of the exemptions in sections 17(1) and 18(1)(c) and (e), it is not necessary for me to consider whether the "public interest override" provision in section 23 applies.

ORDER:

1. I do not uphold the College's decision to deny access to the records.

2. I order the College to provide the appellant with copies of the records by **February 25, 2004** but not before **February 18, 2004**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the College to provide me with copies of the records that are disclosed to the appellant.

Original signed by: January 21, 2004
Donald Hale
Adjudicator