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

ORDER PO-2346

Appeal PA-040117-1

Cabinet Office

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NATURE OF THE APPEAL:

Cabinet Office received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the contract between the Government of Ontario and a named company for "the consultation process launched by Premier McGuinty on February 9, 2004". After consulting with the company, Cabinet Office decided to disclose the record in its entirety and notified the company and the requester of this decision.

The company (now the appellant) appealed Cabinet Office's decision, claiming that certain identified portions of pages 16, 17 and 18 of the record qualify for exemption under sections 17(1)(a) and (c) of the *Act* (third party commercial information).

Mediation efforts were not successful, and the appeal was transferred to the adjudication stage of the appeal process.

A Notice of Inquiry was sent to the appellant, outlining the facts and issues in the appeal and seeking written representations. The appellant submitted representations, the non-confidential portions were shared with Cabinet Office and the requester, along with a copy of the Notice. Cabinet Office responded with brief representations; the requester did not.

During the course of the inquiry, Cabinet Office provided the requester with all portions of the 24-page record, with the exception of the portions of pages 16, 17 and 18 identified by the appellant.

RECORD:

The record remaining at issue consists of portions of pages 16, 17 and 18 of a contract between the Government of Ontario and the appellant, dated January 6, 2004, to "design, organize and conduct pre-budget consultations with Ontarians". As noted above, the rest of the contract has been disclosed.

DISCUSSION:

THIRD PARTY INFORMATION

General Principles

Sections 17(1)(a) and (c) read as follows:

> 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;

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)(a) and/or (c) to apply, each part of the following three-part test must be established:

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

Part 1: Type of Information

The appellant takes the position that the record contains "commercial information" and "financial information". Previous orders have defined these terms as follows:

> *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].

The appellant submits that the withheld portions of the record contain a specific and detailed breakdown of the public dialogue process used in connection with its bid on the project.

I concur.

The record, when considered as a whole, is a commercial arrangement entered into by the Government of Ontario and the appellant for the purchase and sale of services, specifically the design and implementation of a pre-budget public consultation process. The withheld portions on page 16, 17 and 18 describe the deliverables to be provided by the appellant, together with a breakdown of the rates charged by the appellant for its services. Clearly, the withheld portions of the record meet the definitions of both "commercial information" and "financial information".

Therefore the requirements of Part 1 of the section 17(1) test have been established.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the appellant must establish that the information was "supplied" to Cabinet Office "in confidence", either implicitly or explicitly.

The requirement that information be "supplied" to an 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).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

The appellant acknowledges that the withheld portions of pages 16, 17 and 18 comprise part of its agreement, but takes the position that these portions were "not a negotiated document". The appellant submits that this information was provided "to Ontario and, from there, incorporated verbatim into the Agreement". The appellant points to Order PO-2200 in support of its position, stating:

> As noted in Order PO-2200 (para 34): "for such information to have been "supplied" it must be the same as that originally provided by the affected party". This is precisely what happened with respect to the Agreement – it incorporated information exactly as provided/supplied by [the appellant] not only on the costs side, but also on the project methodology.

I do not accept the appellant's position.

In Order MO- 1706, Adjudicator Bernard Morrow states:

> … [T]he 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.

Applying the reasoning in Order MO-1706 to the circumstances of this appeal, I find that just because the withheld portions of pages 16, 17 and 18 may substantially reflect the terms proposed by the appellant, it does not necessarily follow that they were "supplied" by the appellant within the meaning of section 17(1).

The pages in dispute here represent the substance of the contractual agreement between the parties. The contract as a whole would have little meaning without the inclusion of these portions which, in effect, set out the purpose of the relationship between the parties, the objectives of the contract, as well as the duties to be performed by the appellant, and the compensation attributable to those duties. Without the withheld portions of pages 16, 17 and 18, the contract would be little more than standard, boilerplate contractual terms.

It is also clear on the face of the record that the contents of pages 16, 17 and 18 were not simply supplied by the appellant. A portion of page 16 that has already been disclosed to the requester reads:

> Deliverables and Rates
>
> Notwithstanding anything else in the Contract, the total amount payable to [the appellant] under the Contract shall not exceed [the total contract fee].

Immediately beside the fee amount (which has been disclosed), someone has added "**" by hand. At the bottom of the page, again in a portion that has already been provided to the requester, the following handwritten statement has been added to explain the "**" notation:

> The parties agree to an addendum to this Agreement which will address the supplementary costs of this project, which exceed the above stated amounts, for the reasons described in Schedule 1.

Three different individuals then initial this statement.

This note provides strong evidence that, although the text of the withheld portions may be the same as that provided by the appellant with its bid submission, negotiations did take place between the Government of Ontario and the appellant on the terms of the agreement. Clearly, the deliverables and rates charged by the appellant were not simply accepted as submitted. The handwritten notation reflected a material change in the typewritten text of the agreement, as evidenced by the fact it was initialled by all signatories. Had the parties decided to amend the "Deliverables and Rates" portion of the agreement to address the "supplementary costs of this project" referred to in the notes, the appellant could not have credibly argued that the

deliverables and rates were "supplied, not negotiated". In this case the parties chose to implement an amendment through an addendum rather than a change in text. In my view, this is simply an alternative method of reflecting the results of the negotiation process, and should be looked at in the same way as if the text itself had been amended prior to executing the agreement.

I find that the agreement is a negotiated contract between the Government of Ontario and the appellant, and that no information in the agreement, including the withheld portions of pages 16, 17 and 18, was "supplied" as that term is used in section 17(1).

Accordingly, it is not necessary for me to address the "in confidence" component of part 2 of the section 17(1) test before concluding that this part has not been established.

Although this finding is sufficient to dispose of the appeal, I have decided to deal with the harms component of the test as well.

Part 3: Harms

To meet part 3 of the test, the appellant, as the party resisting disclosure, must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The appellant takes the position that disclosing the withheld portions of pages 16, 17 and 18 would "offer direct insight and concrete information relating to how [the appellant] planned to undertake each project component for the public dialogue", and that if this information were disclosed, competitors :would be significantly advantaged in developing competitive proposals for future projects".

The appellant further submits that disclosing this information would allow its competitors to obtain knowledge of "the nature of its contracts for such services or programs and would render public a carefully developed and protected business methodology". It continues:

> Release of [the withheld information] would provide [the appellant's] competitors with a roadmap detailing the nature and terms of its commercial agreements and operations and the project know-how that [the appellant] has invested time and money to develop. Such information is of significant commercial value to entities that compete with [the appellant].

The appellant submits that disclosing the disputed sections of the record would result in undue loss for the appellant and gain to its competitors as set out in section 17(1)(c):

> Competition for contracts is vigorous and any inside information that may be obtained concerning service delivery and the manner of operation is helpful to assist a competitor in preparing for anticipated requests for proposals and contract negotiations and in attempting to undermine the competitive position of an industry leader.

The appellant relies on Order PO-2027 to support its position. In that Order Adjudicator Donald Hale stated:

> … I find that by disclosing the information contained in the report, the methodologies employed by the consultant in conducting its review would be revealed and could reasonably be expected to be used by its competitors in bidding on and performing work of a similar nature for the Ministry or another client. I find that the methodologies contained in the record are unique and belong to the consultant. Their disclosure to competitors could reasonably be expected to result in undue loss to the consultant and undue gain by its competitors, as contemplated by section 17(1)(c) of the *Act*.

The appellant submits that the contents of pages 16, 17 and 18 set out a "successful blueprint" for a public dialogue process, which would give its competitors "insight into a process, methodology and costing framework that it has worked to develop and with which it has achieved success".

Having carefully reviewed the contents of the withheld portions of pages 16, 17 and 18, and considered the appellant's detailed confidential and non-confidential representations, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms outlined in sections 17(1)(a) or (c) of the *Act*.

The information at issue here consists of a general listing and description of various categories of work to be undertaken by the appellant, together with the amount of time budgeted for each of them, and the total fee charged for each category. The overall fee has already been disclosed. In my view, the various categories of work and the activities described in each category are a reflection of what one would anticipate in any public consultation process. Based on the representations provided by the appellant, and my careful review of the content of page 16, 17 and 18, I an not convinced that disclosing the disputed material would reveal a unique, confidential methodology developed by the appellant. While I can accept that the information could possible be of interest to another company operating in the same competitive marketplace, in my view, disclosing the type of information at issue here could not reasonably be expected to "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations" of the appellant, as required in order to establish the section 17(1)(a) harm; or

"result in undue loss or gain" to the appellant or a competitor, the harms identified in section 17(1)(c).

While I can accept the appellant's position that the public dialogue process is a new and highly competitive business, it does not necessarily follow that disclosing the particular information at issue in this appeal would compromise the interests of the appellant or provide an undue gain to its competitors. That determination must be based on the facts and evidence in each case. Simply put, I find that the appellant has not provided the necessary detailed and convincing evidence to establish a reasonable expectation of any of the harms contemplated in sections 17(1)(a) or (c), in accordance with the evidentiary standard set by the Court of Appeal in *Ontario (Workers' Compensation Board*).

Accordingly, I find that the requirements of the part 3 harms component of sections 17(1)(a) and (b) have not been satisfied.

In summary, I find that parts 2 and 3 of the section 17(1)(a) and (c) test have not been established by the appellant. Because all three parts of test must be established in order for a record to qualify for this exemption, I find that the withheld portions of pages 16, 17 and 18 do not qualify and should be disclosed to the requester.

ORDER:

1. I order Cabinet Office to disclose the withheld portions of pages 16, 17 and 18 of the record to the requester by **December 24, 2004** but not before **December 20, 2004**.

2. In order to verify compliance, I reserve the right to require Cabinet Office to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, upon request.

Original signed by: November 19, 2004
Tom Mitchinson
Assistant Commissioner