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

ORDER PO-2160

Appeal PA-020146-1

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NATURE OF THE APPEAL:

Introduction

An individual made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Management Board Secretariat (MBS) for access to "information, including all relevant details, pertaining to the history (since 1998), current status, and future planning of the Ontario Smart Card Project."

MBS divided the request into six separate files. I dealt with three of them in my Orders PO-2091-I, PO-2107-I and PO-2114-F.

The Request

In this particular file, the requester asked for the following information.

> Contracts: Details for all contracts solicited and/or awarded, including: MERX reference number, solicitation number, contractor, amounts, dates (start, end, milestones), deliverables, contractor contact person, and all other information contained in the awarded contracts. Where contracts have produced deliverables, we request copies of such deliverables.

The request was later revised as:

> … access to contracts entered into between the Smart Card project and any vendor engaged for the project (including personal service contracts) and for those contracts calling for deliverables, a copy [of] the deliverable (i.e. a report).

MBS identified 51 responsive records. It provided the requester with access to some records and denied access to the rest (in whole or in part), based on one or more of the following exemptions:

- section 12 - Cabinet records
- section 13 - advice or recommendations
- section 17 - third party commercial information
- section 21 - invasion of privacy.

MBS provided the requester with two indices: one for "contracts"; and the other for "deliverables".

The requester, now the appellant, appealed MBS's decision.

A number of events took place during the mediation stage of this appeal.

With respect to the "deliverables", the appellant excluded Record D8 and most of Record D6 from the scope of the appeal. The only portion of Record D6 that remains at issue is the section titled "Overview of Submissions – By Company" found at page 9 and the top of page 10.

As far as the "contracts" are concerned, the appellant restricted the scope of the appeal to the "ceiling amounts" contained in the records, and excluded other information such as hourly rates, per diems, expenses, resumes, etc. As a result, section 21 is no longer an issue. The appellant also narrowed his request to companies whose contract contained a ceiling amount of more than $100,000 or whose aggregated ceiling amounts exceed $100,000 (i.e., total amount of contract/extensions or series of contracts for different work).

Mediation did not resolve the appeal, and it was transferred to the adjudication stage. I sent a Notice of Inquiry to MBS and a number of affected parties initially. MBS and nine affected parties responded with representations. I then sent the Notice to the appellant, along with a copy of MBS's representations. I summarized the affected parties' representations in the Notice. The appellant provided representations, which were then shared with the other parties. MBS and six affected parties submitted reply representations. Finally, I shared MBS's reply representations with the appellant, and he submitted a reply.

RECORDS:

The following records or partial records remain at issue. They are described in the index provided by MBS to the appellant, so I will not repeat the descriptions here.

Deliverables: Records D3, 4 (in part), 6 (in part), 9-11, 14-17, 19-21

Contracts: Records C1-20, 22-37

DISCUSSION:

CABINET RECORDS

Introductory wording of section 21(1)

MBS initially claimed the section 12 exemption for Records D3, 9, 10, 14, 15, 16, 17, 19, 20 and 21, with specific reference to sections 12(1)(c), (d) and (e) and the introductory language in section 12(1). In its representations, MBS restricts its section 12 submissions to Records D3, 10, 17 and 21, and argues only that these records qualify under the introductory language of section 12(1). I assume from this that MBS is no longer relying on section 12(1)(c), (d) and (e) exemptions, and that it has withdrawn the section 12(1) exemption claim for Records D9, 14, 15, 16, 19 and 20.

It has been determined in a number of previous orders that the use of the term "including" in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of Cabinet or its committees (not just the types of records enumerated in the various subparagraphs of section 12(1)), qualifies for exemption under section 12(1) [Orders P-11, P-22 and P-331]. It is also possible for a record that has never been placed before Cabinet or its committees to qualify for exemption under the introductory wording of section 12(1), if an institution can establish that disclosing the record would reveal the substance of deliberations of

Cabinet or its committees, or that its release would permit the drawing of accurate inferences with respect to these deliberations [Orders P-226, P-293, P-331, P-361 and P-506].

Representations

MBS submits:

> … the rationale for the exemption is clear in respect of the records at issue in this appeal. MBS developed the Smart Card Project (SCP) specifically in response to Cabinet's direction. Consequently, a number of the Project's records were prepared for Cabinet's consideration. Furthermore, the SCP was accountable to, and received direction from the Management Board of Cabinet ("MBC"), the Economic and Resource Policy Committee ("ERPC") and other Cabinet Committees throughout the currency of the project. As such, the records reflect Cabinet's deliberations about various aspects of the smart card initiative.
>
> The records at issue in this appeal are all records that were utilized by Smart Card Project staff to prepare Cabinet submissions, or reflect information previously considered by Cabinet. In each case, MBS submits that information contained in the records would permit a reader to draw accurate inferences about the substance of deliberations of Cabinet, or permit the drawing of accurate inferences with respect to these deliberations, the mandatory exemption in section 12(1) applies and access to the record must be denied, whether or not the record has itself been placed before Cabinet. (Order #PO-1831).
>
> In claiming the Cabinet exemption, the head decided that this is not an appropriate case for seeking the Executive Council's consent to the disclosure of the records at issue.

Record D3

A consultant retained by the SCP prepared Record D3, dated November 2, 2000. The consultant's report analyses the feasibility of using a particular type of technology or technologies when developing the smart card. The report consists of the consultant's comprehensive analysis of the technology or technologies at issue, and their implications for the SCP.

Smart Card Project staff have advised that the consultant's report was then reviewed and used by the SCP to formulate submissions to Cabinet in respect of project issues. In particular, SCP staff have advised that the project used a substantial amount of the consultant's report in a submission made to the Priorities, Policy and Communications Board of Cabinet on September 13, 2001.

A review of the consultant's report as compared to the Cabinet submission noted above indicates that the background, issues, analysis options and recommendations identified in the consultant's report were summarized by the SCP in the Cabinet submission, and are identifiable at pages 39–41. In addition,

SCP staff have advised that the consultant's report was also used to provide background, analysis and recommendations elsewhere in the Cabinet submission, including information contained on pages 3, 4 and 6 of the submission. For this reason a reader reviewing the consultant's report would be able to draw a very accurate inference as to the content of the submissions made by the SCP to Cabinet. MBS submits, therefore, that disclosure of the consultant's report, in whole, or in part, would substantially reveal the analysis prepared by SCP staff and submitted to Cabinet for consideration and deliberation.

Record D10

The severed portions of this document refer directly to information contained in a June 19, 2000 SCP submission to the ERPC. In particular, the information severed from page 16 is substantially similar to information contained in the June 19, 2000 Cabinet submission found on page 33. The information severed on page 17 is substantially similar to information found at section 3 of the June 19, 2000 Cabinet submission. MBS submits that disclosure of the severed information would reveal information also submitted by the SCP for the consideration of a committee of the Executive Council. As such, MBS submits that the information is exempt under the opening words of section 12(1) as it would reveal the substance of the deliberations of the Executive Council.

Records D17 and 21

Records D17 and 21 are reports prepared by consultants retained by the SCP. Both reports address Smart Card application and administration issues. Smart Card Project Staff have advised that the analysis, options and recommendations outlined in the reports were utilized by the Project to prepare a portion of an "MB20" submission to the MBC.

An MB20 is a comprehensive business case prepared by government Ministries to support a request for program approval and related funding. An MB20 is presented to the Management Board of Cabinet, a committee of the Executive Council.

In respect of Records D17 and 21, SCP staff have advised that information provided at page 149 of the December 2000 MB20 was prepared using information contained in the records. MBS submits, therefore, that disclosure of Records D17 and 21, in whole, or in part, would give a reader an accurate inference as to the substance of the deliberations of a committee of Cabinet. Consequently, MBS submits that Records D17 and 21 are exempt under the opening words of section 12(1).

Findings

Record D3 is a feasibility report prepared by a consultant that analyzes the use of a particular type of technology in the development of the smart card. MBS provided me with a copy of the

September 13, 2001 submission to the Priorities, Policy & Communications Board referred to in its representations. Having reviewed it and compared it to the content of Record D3, I find that disclosing this record would reveal the substance of deliberations of the Cabinet committee and for this reason the record qualifies for exemption under the introductory wording of section 12(1).

Record D10 is a strategy paper for the smart card project. MBS also provided me with a copy of the June 19, 2000 submission to the Economic and Resource Policy Committee referred to in its representations. Having reviewed the submission and compared it to the content of Record D10, I find that disclosing this record would reveal the substance of deliberations of the Cabinet committee and for this reason the record qualifies for exemption under the introductory wording of section 12(1).

Records D17 and 21 are records relating to the "Decommissioning of the Smart Card" and "Renewal of Smart Card". Having reviewed their content, I find that disclosing these records would reveal the substance of the deliberations of Management Board of Cabinet at its December 14, 2000 meeting and for this reason the two records qualify for exemption under the introductory wording of section 12(1).

Section 12(2)(b)

Section 12(2)(b) reads as follows:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> > (b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

On the application of section 12(2)(b), MBS first submitted that, "…the head decided that this is not an appropriate case for seeking the Executive Council's consent to the disclosure of the records at issue." After considering the appellant's position that this was not a proper exercise of discretion, MBS provided the following more extensive representations:

> In exercising its discretion not to seek the Executive Council's consent to the disclosure of the records at issue, MBS considered the nature and content of the records, the circumstances surrounding their creating, and the current status of the Smart Card Project.
>
> Based on its consideration of these matters, MBS decided to exercise its discretion under the *Act* not to seek the consent of the Executive Council to release any of the records that qualify for exemption under section 12(1). Despite the fact that Cabinet has decided not to proceed with the Smart Card Project at this time, the complex and controversial nature of the issues Cabinet considered in its deliberations lead MBS to this conclusion. The disclosure of these records would necessarily reveal the substance of Cabinet's deliberations on the many complex issues it considered in respect of the Smart Card Project.

More particularly, MBS based its discretion on the following factors:

- the information has never been made available to the public and it therefore is not in the public domain;
- the records are not merely appendices or attachments to Cabinet records, but rather actual Cabinet submissions, records that reflect material submitted to Cabinet, and substantive materials prepared by MBS and submitted to Cabinet for meetings at which the Smart Card Project was under discussion;
- a reader reviewing the records that were used to prepare cabinet submissions would be able to draw a very accurate inference as to the content of submissions made to Cabinet. Therefore, disclosure of the consultant's report, in whole, or in part, would substantially reveal the analysis prepared by SCP staff and submitted to Cabinet for consideration and deliberation;
- the information at issue is sensitive and even though the project is not going forward at this time, disclosure is not appropriate, in light of the subject matter of the deliberations;
- the information is not necessarily only of historical significance since the issue of smart card technology could be raised again for Cabinet's future consideration.

Furthermore, transparency in the decision making process of government and whether access to the records would inform the public and facilitate civic debate, were also factors that MBS took into account in its exercise of discretion under s. 12(2)(b). These two factors were weighed against the important parliamentary principle recognized by the Cabinet records exemption. In its 1980 report, the Williams Commission noted that the confidentiality of Cabinet discussions is a "necessary feature of a freedom of information scheme compatible with the parliamentary traditions of the Government of Ontario." The very purpose of the s. 12 exemption is to protect the confidentiality of Cabinet deliberations in order to allow Cabinet to consider controversial and sensitive issues in an environment where members are free to discuss and debate decisions and policy options. After careful considerations of these factors as well, MBS exercised its discretion in favour of the principles underlying the section 12 exemption and therefore decided not to seek Cabinet's consent to disclosure of the records.

MBS made similar submissions on section 12(2)(b) with respect to records that qualified for exemption under section 21(1) in the appellant's previous related appeals. For the same reasons as outlined in Order PO-2114-F, I find nothing improper in MBS's exercise of discretion in favour of not seeking Cabinet consent, and would not alter it here.

ADVICE OR RECOMMENDATIONS

Introduction

MBS claims section 13(1) of the *Act* as the basis for denying access to Records D4, 9, 11, 14, 15, 16, 19 and 20.

Section 13(1) reads as follows:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Section 13(1) is subject to the exceptions listed in section 13(2).

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order P-363, upheld on judicial review in *Ontario (Human Rights Commission)* v. *Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)]. Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act* (Order P-233).

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "…purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making."

Representations

MBS submits:

> The rationale for the exemption is particularly evident in the records at issue in this appeal, given that they contain policy advice, analysis and recommendations in respect of specific aspects of the smart card project. All the records discussed below were prepared either by government staff seconded to the SCP, or consultants hired by the SCP to work with project staff.
>
> **Record D4**
>
> Pages 22–27 inclusive have been severed because they contain advice and express recommendations regarding the implementation of PKI architecture on the smart card. Specifically, this portion of the record contains advice regarding alternative models and a recommendation as to a particular model. The recommendations were prepared for senior government officials responsible for decision-making in

respect of smart card policy. The information in the record formed part of the deliberative process of governmental decision and policy making in respect of the smart card project. Consequently, MBS submits that the severed portions of the record clearly meet the IPC's criteria for exemption under s. 13(1).

Record D9

Record D9 is exempt as a whole because it consists entirely of policy advice on particular aspect of the smart card application. It contains a detailed description of options, the criteria for assessing options, with pros and cons, and recommendations for each individual element discussed in the report. The purpose of the record is to provide advice to senior government officials, to assist them in the decision-making process regarding this aspect of the smart card. The recommendations it contains could be accepted or rejected by the decision-makers. MBS submits that on its face, the record falls within the s. 13 exemption, and is similar to the records held to be exempt in PO-1742-I.

Records D11, 14, 15, 16, 19, and 20

MBS submits that all these eight records are exempt, on their face, for the same reasons described above in respect of Record D9.

The stated purpose of each of these records is to provide options and recommendations on a particular aspect of the smart card initiative, application or process. They were developed to identify, formulate and assess policy proposals and recommendations for review and for use by senior government officials in the deliberative process regarding the development of the smart card. Each deals with a particular aspect of the smart card initiative requiring policy direction or decision-making. As such, all the records contain detailed options, a thorough analysis of the options including pros and cons, and an express recommended course of action which could be accepted or rejected by the decision-maker for whom the record was developed and to whom it was submitted.

Since the options described in each of the records are accompanied by recommendations based on a particular option, the options are exempt under s. 13(1). This is consistent with previous Orders where the IPC distinguishes between records containing only options and those containing a recommendation as well. In the latter case, the options have also been exempted. (See Order PO-2028). It is also consistent with Order PO-1742-I, where information regarding various options to be considered in dealing with the Ministry's review of a particular issue were exempt because they provided a "recommended course of action" which could be accepted or rejected by its recipient. As such, "their disclosure would reveal the advice or recommendations" of a public servant or a consultant retained by the Minister, and qualified for exemption.

In addition, some of the records, identify unresolved aspects of certain options that require further policy development, analysis or research. As the IPC held in

> PO-1709, information in a record that identifies an unresolved issue, including considerations which need to be addressed by the Ministry in resolving this issue, contains advice for the purposes of s. 13(1).

The appellant questions whether section 13(1) applies in circumstances such as this, where the smart card project was cancelled. In response, MBS takes the position that section 13(1) is not time-limited and does not cease to apply once the advice or recommendations contained in records are implemented.

The appellant also identifies the possible application of the exception in section 13(2)(g) to Record 3, which is referred to in the MBS index as a "feasibility study". Because MBS did not claim section 13(1) for Record D3, the appellant's position need not be addressed. Having reviewed the records, I can confirm to the appellant that none of the records that have been exempt by MBS under section 13(1) fits within the description of a "feasibility study" as this term is used in section 13(2)(g).

The appellant also submits:

> The advice contained in these documents, now 2 1/2 years out of date, is based largely on technology. I fail to see how releasing these documents will have any adverse effect on government decision-making based on or referring to rapidly evolving technology.

Finally, the appellant questions whether any of the section 13(1) can be severed and partially disclosed. He argues:

> I am concerned that these documents have been withheld in their entirety when it is possible that only some parts need to be withheld according to the *Act*. MBS describes the contents of the documents as being "detailed descriptions of options, the criteria for assessing options, with pros and cons, and recommendations for each individual element in the report." I believe that the bulk of the information in the documents could be released with the exception of the recommendations, provided of course that they "reveal a suggested course of action that will ultimately be accepted or rejected…during the deliberative process" (PO-2028). Previous orders (P-529, P-1307) support releasing documents containing options that do not contain specific recommendations.
>
> Therefore, I ask why is it not possible to release all the information about the options contained in the document, severing only the information relating to the specific recommendations about each option.

Findings

Record D4 is titled, "Investigation of the Need for PKI on the Consumer Smart Card". Pages 22–27 deal specifically with a particular PKI model, the issues surrounding its use, and recommendations. I find that disclosing pages 22–27 would reveal or permit one to infer a

recommended course of action, which will be ultimately accepted or rejected by the recipient, and as such these pages qualify for exemption under section 13(1) of the *Act*.

Record D9 is titled "Programs on the Card – Status". This record sets out the options, pros and cons, and recommendations for possible applications for the smart card. I find that disclosing this record would reveal recommendations to be accepted or rejected by a decision-maker, and for that reason it qualifies for exemption under section 13(1).

As far as Records D11, 14, 15, 16, 19 and 20 are concerned, I find that disclosing them would reveal recommendations that would ultimately be accepted or rejected by a decision-maker, and they all qualify for exemption under section 13(1). I have reached this conclusion for the following reasons:

- Record D11 is titled "Smart Card Production Scenario Evaluation" and sets out the options, evaluation and recommendations for various production scenarios for the smart card.

- Record D14 is titled "Proof Criteria for Identification of a Client". This document sets out the options, evaluation and recommendations regarding types of proof sufficient to validate individual identities for the purposes of the smart card.

- Record D15 is titled "Working Draft – Authentication of Identity Documents and Data with Third Parties". This document sets out options, alternatives and recommendations for steps to be taken to validate documents and data with third parties.

- Record D16 is titled "Smart Card Design Analysis". This document sets out recommendations for how three proposed Registration models will work with three proposed smart card models.

- Record D19 is titled "Working Draft – Authentication of Identity Documents and Data with Third Parties". The document sets out details and recommendations regarding the steps needed to be taken to validate presented documents and data through a particular method.

- Record D20 is titled "Working Draft – Proof Criteria for Identification of an Applicant." The record sets out details and recommendations regarding the proof required to verify that an individual is who the individual claims to be for the purposes of the smart card program.

I have reviewed all of the exempt records with the appellant's severance argument in mind. Each record deals with a particular aspect of the smart card project and, in my view, no information can reasonably be severed and disclosed to the appellant without permitting the appellant and others to make accurate inferences as to the options provided and the recommendations made to the decision-maker.

Accordingly, I find that Records D4, 9, 11, 14, 15, 16, 19 and 20 qualify for exemption under section 13(1) and none of the exceptions in section 13(2) apply.

THIRD PARTY INFORMATION

MBS submits that Records C1-20, 22-37, and the relevant remaining portions of Record D6 qualify for exemption under sections 17(1)(a) and (c) of the *Act*.

As stated above, during mediation the appellant restricted the scope of his request to include only those affected parties whose contracts had a ceiling amount of more than $100,000 or whose aggregated ceiling amounts exceed $100,000. Records C2, 4, 13, 23, 24, 25, 27, 28, 29, 33 and 37 all having ceiling amounts of less than $100,000 and therefore are removed from the scope of this appeal.

I originally notified 24 affected parties. One affected party consented to the disclosure of the ceiling amounts and "maximum fees and expenses" in its contracts. Accordingly, this information in Records C16A, 16B, 17A, 17B, 18A, 18B, 19 and 20 should be disclosed to the appellant.

In his representations, the appellant further limits the scope of his request as follows:

> Furthermore, I have always been willing to accept the ceiling amount of contracts in ranges so as not to too closely identify specific financial/commercial information with a particular company, or individual…At this point I would propose that for those amounts to be partially redacted so that the amount revealed indicates only the hundred thousand dollar range or above. e.g. $123,456 would be redacted to $1##,###. This would be adequate for my purposes, but would protect against accurate calculation of per diem rates. It is hard to imagine how this would harm.

In response, two affected parties consented to the disclosure of the ceiling amounts in their contracts in the redacted method suggested by the appellant. Accordingly, this information in Records C7, 8, 9, 10, 11 and 12 should be disclosed to the appellant.

Therefore, the only information remaining at issue is the redacted ceiling amounts in Records C1, 3, 5, 6, 14A, 14B, 15, 22, 26A, 26B, 30, 31, 32, 34, 35, 36, and the information on pages 9-10 of Record D6.

Introduction

Section 17(1) of the *Act* reads, in part:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), MBS 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 MBS 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, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding my Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar 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. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added] [*Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

Part 1: Type of Information

Commercial information is information that relates to the buying, selling or exchange of merchandise or services (Orders 47, 179 and P-318).

As far as the various contract records are concerned, it is clear that they reflect the purchase of services by MBS from various contractors, and the ceiling amounts in these records qualify as "commercial information" for the purposes of section 17(1).

Record D6 is titled "Projected Card Costs from Merx Questionnaire". With respect to this record, MBS submits:

> **Record D6** is a report prepared by a consultant to the SCP. The report concerns the issue of projected Smart Card production costs. It provides a summary of the responses received to a Questionnaire that was posted to MERX. The purpose of the questionnaire was to solicit estimated forecasts of card production costs from smart card vendors. The only information severed from the record is the cost estimates provided by the vendors, and the consultant's descriptive review of the cost information submitted by the vendors.
>
> MBS submits that the numeric cost information severed from page 5 and the charts in Appendix "A" are commercial information related to the sale of goods – namely, smart cards. Essentially, it is "unit price" information. Furthermore, the information on pages 9–11 also constitutes commercial information provided by the named vendors, as it also relates to the vendor's price for the card.
>
> The information severed from pages 9–11 also constitutes trade secret information; in particular, the description of the assumptions underlying the price quote provided by the vendor. This information essentially describes the elements the vendor would incorporate into, or take into consideration in the card's production. This is the vendor's proprietary trade secret information as it relates to the technical production of the card. MBS submits that this information meets the "trade secret" test described in numerous IPC orders: it is information about a technique of producing a device which is used in a business, is not generally know in that it has economic value from not being generally know; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Orders #M-29, M-65, P-418, P-420, M-94, P-500, P-561, P-707, M-542).

Having reviewed pages 9–10 of Record D6, I accept that they contain commercial information, as that term is used in section 17(1). The information discussed on these pages was provided by various companies in response to a solicitation by MBS for the purchase of products required to implement a smart card initiative. In my view, this is sufficient to satisfy the definition of "commercial information".

However, I do not accept MBS's submission that the information on pages 9-10 constitutes trade secrets. The term "trade secret" has been defined in previous orders to mean information

including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Order M-29)

The information on pages 9-10 consists, for the most part, of a generalized discussion of the type of smart card proposed by various suppliers, together with an assessment of the various proposals outlined by the author of Record D6. No actual formula, pattern, method, technique or process for producing the smart card is described on these pages. I accept that the production of smart cards is a highly technical process and that it could well involve trade secrets owned by various suppliers; however, no information of this nature is contained on pages 9-10 of Record D6.

Because all of pages 9-10 of Record D6 contain commercial information (as well as some financial information", the first part of the section 17(1) test has been established.

Part 2: Supplied in Confidence

In order, to satisfy part 2 of the test, the affected parties and/or MBS must show that the information was supplied to MBS in confidence, either implicitly or explicitly.

Supplied

In Order PO-2018, Adjudicator Sherry Liang provided the following discussion in respect of the "supplied" part of the section 17 test.

> 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).

MBS takes the position that the ceiling amounts contained in Records C1, 3, 5, 6, 14A, 14B, 15, 22, 26A, 26B, 30, 31, 32, 34, 35 and 36 were not subject to negotiation, and therefore satisfy the "supplied" component of the section 17(1) test. It submits:

> The per diem and per hour rates of the individual contractors – information which is not at issue in this appeal – was supplied by the contractors, and was not a negotiated item. This is clear from the wording of the contracts. Since the ceiling amount is based on the relevant per diem rate multiplied by person days (which have been disclosed), the ceiling amount is also supplied information.
>
> Although the contents of agreements do not usually qualify as having been "supplied", the IPC has consistently held that if the information at issue in the agreement is the same as that which was actually supplied to the Ministry by the affected party, then the information is "supplied" for the purposes of section 17. In this case, the ceiling information severed from the contracts meets this test because it was supplied by contractors in their proposals. For example, Schedule "2" of Record C1 provides that "the Rates and fees for the Services provided by

> the Consultant shall be specified in the Consultant's Proposal, and reproduced here for convenience". Not only are the "fees" identical to the ceiling amount, but the latter is based on a straight multiplication of the per diem rate by the person days. Consequently, the ceiling amount is supplied by the consultant, because it is based on other information which is also clearly supplied. As the IPC concluded in P-1611, where information contained in a company's proposal provided to MBS in the context of a commercial bidding process "is one and the same" as that incorporated into the agreement, the information was "supplied".

MBS submits that the affected parties supplied the per diem and hourly rates, and relies on the "fees" section of the various contracts to support its position that these rates were not negotiated. This section reads:

> Provided that the Services are satisfactory to the Client, the Client shall pay the Vendor in accordance with the prices provided in the Vendor's Proposal which forms part of the Management Board's VOR agreement.

Based on MBS's submissions and my review of Records C1, 3, 5, 6, 14A, 14B, 15, 22, 26A, 26B, 30, 31, 32, 34, 35 and 36, I accept that the ceiling amounts were "supplied" for the purposes of section 17(1). The contract provisions themselves confirm that, should a contract be signed, the per diem and hourly rates provided by the various affected parties would not be subject to negotiation. The ceiling amounts are simply an arithmetic calculation of the total per diem and/or hourly rates supplied by the various affected parties, which, in my view, are accurately described as having been "supplied" for the same reasons.

As far as Record D6 is concerned, MBS submits:

> The commercial and trade secret information severed from Record D6 was supplied to the consultant by the vendors identified in the record. Even though the information was not supplied directly to MBS by the vendors, it was nevertheless supplied by an affected party to an institution, and therefore meets the "supplied test". In MO-1373, the IPC concluded that records supplied by a third party, rather than the affected party that actually generated the records, still met the "supplied" test. A report prepared by an affected party that contained another party's information was "supplied" for the purposes of this section. Furthermore, in MO-1450 and MO-1536-F, the IPC noted that which party prepared the records is not determinative; what is important is that the information contained in a record was supplied to an institution by a third party. MBS submits that the information at issue in record 6 meets this test.

Page 9 and the top half of page 10 (the only portions of record D6 that remain at issue) contain an overview of submissions provided by various companies in response to the MERX questionnaire. This information consists of the author's assessment of the various proposals, but does not contain nor would it reveal information drawn directly from documents submitted by the various companies responding to the questionnaire. As such, the information on page 9 and the first half of page 10 was not "supplied" for the purposes of section 17(1) and fails to qualify for exemption for that reason.

In confidence

MBS submits:

> It is MBS's normal and consistent practice to treat contractors' pricing information as confidential information. Consequently, only that information was severed from the contracts in Records C1–20 and 22–37. The bulk of the contractual provisions, including the number of person hours or days, is being disclosed. Furthermore, the affected parties supplied this pricing information with an implied expectation of confidentiality, since the disclosure of per diem and hourly rates in particular would reveal the affected parties' pricing structure, which is proprietary commercial information. As noted above, disclosing the contract ceiling would disclose the per diem/hourly rates.

Two of the affected parties provided representations supporting MBS's position.

Based on the representations of the parties, I am satisfied that the ceiling amounts contained in Records C1, 3, 5, 6, 14A, 14B, 15, 22, 26A, 26B, 30, 31, 32, 34, 35 and 36 was supplied by the various affected parties to MBS in confidence.

Part 3: Harms

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, 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 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.)].

Because the appellant has reduced the scope of his request to only the ceiling amounts in a redacted form, I will address the issue of whether there is any expectation of harm based on disclosing the redacted ceiling amounts.

MBS makes the following submissions regarding section 17(1)(a).

> **Prejudice to third party's competitive position**
>
> Disclosure of the information severed from the contracts could reasonably be expected to prejudice significantly the affected parties' competitive position because it would reveal their pricing structure, and this information could be used by competitors to undercut them in future bids for government or private sector contracts.

> MBS submits that disclosing contract ceiling information would effectively reveal the contractors' per diem or hourly rates – which, in service contracts, is analogous to "unit price" information contained in contracts for goods. In Order MO-1239 the IPC noted that although disclosure of unit price information could prejudice a company's competitive position, disclosing the overall contract price would not result in such harm. MBS submits that in this case, disclosing the contract ceiling price would also result in the harm described precisely because MBS is disclosing person hours or days. This information, combined with the contract ceiling, would disclose contractor's unit price, i.e. hourly or per diem rates. Dividing the ceiling by person days reveals the per diem rates.

MBS essentially makes the same arguments for the harms component of section 17(1)(c).

The affected parties resisting disclosure also argue that disclosing the ceiling amounts would disclose their per diem rates when combined with information already provided to the appellant. MBS and the affected parties submit that making this information available to the affected parties' competitors would cause undue loss to them in the future.

Interestingly, neither MBS nor the affected parties addresses whether any harms could reasonably be expected to occur if redacted versions of the various ceiling amounts are disclosed. One affected party makes the following submissions regarding the impact of disclosing a range of amounts:

> If the ceiling *amounts* contained in the contracts are released in ranges to the appellant, the appellant can simply calculate a range of per diem rates we charge for our services by dividing the ceiling amounts by the total number of days. Although the rate is not exact, the issue remains the same as this still releases financial/commercial information.

Although different considerations might be relevant to the disclosure of actual ceiling amounts, in my view, MBS and the affected parties have failed to provide the necessary detailed and sufficient evidence to establish that disclosing redacted ceiling amounts (i.e., $1##,###; $2##,###, $3##,###) could reasonably be expected to result in any section 17(1) harms. Even if the appellant knows the number of working days contained in the various contracts, providing him with the redacted ceiling amounts would only allow him to guess, in very broad terms, what the actual ceiling amount in any particular contract is. The appellant would only be able to calculate per diem rates within broad ranges and, without further evidence as to the harm that would result from disclosure of broad ranges of this nature, I am not persuaded that disclosing the redacted ceiling amounts would result in prejudice to the competitive position of the affected parties or cause them undue loss.

Accordingly, the redacted ceiling amounts in Records C1, 3, 5, 6, 14A, 14B, 15, 22, 26A, 26B, 30, 31, 32, 34, 35 and 36 do not qualify for exemption under sections 17(1)(a) or (c) of the *Act* and should be disclosed to the appellant.

ORDER:

1. I order MBS to disclose the actual "ceiling amount" or "maximum fees and expenses" amount in Records C16A, 16B, 17A, 17B, 18A, 18B, 19 and 20; the redacted "ceiling" amount" or "maximum fees and expenses" amount in Records C1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14A. 14B, 15, 22, 26A, 26B, 30, 31, 32, 34, 35 and 36; and page 9 and the top half of page 10 of Record D6. Disclosures covered by this provision must be made by **August 12, 2003** but not before **August 7, 2003**.

2. I uphold MBS's decision to deny access to Records D3, 9, 10, 11, 14, 15, 16, 17, 19, 20 and 21, as well as pages 22-27 of Record D4 and all remaining portions of the various contract records not covered by Provision 1.

3. In order to verify compliance with this order, I reserve the right to require MBS to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by: July 9, 2003
Tom Mitchinson
Assistant Commissioner