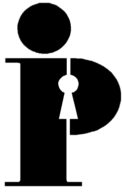

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2599

Appeal PA-060041-1

Ministry of the Environment

NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to contracts between the Ministry and a named company providing call centre services for one of the Ministry's programs. The requester is an international union representing service sector employees.

In addition to obtaining access to copies of the contracts, the requester was interested in the following information for the years 2001 to 2004:

- Beginning and termination dates (including extensions);
- Performance evaluations or audits of the work performed by [the named company] under the contract, including:
  - any evaluation of quality levels and service standards, cost effectiveness, and economic efficiency,
  - whether project objectives and outcomes were achieved; and
  - any other documents, including client satisfaction surveys, measuring the performance of the named company under the contract; and
- Complaints filed within the Ministry or from clients concerning the services provided under [the contract]

After identifying the records responsive to the request, the Ministry provided notice to the company named in the request regarding the proposed disclosure of certain records. Section 28 of the *Act* requires notification of affected parties prior to disclosure of information that might be subject to the confidential third party information exemption in section 17(1). In this way, affected parties are permitted an opportunity to provide submissions to the Ministry as to whether the requested records should be disclosed. The Ministry received representations from the affected party objecting to the proposed release of the identified records.

Following consideration of the affected party's submissions, the Ministry issued a decision letter granting the requester partial access to the records. In a decision letter issued simultaneously to the affected party, the Ministry explained that while certain records, or portions thereof, were to be withheld pursuant to sections 17(1)(a) or (c) of the *Act*, others would be released because the information they contained was generated by the Ministry, which meant that it did not qualify for exemption under section 17(1).

The Ministry also indicated that personal information contained in the records to be released would be severed under section 21(1) of the *Act* and that additional responsive Ministry records were being released for which notice had not been provided to the company.

No appeal of the Ministry's decision was initiated by the original requester, but the affected party, now the appellant, appealed the Ministry's decision to this office.

During the mediation stage of this appeal, the appellant advised this office that it objected to the disclosure of five of the records to be released on the basis that their disclosure would result in harm to it as contemplated by sections 17(1)(a) and (c). The appellant confirmed that it did not take issue with the Ministry's decision to disclose all of the other records for which notice was

given, subject to the severances the Ministry said would be made pursuant to sections 17(1) and 21(1) of the *Act*.

However, the appellant asserted that there were additional responsive records to which notice under section 28 of the *Act* should have been given. In response, the Ministry took the position that notice was not required with respect to those additional responsive records because, in its view, they did not qualify for exemption under section 17(1) of the *Act*. Accordingly, the Ministry's decision not to notify the appellant for the purposes of section 28 about those additional records was added as an issue in this appeal.

No further issues could be resolved during mediation and this appeal proceeded to adjudication, where it was assigned to me to conduct an inquiry.

I decided to start this inquiry by making a determination about the section 28 notification issue as a preliminary matter. Accordingly, I requested copies of the additional responsive records from the Ministry. Once the records subject to my consideration under section 28 were received, I issued a Notice of Inquiry to the Ministry seeking representations on whether its notification to the appellant was in accordance with the requirements of section 28 with respect to all of the records identified as responsive.

In response to the Notice of Inquiry seeking representations on this preliminary issue, the Ministry chose to provide notice to the appellant under section 28 of the *Act* regarding the 59 additional records, instead of submitting representations to this office for me to make a finding on the issue.

The appellant informed the Ministry that it objected to the disclosure of the second group of records for which notice had recently been provided. The Ministry then issued a supplementary decision letter, informing the appellant that it intended to disclose the additional records to the requester because, in its view, the third party information exemption at section 17(1) of the *Act* did not apply to those records.

When contacted by staff from this office at my request, the appellant confirmed that it wished to add the 59 additional records included in the Ministry's supplementary decision letter to the list of records at issue. This brought the number of records at issue to 64.

I proceeded with my inquiry by sending a Notice of Inquiry to the appellant, outlining the issues and seeking representations on the possible application of section 17(1) of the *Act* to the records. Having received submissions from the appellant, I determined that it would not be necessary to request representations from the Ministry or the original requester.

During the preparation of this order, staff from this office confirmed with the original requester that it was not interested in access to any personal information contained in the records at issue, including the second group of records submitted to this office during the adjudication stage of the appeal. Accordingly, any personal information in the records to be released will not include information which I find qualifies as "personal information".

RECORDS:

There are 64 records, totaling 132 pages, at issue in this appeal. These records can be described as follows:

- three letters (5 pages)
- two contract performance reports (5 pages) and 30 monthly contract management reports (54 pages) in table form; and
- 29 chains of email correspondence between the Ministry and appellant's staff (68 pages).

DISCUSSION:

THIRD PARTY INFORMATION

The appellant submits that the mandatory exemptions found in sections 17(1)(a) and (c) of the *Act* apply to the records and, specifically, the "performance reports". These sections 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;
>
> (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, MO-1706].

For section 17(1) 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), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The appellant submits that the records reveal both technical and commercial information. These terms have been defined in previous orders 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 [Orders P-493 and 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 [Order P-1621].

I adopt these definitions for the purpose of this appeal.

Representations

The appellant's representations regarding the type of information contained in the records are brief. The appellant submits that the records contain technical and commercial information related to its call centre, with no further elaboration as to the nature of that information. The appellant also refers to a specific rate for a particular service that is listed in one of the contract management reports and submits that this rate, or pricing, should be exempted under section 17(1).

Although not asked to provide representations during this inquiry, the Ministry stated in its decision letter that the records "involve the financial and commercial interests" of the appellant.

Analysis and Findings

Having considered the representations of the appellant and the records themselves, I am satisfied that the records contain commercial, technical, and financial information for the purposes of part

1 of the section 17(1) test.

All of the records at issue contain information that is, in my view, directly connected to the "buying, selling or exchange of goods or services". The letters, contract management reports and email correspondence all contain discussion and description of terms of the call centre contract between the appellant and the Ministry. This includes the specific dollar figure for the pricing of one of the services provided by the appellant to the Ministry that appears in one of the contract management reports, as mentioned by the appellant in its representations. Accordingly, I find that this information qualifies as the commercial information of the appellant.

The contract management reports and email correspondence contain information that satisfies the definition of technical information under part 1 of the section 17(1) test. Throughout the email correspondence and, to a lesser extent, the tables, there are relatively detailed descriptions of computer systems issues, including audit functions and other processes for monitoring the centre. I find that these records contain information that qualifies as technical information.

Part 2: supplied in confidence

In order to satisfy part 2 of the test under section 17(1), the appellant must establish that it "supplied" the information at issue to the Ministry "in confidence", either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In confidence

In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

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

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

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

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

Representations

The appellant's representations on the second part of the section 17(1) test are similarly brief and do not address the "supplied" requirement at all. In support of its position that the records, and specifically, the contract evaluation reports, should be withheld, the appellant states the following:

> The contract between the [Ministry] and [the appellant] dated September 26, 2001, section 9.1 and 9.3.2 addresses the confidentiality of documents.

Although no representations were solicited from the Ministry during the adjudication stage of the appeal, the Ministry's decision letter to the appellant is relevant. The Ministry informed the appellant that where the document originated with - or was generated by - the Ministry itself, it could not satisfy the three part test under section 17(1). As I understand the Ministry's position, Ministry-generated records cannot be considered to have been "supplied" by a third party.

Analysis and Findings

Following my consideration of the representations and a review of the records themselves, I have concluded that the information at issue was neither "supplied" by the appellant, nor would its disclosure reveal information so provided. Even had I reached the opposite conclusion regarding the "supplied" requirement, I would have concluded that no reasonable expectation of confidentiality attaches to the information, as demanded by the second aspect of this part of the 17(1) test.

The Ministry seems to have concluded that the records to which it intended to grant partial access, and which are at issue in this appeal, failed to satisfy the second part of the section 17(1) test because those records had been prepared by, or had originated with, Ministry staff, not the appellant. I agree.

Although the appellant's representations make reference to certain terms of the call centre contract it signed by the Ministry, the actual contract itself is not at issue in this appeal. It is worth acknowledging, however, that portions of the records that are at issue make reference to individual terms or features of that contract. The most specific example is the pricing information contained in one of the contract management reports, which I have found qualifies

as commercial information under my evaluation of part 1 of the test for exemption under section 17(1).

Having said that, past orders of this office have consistently held that the contents of a contract between an institution, such as the Ministry, and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). This is because the provisions of a contract have generally been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, PO-2371, PO-2384]. The Divisional Court of Ontario upheld this approach in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851, motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Furthermore, as the Ministry has pointed out, the information contained in the records did not originate with the appellant. The letters at issue are written by Ministry staff to senior staff employed by the appellant. The contract management and/or monitoring reports were generated by Ministry staff from the Ministry's computer system. Finally, the email correspondence between Ministry staff and that of the appellant, much of which consists of duplicated chains of discussion, originated with staff from the Ministry, as a function of monitoring the appellant's performance of its contractual responsibilities.

In my view, the information contained in the records about the call centre contract between the Ministry and the appellant represents the Ministry's subjective and objective evaluation of the contract performance and compliance. It is not information "supplied" by the appellant to the Ministry, as required by section 17(1). Moreover, I am also satisfied that none of the information in the letters, reports or emails would "reveal or permit the drawing of accurate inferences with respect to information supplied by" the appellant to the Ministry. Accordingly, I find that none of the information meets the requirements of part 2 of the test for exemption under section 17(1).

Having determined that none of the records at issue were "supplied" by the appellant to the Ministry within the meaning of that term in section 17(1) of the *Act*, the appellant's claim for exemption fails and the records must be disclosed. While it is not strictly necessary for me to complete the part 2 analysis, I will briefly review the issue of confidentiality.

In its representations, the appellant refers to two specific clauses of the contract between it and the Ministry. Furthermore, as I understand the appellant's argument, those two terms are determinative of the issue of access to *any* records related to the contract.

As noted previously in this order, access to the contract itself is not at issue as the appellant did not appeal the Ministry's decision to release a severed version of it. However, that document is available to me, and I have reviewed it. While the two paragraphs specifically mentioned by the appellant refer to its rights respecting proprietary materials and interests, the second clause contains an express acknowledgement that disclosure of information falling into that category may be required by law. Indeed, this same clause refers to one following that acknowledges the necessity of compliance with the *Act*.

Moreover, it is a relatively well-established principle that one may not contract out of the provisions of the *Act*. In Order PO-2520, Senior Adjudicator John Higgins had to determine as a preliminary issue whether an institution had, as it submitted, "contracted out" of the *Act* by having previously entered into an agreement with the requester. In rejecting the institution's argument, Senior Adjudicator Higgins stated the following:

> Section 10(1) creates an express and unambiguous right of access to records "in the custody or under the control" of an institution such as the College, subject to exceptions that do not include the provision of a contract. In my view, therefore, the *Act* applies in the circumstances of this appeal regardless of the contents of any agreement to the contrary, and the right of access in section 10(1) must be decided within the four corners of the statute. The Commissioner's authority is unaffected. If the Minutes of Settlement ending the grievance in this case in fact include an express provision contracting out of the right of access created by the *Act* (and I expressly decline to find that they do), any violation of that provision would be a matter of contract law, employment law or labour law, and enforceable in that context. …

I agree with this approach and adopt it. In other words, even if the terms of the contract between the Ministry and the appellant respecting compliance with the *Act*, as described above, sought instead to remove the parties or records from its reach, I would have found the requester's right of access under the *Act* to be unaffected by any such purported limitation.

In the circumstances, I find that any expectation of confidentiality was not reasonably held.

Accordingly, I find that the information at issue was neither "supplied" by the appellant, nor is there a reasonably held expectation of confidentiality in it. Having determined that none of the information in the records at issue meets the requirements of part 2 of the test for exemption under section 17(1), I need not consider whether it meets the third part of the test for harms and I expressly decline to do so.

Post Script - Personal Information

In the version of the records sent to this office by the Ministry, certain blocks of text in the email correspondence were crossed out with a large "X". Other than one notation beside the first crossed out block of text signifying that the Ministry considered the passage to be non-responsive ("N/R"), these were not accompanied by a label to explain the reason for the severance. Upon my own review of the records to identify and mark "personal information" (to which the appellant does not seek access), it became apparent that entire passages of text were blocked out simply because they were *associated* with the personal information of identifiable individuals. I noted that certain passages containing information responsive to the request had been severed in their entirety when, in my view, only "personal information" should have been severed in this way. Accordingly, in the version of the records to be sent to the Ministry along

with this order, only that which I find qualifies as "personal information" is marked and only it should be severed before the records are provided to the original requester.

ORDER:

1. I uphold the decision of the Ministry to disclose the records to the original requester, subject to the severances of "personal information" applied to the records.

2. I order the Ministry to disclose the records by sending a copy to the requester by **September 4, 2007** but not earlier than **August 30, 2007**.

3. For greater certainty regarding the severance of personal information referred to in this order, I am sending a copy of the records to be disclosed with those severances marked in orange highlighter to the Ministry. This information is not to be disclosed. All other information not so marked is to be disclosed.

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

Original signed by: July 31, 2007
Daphne Loukidelis
Adjudicator