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

ORDER PO-2914

Appeal PA10-2

Infrastructure Ontario

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BACKGROUND:

In November 2003, Transport Canada selected a company (the affected party) as the successful proponent to finance, design, construct and maintain a link between Union Station in downtown Toronto and Pearson Airport. This project was transferred to provincial responsibility in 2008 and Infrastructure Ontario was directed to act as the agent of the Ontario Ministry of Transportation (MOT) and began negotiations with the affected party for the completion of the project. To this end, prior to the execution of a more formal agreement between the parties, a Memorandum of Understanding was entered into.

Infrastructure Ontario is a Crown agency established under the *Ontario Infrastructure Projects Corporation Act, 2006*. It is assigned projects by the Province of Ontario and uses a model called Alternative Financing and Procurement (AFP) whereby the public sector establishes the purpose and scope of the project while the actual construction work is financed and carried out by the private sector.

NATURE OF THE APPEAL:

Infrastructure Ontario received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …any document from or to [a named engineering firm] that pertains to the Georgetown South Service Expansion (GSSE), the Union-Pearson Rail Link (UPRL) or the purchase and sale of any locomotives. The documents should be dated from January 1, 2007 to the present date of October 23, 2009.

In a decision letter dated November 30, 2009, Infrastructure Ontario stated:

> While there is no responsive record that directly corresponds to your request, we have identified a Memorandum of Understanding between Infrastructure Ontario and [the affected party] which references this transaction.

Infrastructure Ontario further advised that access to this record is denied pursuant to the mandatory exemptions at sections 17(1)(a), (b) and (c) (third party information) and the discretionary exemptions in sections 18(1)(a), (c), (d) and (e) of the *Act*.

The requester (now the appellant) appealed the decision of Infrastructure Ontario to this office.

During mediation, the mediator contacted the affected party in order to determine whether it would provide its consent to release the record at issue. The affected party did not consent.

I began my inquiry by sending Infrastructure Ontario and the affected party a Notice of Inquiry setting out the facts and issues in the appeal. Both parties provided me with representations in response. In its representations, Infrastructure Ontario indicated that it was no longer relying on the application of section 18(1)(c). As a result, I will not be considering this exemption further.

I then provided the appellant with a Notice of Inquiry, and the non-confidential portions of the representations of Infrastructure Ontario, severing specific information that also appears verbatim in the record, to assist him in formulating his submissions. I did not share the affected party's brief representations, though I advised the appellant that the affected party's representations focus on the harm to its commercial interests which it feels would result from the disclosure of the information in the records. The appellant also provided representations, which I shared with the affected party and Infrastructure Ontario. Both of these parties were invited to and did submit reply representations.

RECORDS:

The record at issue is a 9 page Memorandum of Understanding and an attached 4 page Schedule.

DISCUSSION:

THIRD PARTY INFORMATION

Infrastructure Ontario and the affected party submit that the responsive record is subject to the mandatory exemptions in section 17(1)(a), (b) and (c) of the *Act*, which read:

> 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;

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.), leave to appeal dismissed, Doc. M32858 (C.A.)]. 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, Infrastructure Ontario and/or the third 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), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The affected party and Infrastructure Ontario submit that the record contains information that qualifies as both commercial and financial information for the purposes of this exemption. The types of information listed in section 17(1) have been discussed as follows in prior orders:

> *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].

Infrastructure Ontario indicates that the record contains a formula for the payment of "break fees", described as compensation to be paid by Infrastructure Ontario to the affected party "should the Project be cancelled within a certain period of time" and that this information qualifies as "commercial information' for the purposes of section 17(1). It also submits that, in addition to information pertaining to break fees, the record also includes "specific references to figures and payments" regarding "fare setting and revenue sharing between the parties" and that this information qualifies as "financial information" within the meaning of section 17(1).

The appellant does not address this aspect of the test under section 17(1) in his representations.

In its reply representations, the affected party submits that, in addition to the amount of the break fees and cost recovery fees set out in the MOU, the Rate Setting formula and Competing Project Compensation information in the record also qualify as financial information.

I have reviewed the record at issue and agree that it contains commercial information relating to the provision of goods or services by the affected party to Infrastructure Ontario. The record also contains information relating to formulas about pricing and the calculation of payments between the parties to the MOU, thereby qualifying as financial information for the purposes of section 17(1).

Part II: supplied in confidence

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].

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 or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are 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 is not susceptible of change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above)].

Representations of the parties

Infrastructure Ontario takes the position that the MOU which it entered into with the affected party does not constitute a formal contract as it is designed simply to serve as a "basis for a future formal Project agreement between the parties." Accordingly, it suggests that, contrary to the reasoning of the Court in *Boeing*, a formal contract with mutual obligations on both of the parties to the MOU was not entered into. On this basis, Infrastructure Ontario argues that the facts of the *Boeing* decision may be distinguished from those in the present appeal.

The affected party submits that the MOU which constitutes the record at issue was drafted and executed "in order to capture the process for the finalization of a formal agreement." The affected party concedes that the record was drafted by Infrastructure Ontario but argues that the document contains commercial and financial information provided to it by the affected party and that this information was then incorporated into the MOU. Specifically, it submit that terms in the MOU relating to the payment of "break fees" and "cost recovery fees" which were designed to compensate it "for some of the costs it incurred in relation to the development and submission of its proposal in case the procurement process [is] cancelled and to express the Provinces commitment to the project."

The affected party goes on to argue that it determined the formula for the calculation of the break and cost recovery fees based on "various factors such as the length of the Request for Proposals process, [its'] out-of-pocket expenses etc."

The appellant relies on the reasoning in various IPC Orders which have held that "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)" because these provisions "have been 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." The appellant refers directly to a number of statements contained in Infrastructure Ontario's representations which he argues lead to the conclusion that the MOU was drafted following negotiations between it and the affected party.

The appellant also suggests that the distinction made by Infrastructure Ontario between a contract and an MOU is a "distinction without a difference". He relies on the quotation contained in the institution's representations from Black's Law Dictionary which confirms that an MOU "is a contract or deed which has yet to be formalized." The appellant also points out the use of the word "understanding" in the title of the document "indicates an agreement between two parties, not the supply of information from one party to another."

In its reply submissions, Infrastructure Ontario reiterates its position that the MOU does not constitute "a formal contract creating any obligations" on either party to it "but rather is a record to serve as a basis for a future formal project agreement."

Findings

I accept the arguments of the appellant respecting the nature of the MOU and the fact that it is in essence a contract between the parties for the performance of certain obligations. A closer examination of the MOU itself gives further support to this finding. Specifically, I find that the MOU contemplates that it may be superseded by the execution of more formal documentation in the future, it also inherently recognizes the legal enforceability of the MOU until these formal documents are finalized. In my view, the MOU created a series of legally-enforceable obligations in the part of both parties to it which are set out in unequivocal language.

As noted in my discussion above, previous orders of this office have found that:

> [T]he 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 or where the final agreement reflects information that originated from a single party.

Based on my review of the representations of the parties, and particularly the contents of the record itself, I conclude that the information contained in the MOU and the Schedule to it cannot properly be characterized as having been "supplied" by the affected party to Infrastructure Ontario within the meaning of that term in section 17(1). Rather, in keeping with the conclusions reached in a long line of authorities dealing with similar records, I find that the MOU was not "supplied" by the affected party and does not, therefore, qualify for exemption under section 17(1).

ECONOMIC AND OTHER INTERESTS

Infrastructure Ontario claims that the record at issue is also exempt from disclosure under the discretionary exemptions in sections 18(1)(a), (d) and (e) of the *Act*, which 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;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

The purpose of section 18 is 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.

For section 18(1)(d) 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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18 [Orders MO-1947 and MO-2363].

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests [see Orders MO-2363 and PO-2758].

Section 18(1)(a): information that belongs to government

For section 18(1)(a) to apply, the institution must show that the information:

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

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

3. has monetary value or potential monetary value.

Part 1: type of information

I have found in my discussion of section 17(1) that the record contains information that qualifies as financial and commercial information. Accordingly, I find that for the purposes of my analysis under section 18(1)(a), the record also includes financial and commercial information.

Part 2: belongs to

The term "belongs to" refers to "ownership" by an institution. It is more than the right 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, the information 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 [Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.]

Infrastructure Ontario claims that it has a proprietary right to the information contained in the record because it includes its "confidential business information" "which has been [developed] as a result of the application of considerable skill and effort to develop the information which is of monetary value" to it. It argues that those portions of the MOU describing break fees and cost recovery, a fare setting formula and revenue sharing arrangements "is unique to the construction of the Project and was derived and developed by utilizing the resources and skills of Infrastructure Ontario's Project Development Division based on negotiations with" the affected party.

The appellant points out that the position taken by Infrastructure Ontario with respect to the application of section 18(1)(a) appears to contradict its arguments pertaining to the application of section 17(1). It appears to suggest that the contents of the MOU include its own "confidential business information" along with terms that were "derived and developed" as a result of its negotiations with the affected party. However, the appellant submits that this position contradicts that taken by Infrastructure Ontario in its arguments in support of section 17(1) where it suggests that this information was "supplied" to it by the affected party.

In keeping with my findings in the discussion of section 17(1), I find that the information contained in the MOU does not "belong" exclusively to Infrastructure Ontario. Rather, it was the product of negotiation with the affected party, as is acknowledged in the representations of both parties resisting disclosure. I find that because the information in the MOU, including the Schedule to it, is not proprietary information of Infrastructure Ontario, it does not satisfy the second part of the test under the discretionary exemption in section 18(1)(a).

As all the parts of the test under section 18(1)(a) must be met, I find that this exemption has no application to the record at issue in this appeal.

Section 18(1)(d): injury to financial interests

Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians [Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233].

Infrastructure Ontario describes itself as a statutory Crown agency established for the purpose of, among other things, managing the delivery of the Province's Alternative Financing and Procurement (AFP) projects. It submits that "[T]he commercial and financial information submitted by bidders within their proposals has always been implicitly understood by both parties to remain confidential during the entire AFP process." It argues that if the information in the record were to be disclosed, "other eligible bidders would not be forthcoming with respect to revealing such confidential commercial and financial information to Infrastructure Ontario in their proposals for fear of such information being disclosed in the public domain." It goes on to suggest that as a result of such disclosure, certain projects would not be completed or would be subject to delays.

Infrastructure Ontario takes the position that other private sector business entities would be disinclined to participate in joint projects with it if they were required to share what they consider to be their proprietary information. I disagree with this suggestion. In my view, it is not reasonable to suggest that participation by private sector partners in projects involving government bodies is less likely should information such as that at issue in the present appeal be made publicly available through access to information requests. In my view, it is not reasonable to suggest that participation by the private sector with government in these types of joint ventures will not be curtailed in any meaningful way as a result of the disclosure of the information contained in the MOU in this appeal.

Based on my review of the record and the representations of the parties, I find that I have not been provided with sufficiently detailed and convincing evidence to enable me to make a finding that the disclosure of the MOU could reasonably be expected to result in the harms contemplated by section 18(1)(d). As a result, I find that section 18(1)(d) has no application to the record at issue.

Section 18(1)(e): positions, plans, procedures, criteria or instructions

In order for section 18(1)(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of the Government of Ontario or an institution [Order PO-2064].

Section 18(1)(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Orders PO-2064 and PO-2536].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Orders PO-2034 and PO-2598].

The term "plans" is used in sections 18(1)(e), (f) and (g). Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Orders P-348 and PO-2536].

The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow [Order PO-2034].

In support of its claim that the record is exempt under section 18(1)(e), Infrastructure Ontario relies on its earlier arguments that the MOU "does not formalize a 'contract' between the parties, but merely serves as a basis for a future formal Project and stakeholder agreement to be executed." It suggests that the information contained in the record "is being utilized by the parties through on-going meetings and negotiations to achieve an agreement on key business terms as are currently reflected and referred to in the MOU."

The appellant submits that the representations of Infrastructure Ontario do not "explain how the requested information constitutes positions, plans, criteria or instructions."

Again, I find that Infrastructure Ontario has failed to adduce the type of evidence necessary for me to uphold its decision to deny access to the record based on the application of section 18(1)(e). I note that it has not indicated where in the record information that constitutes "positions, plans, criteria or instructions" are located; nor am I able to identify any such information in the record. As a result, I find that the section 18(1)(e) exemption has no application to the record.

As I have found that none of the exemptions claimed have any application to the record, I will order Infrastructure Ontario to disclose it to the appellant.

ORDER:

1. I order Infrastructure Ontario to disclose the Memorandum of Understanding, as well as the Schedule to it, to the appellant by providing him with a copy by **November 2, 2010** but not before **October 26, 2010.**

2. In order to verify compliance with the terms of this order, I reserve the right to require Infrastructure Ontario to provide me with a copy of the record.

Original signed by: September 27, 2010
Donald Hale
Adjudicator