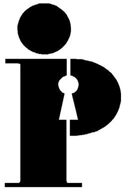

ORDER PO-2963

Appeal PA10-67

University of Western Ontario

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NATURE OF THE APPEAL:

The appellant made a request to the University of Western Ontario (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the successful bids for two identified tenders for the supply of snow removal. The university subsequently spoke with the appellant and confirmed that he was seeking access to the prices for each snow plow area contained in the bids

Prior to making its decision, the university notified five businesses whose interests may be affected by the outcome of this appeal (the affected parties), in accordance with section 28(1) of the *Act*, seeking their views regarding disclosure of the responsive record, which contains their winning bid. The university subsequently issued a decision to the appellant and the affected parties advising of its decision to deny access to the records pursuant to the mandatory exemption in section 17(1) (third party information). The appellant appealed this decision.

During mediation, the appellant clarified that he is seeking access to the names of the contractors, as well as their respective bid pricing totals, for each snow plow area. Accordingly, the university agreed to include the names of the contractors as part of the responsive record.

The mediator contacted the affected parties in an attempt to gain their consent for disclosure of the information relating to them. The affected parties did not consent to the disclosure of their information.

During my inquiry into this appeal, I sought representations from the university, the affected parties and the appellant. I received representations from the university and one of the affected parties only. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

RECORDS:

The record at issue is a 5-page document containing the names of the contractor, the RFQ number, the snow plow area and the successful bid amounts.

DISCUSSION:

THIRD PARTY INFORMATION

Section 17(1) states:

> 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

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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

Part 1: type of information

Past orders of this office have defined financial and commercial information 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].

I adopt these definitions for the purposes of this appeal.

As the record at issue relates to the provision of snow plow services to the university by the affected parties and includes the snow plow zone and the successful bid amount, I find that the records contain both financial and commercial information for the purposes of section 17(1). Accordingly, the first part of the test for the application of section 17(1) has been met.

Part 2: 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)].

In confidence

In order to satisfy the "in confidence" component of part two, 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 [Orders PO-2043, PO-2371, PO-2497].

Both the university and one affected party submit that the commercial and financial information was submitted by way of a sealed tender in accordance with the university's purchasing policy. Both parties further attest to the reasonable expectation of confidentiality, both explicit and implicit, that the affected parties held when submitting their bids.

While I accept that the affected parties had an implicit and explicit expectation of confidentiality when submitting their bids, I find that the information at issue was not supplied for the purposes of the section 17(1) exemption. Numerous decisions of this office have considered whether pricing information contained in a contract or bid proposal meet the "supplied" portion of the section 17(1) test.

In Order PO-2435, Assistant Commissioner Brian Beamish considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government RFP's, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. The Assistant Commissioner rejected that position and 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.

Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part 2 of the section 10(1) test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in Order PO-2453 contained the successful bidder's pricing for various components of the service to be delivered as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under section 17(1) (the equivalent to section 10(1) in the provincial *Act*), Adjudicator Corban stated (at page 7):

> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.
>
> Additionally, having reviewed the information at issue, I do not find, nor have I been provided with any evidence to show, that any of the information at issue is "immutable" or that disclosure of the information, including the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied to the Ministry by the affected party. I have also not been provided with any evidence to show that the pricing information reflects the affected party's underlying costs. In fact in my view, the information contained in the record itself appears to point to the opposite conclusion that the amounts charged by the affected party are for the provision of particular services.

In my view, this excerpt from Adjudicator Corban's reasons in Order PO-2453 emphasizes that the exemption in section 10(1) is intended to protect information belonging to an affected party that *cannot* change through negotiation, not that which could, but was not, changed [see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); Orders PO-2371, PO-2433 and PO-2435].

The reasoning in these decisions was also recently applied in Order MO-2403 where Adjudicator Daphne Loukidelis found that pricing totals contained in proposals sent to the Toronto Transit Commission were not supplied for the purposes of section 10(1) [the municipal equivalent of section 17(1)], stated:

> In my view, pricing information, particularly the pricing totals at issue here, cannot reasonably be said to have inherent value as an informational asset. Rather, with specific reliance on the principles expressed in past orders of this office, I find that the information at issue represents the position taken by the

> appellant [affected party] in its bid regarding the cost of providing and performing the various components of the TTC website redevelopment contract. If the pricing or rates submitted by the appellant had been deemed by the TTC to be "too high, or otherwise unacceptable," the TTC was in a position to accept or reject them. This is the form of negotiation envisaged by Assistant Commissioner Beamish in Order PO-2435.
>
> Moreover, I have not been provided with any evidence to demonstrate that the pricing totals reflect the appellant's "immutable" or fixed underlying costs, or that disclosure would somehow permit accurate inferences to be drawn about other, non-negotiated confidential information of the appellant. In my view, the pricing totals at issue reflect the contractual interests and intentions of the TTC and the appellant. Accordingly, I find that this information was not "supplied" within the meaning ascribed to that term in section 10(1) of the *Act*.

In the present appeal, the affected party (who submitted representations) submits that its quote was based on square footage of the plow area, estimated labour and a suitable mark-up. In my view, all of the affected parties' bids do not reflect their "immutable" or fixed underlying costs. Further, I am not convinced that disclosure would somehow permit an individual to accurately infer the non-negotiated confidential information that the affected parties supplied to the university. Accordingly, based on my review of the records, I find that the information at issue reflects the negotiated agreement between the university and the affected parties for the provision of snow plow services. As the information at issue was not "supplied", neither the university nor the affected parties have met part two of the test for the application of section 17(1). As all parts of the test for exemption under section 17(1) must be met, the information at issue is not exempt under this exemption and must be disclosed to the appellant.

ORDER:

1. I order the university to disclose the records to the appellant by providing him a copy of the records by **May 27, 2011** but not later than **June 1, 2011**.

2. To verify compliance with this order, I reserve the right to require the university to send me a copy of the records disclosed pursuant to order provision 1.

Original signed by: April 27, 2011
Stephanie Haly
Adjudicator