

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3072-R

Appeal PA10-218

Order PO-3011

Infrastructure Ontario

April 20, 2012

Summary: This is a reconsideration of Order PO-3011, concerning a request for a copy of the Alternative Financing and Procurement agreement between the Province of Ontario and a named company awarded for the redevelopment and operation of Ontario Service Centres. In Order PO-3011, the institution's decision to withhold certain portions of the agreement was upheld pursuant to the mandatory exemption in section 17(1) of the *Act*, but the remainder of the agreement was ordered to be disclosed. After receiving Order PO-3011, the affected party sought reconsideration of the application of section 17(1). In this reconsideration order, the Assistant Commissioner reverses the previous finding in respect of certain information in the agreement that was previously ordered disclosed in Order PO-3011, finding that this information is exempt pursuant to section 17(1). The Assistant Commissioner upholds his previous decision in respect of all other information at issue in this reconsideration order.

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

OVERVIEW:

[1] The appellant made an access request to Infrastructure Ontario under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the Alternative Financing and Procurement agreement between the Province of Ontario and

a named company (the affected party) concerning the redevelopment and operation of Ontario Service Centres.

[2] While a redacted copy of the agreement was posted on Infrastructure Ontario's website, the appellant appealed to the Information and Privacy Commissioner of Ontario (the IPC) on the basis that the whole agreement was not publicly available. The appellant later narrowed the scope of the appeal to the redacted information contained in Schedules 13, 14, 16, 29, 30 and 31 of the agreement.

[3] After an inquiry was conducted into the appeal, I issued Order PO-3011:

- (i) upholding Infrastructure Ontario's decision to withhold certain information¹ which I found to be exempt from disclosure pursuant to sections 17(1)(a) and (c) of the *Act*; and
- (ii) ordering Infrastructure Ontario to disclose all remaining information² at issue as I found that neither section 17 or 18 of the *Act* applied to exempt that information from disclosure.

[4] On December 16, 2011, I received a request from the affected party asking that I reconsider certain parts of my decision in Order PO-3011. The affected party's reconsideration request was shared with Infrastructure Ontario and the appellant in accordance with Section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[5] For the reasons that follow, I reverse my order directing Infrastructure Ontario to disclose the redacted information contained in Schedule 13 section 1.1(d) and Schedule 31 section 1.1(i) only. I uphold my earlier decision in respect of all remaining information at issue and direct Infrastructure Ontario to disclose this information in accordance with the timelines set out in this reconsideration order.

RECORDS:

[6] Redacted information from the following Schedules to the Alternative Financing and Procurement contract is at issue in this reconsideration request:

- Schedule 13, which sets out the capital and concessionary and rent payments between the affected party and the Province pertaining to the project;

¹ Information contained in sections 1.5, 1.16, 1.7 and 3.7(5) of Schedule 29, Schedule 30 in its entirety and Appendix A of Schedule 31.

² Severed information contained in Schedule 13, Schedule 14, Schedule 16, Schedule 29 (except sections 1.5, 1.7, 1.16 and 3.7(5)) and Schedule 31 (except Appendix A).

- Schedule 14, which sets out the pricing of various products serviced at highway service centre locations;
- Schedule 16, which sets out any compensation payments to the parties based on certain termination events that may occur;
- Schedule 29, except sections 1.5, 1.7, 1.16 and 3.7(5), which sets out the various payments to be made between the parties with respect to the project; and
- Schedule 31, except Appendix A, which sets out the payment details regarding any refinancing that may occur with respect to the project.

ISSUES:

- A. Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-3011?
- B. Does the third party information exemption at section 17(1) of the *Act* apply to the records ordered to be disclosed in Order PO-3011?

DISCUSSION:

A. Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-3011?

The Reconsideration Process

[7] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which this office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

Grounds for the Reconsideration Request

[8] The affected party submits that I:

- (a) fettered my discretion by applying past IPC precedents without regard to the specific circumstances of this case; and
- (b) failed to state reasons for dismissing its submission that the records at issue "...allow an observer to make an accurate inference regarding the very same confidential information".

Was Discretion Fettered?

[9] The principle of *stare decisis* does not apply to administrative tribunals.³ Decision makers fetter their discretion by *automatically* following policies, rules, guidelines, or precedent without considering other relevant factors.⁴

[10] In its request for reconsideration, the affected party argues that I failed to exercise independent judgment in considering its submissions in the original inquiry and instead treated the IPC's previous decision in Order PO-2435 as binding precedent. For the reasons set out below, I find that the affected party has failed to establish that I fettered my discretion in the original inquiry. As a result, I will not be reconsidering Order PO-3011 on this basis.

[11] In Order PO-3011, I considered the facts and arguments advanced by all parties to determine whether sections 17 and 18 of the *Act* exempted the information requested by the appellant. After examining the agreement at issue, I found that certain information was the end product of a negotiation process and set out mutually agreed upon terms by Infrastructure Ontario and the affected party. In finding that portions of the records consisted of negotiated terms, I found that they were not "supplied" as per section 17(1) of the *Act* and ordered that they be disclosed.

[12] In reaching this conclusion, I referenced and excerpted parts of an earlier decision, Order PO-2435, in which I addressed the issue of whether information provided by one party but incorporated into a contract was "supplied". While I am not

³ *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), at para. 129. This principle has been recognized repeatedly by the IPC, most recently in Order PO-2976.

⁴ D.J.M. Brown and Hon. J.M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998), section 12.4421, at pp. 12-39 and 12-44.

bound by the findings in the earlier order, I am entitled to consider and use this earlier precedent to assist in deciding issues before me in this appeal, to the extent it may be relevant.⁵ I cannot be said to have fettered my discretion by deciding this earlier IPC decision can assist me in analyzing this appeal, referring to it, and, after reviewing the information at issue in this appeal, reaching a conclusion that one of the parties does not agree with.

Was there a Failure to State Reasons?

[13] In its reconsideration request, the affected party argues that I failed to state reasons in dismissing arguments put forward by it. In particular, the affected party asserts that Order PO-3011 fails to state reasons for dismissing the affected party's submission that the "inferred disclosure" exception applies to the records at issue.

[14] After reviewing the affected party's reconsideration request, the representations of the appellant and Infrastructure Ontario concerning the reconsideration request, the representations of all parties made during the inquiry, and my findings in Order PO-3011, I find that I erred in failing to fully consider the inferred disclosure exception to the second part of the section 17(1) test. I find that this error constitutes a fundamental defect in the adjudication process, thereby meeting the ground for reconsideration outlined in section 18.01(a) of the IPC's *Code of Procedure*. Accordingly, I will reconsider my decision in Order PO-3011 on this basis and will now proceed to reconsider whether the inferred disclosure exception to the "supplied" part of the section 17(1) test applies to the records that I ordered disclosed.

[15] In its reconsideration request, the affected party also claimed that there was some other jurisdictional defect in Order PO-3011, as per section 18.01(b) of the IPC's *Code of Procedure*. The affected party's representations do not explain the nature of this jurisdictional defect (other than referencing it as a ground for reconsideration in the first paragraph of its reconsideration request). As a result, there is no basis upon which to further evaluate the reconsideration request on this ground.

B. Does the third party information exemption at section 17(1) apply to the records ordered to be disclosed in Order PO-3011?

[16] As set out in Order PO-3011, for section 17(1) of the *Act* 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

⁵ *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), at para. 129.

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

[17] During the original inquiry in the appeal, I reviewed the records and found that all of the records contain “commercial” and “financial information”, as defined by this office.⁶

Part 2: Supplied in confidence

Supplied

[18] With regard to the second part of the section 17(1) test, and as previously set out in Order PO-3011, the contents of a contract involving an institution and a third party will normally not qualify as having been “supplied” for the purpose of section 17(1). There are two exceptions to this general rule, which are described as the “inferred disclosure” and “immutability” exceptions.

[19] During the inquiry, the affected party argued that all of the information at issue was either directly supplied by the affected party to Infrastructure Ontario or that components of the affected party’s underlying business model, such as pricing, rental amounts, gain/sale price, pricing assumptions, margins on sales, capital costs of construction, construction time frame and targets, expected sales revenue, equity level, internal right of return and lending arrangements, can be inferred from the information at issue.

[20] The affected party also argued that the information that was not directly supplied, if disclosed, would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was supplied by the affected party. That is, the affected party argued that a reasonably informed observer could draw accurate inferences about information not expressly contained in the contract.

[21] Upon review of my “supplied” analysis in Order PO-3011, set out at paragraphs 26-39 of my decision, I find that I failed to fully consider the application of the “inferred disclosure” exception to this part of the section 17(1) test. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit

⁶ See paragraphs 22-25 of Order PO-3011.

accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution.

[22] After reconsidering the application of this exception to the records that I ordered to be disclosed in Order PO-3011 and considering all relevant evidence and arguments made by the parties on this issue, I find that the redacted information contained in Schedule 13 section 1.1(d) and Schedule 31 section 1.1(i) can be considered to have been "supplied" under the section 17(1) test. In my view, the information contained in section 1.1(d) of Schedule 13 would permit an accurate inference to be made with respect to the affected party's rate of return on the Ontario Service Centres' project. Similarly, I find that the information contained in section 1.1(i) would permit an accurate inference to be made with respect to the affected party's threshold equity rate of return for the Ontario Service Centres' project. In my view, the disclosure of these two pieces of information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party. The affected party's rates of return on the project are not the result of negotiations between the affected party and Infrastructure Ontario.

[23] In addition to these two pieces of information, I re-reviewed the remaining portions of the agreement that I ordered to be disclosed in Order PO-3011 and considered all evidence/submissions on these issues by the parties. Based on that review, I find that the following information was not "supplied" as per section 17(1) of the *Act*:

- Schedule 13, except section 1.1(d);
- Schedule 14;
- Schedule 16;
- Schedule 29, except sections 1.5, 1.7, 1.16 and 3.7(5); and
- Schedule 31, except Appendix A and section 1.1(i).

[24] In my view, the remaining information is the end product of a negotiation process, and sets out mutually agreed upon terms. The parties chose to incorporate these terms into the agreement entered into between them. In doing so, the records cannot be considered to have been "supplied" by the affected party.

[25] Based on my review of the remaining information at issue, I am also unable to discern how disclosure of this information would permit the drawing of accurate inferences of underlying non-negotiated confidential information supplied by the affected party to Infrastructure Ontario. Moreover, the affected party's representations on this issue provide, for the most part, unsupported assertions that the proposed

disclosures will allow inferences to be drawn of various components of the affected party's business model. These sweeping generalities do not, in my view, provide a sufficient explanation as to how disclosure of the information at issue would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to Infrastructure Ontario. Accordingly, I find that the information at issue (except for section 1.1(d) of Schedule 13 and section 1.1(i) of Schedule 31) was not "supplied" for the purposes of section 17(1) of the *Act*.

In confidence

[26] In Order PO-3011, I limited my consideration of whether records were supplied "in confidence" to the information which I had already concluded were "supplied". As I have now found that section 1.1(d) of Schedule 13 and section 1.1(i) of Schedule 31 have also met the "supplied" component of part two of the section 17(1) test, I will consider whether these two pieces of information were supplied "in confidence". In doing so, I adopt the relevant considerations and arguments on this issue set out in paragraphs 40-50 of Order PO-3011.

[27] In my view, there is a reasonable basis for the expectation of confidentiality for these two additional pieces of information that I have found to have been supplied by the affected party to Infrastructure Ontario. I have arrived at this conclusion based on: (i) the submissions provided by the affected party; (ii) the sensitive nature of the information in question; and (iii) the fact that this information would have been generated by the affected party separate from any negotiations with Infrastructure Ontario. I, therefore, find that the redacted information in section 1.1(d) of Schedule 13 and section 1.1(i) of Schedule 31 was "supplied in confidence" for the purpose of part 2 of the test under section 17(1) of the *Act*.

Part 3: Harms

[28] In Order PO-3011, I also limited my analysis of whether records give rise to a reasonable expectation of harm to the information which I had already concluded met the first two parts of the section 17(1) test. As I have now found that section 1.1(d) of Schedule 13 and section 1.1(i) of Schedule 31 have also met the first two parts of the section 17(1) test, I will consider whether the disclosure of these two pieces of information meets the harms component of that same test. In doing so, I adopt the relevant considerations and arguments on this issue set out in paragraphs 52-61 of Order PO-3011.

[29] After reviewing the affected party's representations regarding harm and the arguments of the other parties to this appeal on this issue, I find that the disclosure of the information in section 1.1(d) of Schedule 13 and section 1.1(i) of Schedule 31 could reasonably be expected to prejudice significantly the competitive position or interfere

significantly with the contractual or other negotiations of the affected party, resulting in undue loss to the affected party and gain to other competitors.

[30] Consequently, in addition to the portions of the records I found exempt under section 17(1) in Order PO-3011, I find that section 1.1(d) of Schedule 13 and section 1.1(i) of Schedule 31 are also exempt from disclosure under section 17(1).

ORDER:

1. I reverse my finding in Order PO-3011 that section 1.1(d) of Schedule 13 and section 1.1(i) of Schedule 31 were not exempt under section 17(1) of the *Act*.
2. I uphold my decision to order Infrastructure Ontario to disclose the severed portions of Schedule 13 (except for section 1.1(d)), Schedule 14; Schedule 16; Schedule 29 (except sections 1.5, 1.7, 1.16 and 3.7(5); and Schedule 31 (except Appendix A and section 1.1(i)).
3. I order Infrastructure Ontario to disclose the severed portions set out in paragraph 2 of this order by **May 28, 2012** but not before **May 23, 2012**.

Original Signed by: _____
Brian Beamish
Assistant Commissioner

_____ April 20, 2012