

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3028

Appeal PA11-37

Hydro One

December 22, 2011

Summary: The appellant is a third party company who appealed Hydro One's decision to release the total dollar amount of monies it paid to the third party in a given year. The third party claims that this information qualifies for exemption under sections 17(1)(a) and/or (c) of the *Act*. Hydro One's decision to release the information to the original requester is upheld. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1) and (c).

OVERVIEW:

[1] The requester filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the amount of monies Hydro One (Hydro) paid to a named third party contract provider. Upon its receipt of the request, Hydro contacted the requester who clarified that the request is for records for payments made in 2009 only.

[2] After notifying the third party under section 28 of the *Act*, Hydro issued a decision letter to the requester granting access to the requested information. The third party appealed Hydro's decision to this office and a mediator was assigned to the appeal.

[3] During mediation, the original requester advised the mediator that he or she is not seeking the breakdown of the amounts paid over the 12 month period but only the total amount paid for the year in question.

[4] The parties were unable to resolve the appeal in mediation and the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. A Notice of Inquiry, setting out the facts and issues in this appeal, was sent to Hydro, the original requester and the third party.

[5] The original requester did not submit representations. Hydro and the third party's representations were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7. The third party requested that its appeal letter be considered along with its representations. The appeal letter submits that the information at issue should be excluded from the scope of the *Act* under section 65(6) and (7). However, it does not appear that the third party pursued this issue in mediation and it was not raised during the inquiry stage or in the third party's representations. Accordingly, I find that this issue is no longer at issue.

[6] In this order, I find that the third party information exemption under sections 17(1)(a) and/or (c) do not apply to the information at issue.

[7] For the remainder of this order, the third party will be referred to as the appellant.

RECORDS:

[8] Total dollar amount Hydro paid to the third party in 2009.

DISCUSSION:

Is the undisclosed information exempt under sections 17(1)(a) and/or (c)?

[9] The appellant submits that the information at issue qualifies for exemption under sections 17(1)(a) and/or (c) of the *Act*. Sections 17(1)(a) and (c) 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;

- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[10] As noted above, Hydro takes the position that the information at issue does not qualify for exemption under section 17(1) and should be released to the requester.

[11] 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].

[12] For section 17(1) to apply, the institution 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

[13] The appellant submits that the information at issue contains financial and/or labour relations information which relate to its contract for services with Hydro. Past orders have defined financial information as follows:

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].

[14] Given that the record relates to the amount of monies Hydro paid to the appellant, I am satisfied that the information at issue contains financial information. Accordingly, the first part of the test under section 17(1) has been met. As I have found that the record contains financial information it is not necessary that I also determine that the record contains labour relations information.

Part 2: supplied in confidence

[15] 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].

[16] 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].

Supplied

[17] The appellant submits that it supplied financial information relating to its “pricing practices, profit and loss data, overhead and operating costs” to Hydro when it submitted its bid. The appellant also submits that it “tendered a bid and was awarded the contract without any prior negotiation” and states:

The information was supplied to the Hydro institution by the Appellant in the reasonable expectation of privacy but more importantly in the reasonable expectation of confidentiality to the extent that disclosure would reveal or permit the accurate inferences with respect to the supplied information.

[18] In support of its position the appellant refers to Order PO-2018, which discusses previous decisions from this office that have found that, but for the “inferred disclosure” and “immutability” exceptions, 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).

[19] 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.)].

[20] 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 third 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)].

[21] The appellant submits that the financial information at issue relates to its pricing practices, profit and loss data and operating costs. The appellant claims that the bid documents it provided to Hydro contain this information. However, the bid documents are not at issue in this appeal.

[22] What is at issue is the total dollar amount of monies Hydro paid the appellant for services rendered in 2009. This information is located on a computer print-out, which appears to be an accounting ledger created by Hydro. The date and amount paid to the appellant is listed for dozens of entries. However, only the total dollar amount listed at the bottom of the ledger is at issue in this appeal.

[23] In my view, the total dollar amount Hydro paid to the appellant can not be said to have been supplied by the appellant to Hydro. Presumably, the appellant issued invoices to Hydro, who in turn paid the invoice and made a note of the payment on its computer software program. Having regard to the records and circumstances of this appeal, I find that disclosure of the information at issue would not reveal or permit the drawing of accurate inferences with respect to information the appellant claims it provided Hydro when it submitted its bid documents.

[24] In making my decision, I also considered the appellant’s submission that it “tendered a bid and was awarded the contract without any prior negotiation”. Though the appellant did not adduce evidence which specifically addresses whether the “inferred disclosure” and/or “immutability” exceptions apply in the circumstances of this appeal, it appears that the appellant seeks to advance an argument that these exceptions apply.

[25] In my view, these exceptions do not apply to this appeal. I have carefully reviewed the record along with the appellant’s representations and find that disclosure of the total dollar amount would not permit an accurate inference to be made with respect to underlying non-negotiable confidential information. I also find that

disclosure of the information at issue would not permit an accurate inference of "immutable" information, such as the appellant's fixed underlying costs.

[26] Having regard to the above, I find that the information at issue was not supplied to Hydro by the appellant. Accordingly, this information cannot qualify for exemption under section 17(1).

[27] As a result of my finding, it is not necessary that I also consider the "in confidence" portion of part two of the three-part test has been met. It is also not necessary that I determine whether disclosure of the information could reasonably be expected to lead to the harms contemplated in sections 17(1)(a) or (c).

[28] Accordingly, the appeal is dismissed.

ORDER:

1. I order Hydro to disclose the total dollar amount to the original requester by providing the requester with a copy of the record by **January 30, 2012** but not before **January 25, 2012**.
2. To verify compliance with this order, I reserve the right to require Hydro to send me a copy of the record disclosed pursuant to order provision 1.

Original Signed by: _____
Jennifer James
Adjudicator

December 22, 2011 _____