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

ORDER PO-2522

Appeal PA-050093-1

Ontario Power Generation

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NATURE OF THE APPEAL:

Ontario Power Generation (OPG) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information pertaining to the acquisition of two rough terrain forklifts. In particular, the requester asked for the following information:

1. Date of purchase [of the forklifts].

2. The [names] of bidders [that were] sent bid packages.

3. [The] bids submitted.

4. A copy of [the] bid package.

5. The value of [the bid] award.

OPG identified records responsive to the request and, after notifying three bidders, decided to grant partial access to the records. OPG initially relied on sections 17(1)(a) (third party information), 18(1)(a) (valuable government information) and section 21(1) of the *Act* (personal privacy) to deny access to the withheld information.

The requester (now the appellant) appealed the decision.

At the intake stage of the appeal the appellant advised that he was not seeking access to the personal information withheld by OPG under section 21(1) of the *Act*. Accordingly, that information and the application of section 21(1) are no longer an issue in this appeal.

Shortly after the appeal was commenced, and within the time limit to claim additional discretionary exemptions, OPG advised that it would also be relying on sections 17(1)(c) and 18(1)(c) to deny access to the withheld information.

At mediation, the scope of the appeal was narrowed considerably. The appellant advised that he was only seeking access to prices and costs relating to the successful bidder (the affected party). The appellant also identified the specific pages of the records where that information could be found.

Mediation did not resolve the appeal and it was moved to the adjudication stage.

A Notice of Inquiry was sent to OPG and the affected party, initially. They both provided representations in response. The affected party asked that all of its representations be withheld due to confidentiality concerns. OPG asked that a portion of its representations also be withheld due to similar confidentiality concerns. A Notice of Inquiry along with the non-confidential representations of OPG was sent to the appellant. In order to address the confidentiality concerns of the affected party, a summary of its position on disclosure was provided in the Notice of Inquiry sent to the appellant. The appellant provided representations in response. As the appellant's representations raised issues to which I determined that OPG and the affected

party should be given an opportunity to reply, I sent the appellant's representations accompanied by a covering letter to OPG and the affected party, inviting their reply representations. Only OPG filed representations in reply.

In making my determinations in this appeal, I have considered both the confidential and non-confidential representations filed, including an affidavit provided by OPG in support of its decision to withhold the information.

RECORDS

The undisclosed portions of the following records remain at issue:

Record 1	Quotation dated June 5, 2001 (2 pages)
Record 2	OPG Bid Summary Memo dated June 11, 2001 (1 page)
Record 3	OPG fax Award (1 page)

OPG claims that sections 17(1)(a) and (c) as well as sections 18(1)(a) and (c) apply to all of the withheld information.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 17(1)(a) and (c) of the *Act* state:

> 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; or
>
> (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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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, PO-2371, PO-2384, MO-1706].

For section 17(1) to apply, the institution and/or the affected party 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) and/or (c) of section 17(1) will occur.

Part 1: Type of Information

OPG claims that the records contain "commercial information". The affected party also submits that releasing the bid amounts would allow a competitor to see how it constructs a bid. It submits that this would permit a competitor to formulate a bid package for a potential customer of the affected party, other than OPG. I interpret this further submission to mean that the affected party's position is that the structure of its bid is unique in some way and qualifies as "technical information" within the meaning of section 17(1).

Analysis

Previous orders have defined "technical information" and "commercial information" 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].

Based on the representations of the parties and my review of the records, I am satisfied that all of the information that OPG is seeking to withhold under sections 17(1) and 18(1) is "commercial" information. I am not satisfied, however, that the structure of the bid, *per se*, contains information belonging to an organized field of knowledge that would fall under the general

categories of applied sciences or mechanical arts, or otherwise meets the definition of "technical information".

Because all of the withheld information qualifies as "commercial", I find that the requirements of Part 1 of the section 17(1) test have been met. The application of section 18(1)(a) will be addressed later in this decision.

Part 2: supplied in confidence

In order to satisfy Part 2 of the test, the institution and/or the affected party must establish that the information was "supplied" to the institution "in confidence", either implicitly or explicitly.

Supplied

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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

In Order PO-2384, I wrote with respect to 17(1) of the *Act*:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, 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 preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".

> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

In Order PO-2435, Assistant Commissioner Beamish rejected the position of the Ministry of Health and Long-Term Care (the Ministry) that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish observed that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather it is the amount being charged by the contracting party for providing a particular individual's services.

I agree with and also adopt the approach taken by Assistant Commissioner Beamish in Order PO-2435 for the purposes of this appeal.

OPG and the affected party offer very little assistance regarding whether the withheld information was subject to negotiation. The appellant's representations do not specifically address this part of the section 17(1) test.

Analysis

Based on the authorities reproduced above, and my review of the representations and the records, I conclude that all of the information that OPG seeks to withhold from the records under section 17(1) of the *Act* consists of mutually generated agreed upon essential terms that I consider to be the product of a negotiation process. Therefore, in the circumstances of this appeal, I do not consider the information OPG withheld from these records to have been "supplied" by the affected party for the purposes of part 2 of the section 17(1) test.

As all three parts of the test under section 17(1) must be met, I find that section 17(1) does not apply to the withheld information. I will now consider whether this information qualifies for exemption under sections 18(1)(a) or (c).

VALUABLE GOVERNMENT INFORMATION

OPG claimed that the exemptions in sections 18(1)(a) and (c) apply to information severed from the records, which, as discussed above, it submits is "commercial" information. Sections 18(1)(a) and (c) read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

Broadly speaking, section 18 is designed to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Section 18(1)(c) takes into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For section 18(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464, (C.A.)]. This contrasts with section 18(1)(a), which is concerned with the **type** of the information, rather than the consequences of disclosure (see Orders MO-1199-F, MO-1564).

OPG submits that it has a proprietary interest in protecting the information from misappropriation by other potential equipment suppliers. OPG submits that it has always treated this information in a confidential manner and provided me with an affidavit which purports to demonstrate that the information has monetary value or potential monetary value. Paragraph 14 of the affidavit provided by OPG explains:

> The information which OPG has requested be withheld from disclosure in this appeal has intrinsic value to OPG as well to other prospective supplier's because it reveals OPG's contracting strategy. This information is valuable to future bidders because it provides a negotiating "floor" below which they will not need to bid. The value to OPG in maintaining the confidentiality of the information under appeal is ensuring that there is nothing outside the information currently available in a lawful bidding process to keep prices competitive and maintains the integrity of the procurement process.

The appellant submits that none of the withheld information is proprietary in nature.

Section 18(1)(a)

In order for a record to qualify for exemption under section 18(1)(a) of the *Act*, it must be established that the information contained in the record:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

Part 1- Type of information

The definition of "commercial" information in section 18(1) mirrors the way the term is defined for the purposes of a section 17(1) analysis. As noted above, I found that the information that OPG seeks to withhold under this exemption also meets the definition of "commercial" information under section 18(1).

Part 2: Belongs to OPG

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], Senior Adjudicator David Goodis reviewed the phrase "belongs to" as it appears in section 18(1)(a) of the *Act*. After reviewing a number of previous orders, he summarized the status of the relevant previous orders as follows:

> The Assistant Commissioner [Tom Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein).

Analysis

Based upon my review of the records and representations, I have concluded that the withheld information does not "belong to" OPG. I have not been provided with sufficient evidence to demonstrate that the mutually generated agreed upon terms that were part of a negotiation process constitute the intellectual property of OPG or is/are a trade secret of OPG. Nor have I been provided with evidence to indicate that OPG expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" OPG within the meaning of section 18(1)(a) of the *Act*. Part 2 of the test is, therefore, not met.

As all three parts of the test must be met, this is sufficient for me to find that section 18(1)(a) does not apply.

Section 18(1)(c)

In OPG's affidavit, the deponent states that releasing the withheld information would be injurious to OPG's financial interests and reduce competition. The affiant deposes that other suppliers have expressed concerns about the confidentiality clause in its Request for Quotations process. This clause indicates that OPG will disclose any part of a proposal that it is obligated to disclose under the *Act*. He deposes that any reduction of the pool of suppliers will adversely impact OPG's ability to select the best bid from all qualified suppliers. He states that this poses a financial risk to OPG because it will become more dependent upon the remaining suppliers, who in turn have greater leverage to dictate terms such as price and delivery.

The affiant further deposes that disclosure of the bid award, particularly over a longer term would allow a comparison of a tender bid to the awards, thereby revealing its procurement strategy. The deponent states that this would allow potential bidders to "identify OPG's 'bottom line'".

The appellant's position is that the information at issue is over five years old and relates to a specific item. The appellant submits that its release would not cause OPG harm to its economic interests or competitive position.

In particular, the appellant submits that OPG has failed to provide any evidentiary support, such as a letter from a potential supplier, for the deponent's statement that "OPG's available pool of suppliers would decrease" if the withheld information was disclosed. The appellant submits that further requests for information about other bids will have to be judged on their merits and takes issue with what he defines as OPG's "flood gates" arguments. He submits generally that OPG's representations and the affidavit it filed do not provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" to OPG.

Analysis

I find that OPG has failed to provide sufficiently detailed and convincing evidence to demonstrate that disclosure of the withheld information could reasonably be expected to prejudice its economic interests or competitive position. I adopt the findings of Adjudicator Catherine Corban in Order MO-2103-I, where she stated:

> In my view, disclosure of the records at issue in this appeal would not prejudice the Township from earning money in the marketplace. In the circumstances of this appeal, the Township is not in a position where it is earning money or competing for business with other public or private entities but is rather soliciting business from such entities. Accordingly, I find there is no reasonable expectation of prejudice to the Township's competitive position as contemplated by the exemption at section 11(c). …I do not accept that the Township's economic interests would be prejudiced by disclosure of the information because in the circumstances, the Township is not soliciting proposals but receiving them and I am not satisfied that disclosure of the information could reasonably be expected to result in future vendors refusing to do business with the Township.

> Therefore, I do not accept that disclosure of the information at issue could reasonably be expected to prejudice the Township's economic interests or competitive position. Accordingly, I find that section 11(c) does not apply in the circumstances of this appeal.

OPG provided no specific example of a potential supplier refusing to bid if their information was disclosed. OPG points out the existence of a clause in the Request for Quotation that notifies a potential bidder of the risk of disclosure of its information under the *Act* as giving rise to concerns, yet bids were still received by OPG. Furthermore, the allegation that disclosure of the withheld information would contribute to a comparison of tender bids and awards over time speculates as to the intentions of an individual who receives information and disregards the fact that all freedom of information requests are subject to the processes of the relevant legislative enactments. Mere speculation of possible harm is not sufficient to establish the application of section 18(1)(c) [See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, (C.A.)].

In my view, I have not been provided with sufficient evidence to establish that the disclosure of the information severed by OPG under section 18(1) of the *Act* could reasonably be expected to prejudice its "economic interests" or its "competitive position", as required in order to establish the application of section 18(1)(c).

ORDER:

1. I order OPG to disclose to the appellant the portions of Records 1, 2 and 3, that were withheld under sections 17(1)(a) and (c) and 18(1)(a) and (c) of the *Act*, by sending him a copy by **December 13, 2006**, but not before **December 8, 2006**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require OPG to provide me with a copy of the information disclosed to the appellant.

Original signed by: November 8, 2006
Steven Faughnan
Adjudicator