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

ORDER PO-2527

Appeal PA-060105-1

Ministry of Citizenship and Immigration

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of Citizenship and Immigration (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for information relating to all contracts entered into with a named firm (the third party), including a copy of all contracts and correspondence, as well as copies of all other tenders/Requests for Proposals, bidders and correspondence relating to these contracts.

The Ministry located a number of records and pursuant to section 28 of the *Act*, notified the third party to provide it with an opportunity to make submissions regarding disclosure of one of the records, a Letter of Agreement.

In its submissions, the third party consented to the disclosure of most of this record, with the exception of certain information contained in a chart on page two of the three page document. Following consideration of the third party's submissions, the Ministry issued a decision letter in which it provided partial access to the identified records with severances pursuant to sections 17(1)(a), (b) and /or (c) of the *Act*. In particular, the Ministry's decision proposed to disclose more of the chart on page two of the Letter of Agreement than the third party consented to.

The third party, now the appellant, appealed the Ministry's decision. The original requester did not appeal the severances made to this document under section 17(1) and they are, therefore, not at issue in this appeal.

During mediation, the mediator was unsuccessful in her attempts to reach the original requester to discuss the appeal. Upon discussion with the mediator, the Ministry agreed to disclose to the original requester those portions of the agreement which are not at issue. The Ministry provided access in full to pages 1 and 3 and to the portions of page 2 of the Letter of Agreement which are not at issue in this appeal.

No further mediation was possible and the matter moved to the adjudication stage of the appeal process. I commenced the adjudication of this appeal by issuing a Notice of Inquiry to the appellant, initially, seeking representations. The appellant submitted representations in response and they were shared, in their entirety, with both the Ministry and the original requester. The Ministry and original requester were invited to make representations on the issues in this appeal, but neither party responded.

RECORDS:

The portions of the records remaining at issue consist of the first two columns (including the headings) of the chart located on page 2 of the Letter of Agreement. The Letter of Agreement was entered into between the Ministry, the Ontario Women's Directorate and the appellant pursuant to a "master contract" relating to the naming, development and execution of a public education/awareness campaign on violence against women/girls. The purpose of the Letter of Agreement is to set out the "deliverables" under the contract, which refers to the component parts of the work undertaken by the appellant, such as creative direction, account management and collateral design. The portion of the Letter of Agreement under dispute pertains to the proposed compensation under the Letter of Agreement. The chart on which the disputed information is contained reflects the estimated time of staff in relation to the deliverables.

DISCUSSION:

THIRD PARTY INFORMATION

The appellant submits that the mandatory exemptions in sections 17(1)(a), (b) and (c) apply to the portions of the record at issue to which it opposes disclosure.

Sections 17(1) (a) (b) and (c) 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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, MO-1706].

For section 17(1)(a), (b) or (c) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) or (c) of section 17(1) will occur.

Part 1: type of information

The appellant takes the position that the record at issue comprises identifying details of a letter of agreement between it and the Ministry. It submits that the information in this record that it objects to disclosing contains the breakdown of the project structure into components and functions, which it believes consists of "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 record at issue pertains to a commercial arrangement entered into by the Government of Ontario and the appellant for certain services related to a public education/awareness campaign on violence against women/girls. The disputed portion of the record at issue contains a breakdown of the project into functions, but does not include the financial details of that breakdown. Although portions of the table on page 2 of the Letter of Agreement contain some financial information, these portions are not at issue in this appeal. Nevertheless, I find that the record in its entirety pertains to a commercial enterprise to be performed by the appellant, and thus meets the definition of "commercial 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 the Ministry by it "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 the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

As noted above, the disputed information is contained in a Letter of Agreement entered into between the Ministry and the appellant pursuant to a contract dated September 15, 2004. Portions of the terms of the Letter of Agreement were disclosed to the original requester. They confirm the deliverables that are to be provided by the appellant under the contract. The Letter of Agreement was signed by representatives of the Ministry and the appellant. In essence, this document sets out the terms and conditions of the agreement reached between the Ministry, the Ontario Women's Directorate and the appellant.

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.

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

The rationale for this approach with respect to certain types of information, such as per diem rates, is noted by Assistant Commissioner Brian Beamish in Order PO-2435:

> 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 released by 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 VOR 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.

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected

party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

The appellant did not address the "supplied" component of the test in its submissions. It did submit, however, that the disputed information contains its "project formula". Although these submissions did not specifically refer to the two exceptions noted above, I have considered whether this type of information might reasonably fall within either one, in the particular circumstances of this case.

The appellant does not explain why the break-down of time of staff estimated for the provision of the deliverables in the agreement would be considered a "formula". Nor does it explain how this information might be perceived as "immutable" or how its disclosure would permit accurate inferences to be made with respect to underlying non-negotiated confidential information. When the information at issue is viewed in conjunction with the remaining information in the table, it simply sets out the nature of the service to be provided and the estimated cost of doing so. Based on my review of this record, it is apparent that its contents reflect the meeting of the minds that generally takes place during the negotiation process. In Order PO-2435, Assistant Commissioner Beamish makes the following comments regarding Service Level Agreements between the Ontario Family Health Network and various consultants:

> Further, upon close examination of each of these SLAs, I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.
>
> In summary, I find that the SLAs are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1).

I find that the Letter of Agreement sets out the terms and conditions under which the program deliverables of the project are to be provided and is signed by representatives of both the Ministry and the appellant. It was created to confirm the deliverables agreed to under contract. Although it may contain terms proposed by the appellant, they have clearly been transferred into a document that was intended to reflect the agreement reached between it and the Ministry. I find that, although not the contract *per se*, the Letter of Agreement is an adjunct to that contract. I conclude that the body and nature of this document signifies that the terms were subject to negotiation and, therefore, were not "supplied" within the meaning of section 17(1) of the *Act*.

Moreover, based on the reasoning applied by Assistant Commissioner Beamish in Order PO-2435 and my own review of this document, I find that there is nothing in the body of this document that would fall into the "inferred disclosure" or "immutability" exceptions as set out above.

Accordingly, I find that the portion of the record at issue in dispute in this appeal was not supplied to the Ministry for the purposes of section 17(1). As all three parts of the test under this exemption must be established, I find that section 17(1) does not apply to it.

ORDER:

1. I uphold the Ministry's decision to disclose the portion of the record at issue.

2. I order the Ministry to disclose the record at issue to the requester by sending him a copy by **December 28, 2006** but not before **December 21, 2006**.

3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the record which was disclosed to the requester.

Original signed by: November 21, 2006
Laurel Cropley
Adjudicator