Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3208

Appeal PA12-154

North York General Hospital

May 30, 2013

Summary: The hospital received a request for access to the total cost of a management agreement which it entered into with a third party service provider (the appellant). The hospital decided to disclose a document setting out the total cost of the contract to the requester. The appellant appealed this decision on the basis that the information was exempt under the mandatory third party information exemption in section 17(1). In this order, the hospital's decision to disclose the record is upheld as the section 17(1) exemption does not apply. The information in the record was not "supplied" to the hospital by the appellant within the meaning of section 17(1).

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

Orders and Investigation Reports Considered: Orders PO-2435, PO-2453, MO-2715.

Cases Considered: *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.).

OVERVIEW:

[1] North York General Hospital (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> Total cost of the [named company] management contract at the Seniors' Health Centre including Administrator salary and benefits.

[2] The hospital notified the named company (the appellant) pursuant to section 28 of the *Act* and following receipt of its representations respecting access, the hospital issued a decision to disclose the responsive information to the requester. The appellant appealed the decision to disclose the information to this office. As mediation was not successful, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. Initially, I sought and received representations from the sole party who is resisting disclosure, in this case, the appellant. I provided a complete copy of those representations to the requester, who also provided submissions. I then shared the requester's representations with the appellant, which submitted further representations by way of reply.

[3] In this order, I uphold the hospital's decision to disclose the information at issue to the requester.

RECORDS:

[4] The record at issue is a one-page document containing the responsive information.

DISCUSSION:

[5] The sole issue for determination in this appeal is whether the information at issue is subject to the mandatory third party information exemption in section 17(1) of the *Act*

[6] Section 17(1) states, in part:

> 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

[7] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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.[2]

[8] 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

[9] The appellant submits that the record contains both commercial and financial information describing its relationship with the hospital. It argues that the record describes its provision of services to the hospital and the compensation it will receive in exchange. The requester's representations rely on the fact that the hospital has determined that this information ought to be disclosed.

[10] Based on my review of the contents of the record, I agree with the appellant that it contains both commercial information, as it relates to the provision of services to the hospital, and financial information, as it describes in detail the actual value of the contract between the appellant and the hospital. Accordingly, I conclude that the first part of the test under section 17(1) has been satisfied.

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[1] *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.).
[2] Orders PO-1805, PO-2018, PO-2184, MO-1706.

Supplied

[11] 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].

[12] 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].

[13] 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.[3]

[14] 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

[15] The appellant argues that the record contains information which would reveal the "manner of calculating its base fee for services provided and the cost of the services based upon that formula" which it provided to the hospital in response to the RFP. It argues that the formula for calculating the base fee was not negotiated "and cannot be said to have been mutually generated by the parties." The appellant goes on to add, however, that:

> [W]hile certain performance criteria details (which were not contained in [its] 2-page pricing formula document) were later mutually agreed upon, the formula itself was provided, not negotiated, and the figures that were

[3] 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.).

> ultimately used in the contract between [the hospital and the appellant] and the ultimate cost of the contract reflect the application of [the appellant's] formula.

[16] The appellant also suggests that the disclosure of the record would reveal or permit the drawing of accurate inferences with respect to the information actually provided by the appellant to the hospital. Specifically, it argues that disclosure of the information in the record would enable a knowledgeable reader (such as one of its competitors) to draw accurate inferences with respect to its pricing formula "by combining the cost information with [the hospital's] published budget information and taking into consideration the contract cost in this case does not include the Administrator's salary and benefits."

[17] The appellant also relies on the inferred disclosure and immutability exceptions described above. It argues that its pricing formula has been developed over many years and the disclosure of the record would disclose not only the actual amount which it is paid on a yearly basis for its services, "but also the immutable financial model and formula for how [it] conducts its business."

[18] With respect to the "in confidence" aspect of the second part of the test under section 17(1), the appellant relies on the language contained in section 10.3.1 and 2 of the Request for Proposals (the RFP) issued by the hospital. These provisions instructed bidders to indicate which portions of their proposals they wished to be kept confidential. In its submission in response to the RFP, the appellant indicated that it:

> . . . specifically segregated that information relating to its proposed financial relationship with [the hospital] from the remainder of its RFP response and marked it as confidential. In particular, the pricing information was omitted from [its] main (83-page) response and placed in a separately submitted 2-page document marked "Confidential" on its face and delivered with a covering letter . . . which expressly stated that the pricing information was to be held confidential.

[19] On this basis, the appellant submits that it had "a reasonable expectation that its proposed financial relationship with [the hospital] would be kept confidential. . . "

[20] The requester argues that the provisions of the contract between the appellant and the hospital which are reflected in the record "have been mutually generated and not 'supplied' by [the appellant]." In support of this contention, the requester relies upon a statement issued to her by the hospital's President and CEO during the course of the negotiation of its contract in February 2011 with the appellant in which he stated: "[W]e are still in the negotiation process with the preferred vendor. This process will not be completed by February 24. Once the negotiation is completed, you will have access to any information that is publicly reportable."

Analysis and findings

[21] Numerous decisions of this office have considered whether pricing information contained in a contract or bid proposal meets the "supplied" portion of the section 17(1) test. The most recent line of decisions have clearly established that pricing information that is contained in a third party bid, which is then accepted by an institution and included in a contract for services, is "negotiated" information. By accepting the pricing as stated in the bid and including it in a contract for services, the institution has agreed to it and the pricing information constitutes the essential terms of a negotiated agreement.[4]

[22] 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. After carefully reviewing the records and representations, he rejected that argument and concluded 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.[5]

[23] Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part two of the test under section 17(1) (the equivalent to section 10(1) in the provincial *Act*) 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 PO-2453 contained the successful bidder's pricing for various components of the services to be delivered as well as the total price

[4] See PO-2435, PO-2453 and MO-2715
[5] Order PO-2435, page 7.

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), Adjudicator Corban stated:

> 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.[6]

[24] The above excerpt from Order PO-2453 emphasizes that the exemption in section 17(1) is intended to protect information belonging to an affected party that *cannot* change through negotiation, not that which could, but was not, changed.[7]

[25] Finally, in Order MO-2715, Assistant Commissioner Beamish revisited this issue in the context of pricing information contained in a contract between a government agency and the selected vendor for the installation of red light cameras in the city of Hamilton. In finding that the pricing information did not meet the supplied test under section 10(1), which is the equivalent provision to section 17(1) in the municipal *Act,* Assistant Commissioner Beamish states:

> Following my reasoning in Order PO-2435, I find that the "Item Unit Costs" and "Estimated Unit Costs" in Schedule A and the "Unit Costs" and "Total Costs" from the Price Detail Form cannot be considered to have been "supplied" to the city. Even though the affected party claims that there was no negotiation over the price, the fact that the city had the

[6] Order PO-2453, page 7.
[7] 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.

> option to accept or reject the affected party's bid in response to the RFP leads me to conclude that the costs were subject to negotiation.
>
> Furthermore, I am not convinced that the disclosure of the information withheld from Schedule A and the Price Detail Form would somehow permit an individual to accurately infer the non-negotiated confidential information that the affected party supplied to the city. According, based on my review of Schedule A and the Price Detail Form, I find that the information withheld reflects the negotiated agreement between the city and the affected party for the provision of services to operate the red light cameras.[8]

[26] I accept the approach taken in the above decisions and apply it in this case. While the appellant argues that the pricing information at issue was not the subject of negotiations between the parties, I find that this information represents negotiated terms since the hospital had the option to accept or reject the appellant's pricing in consummating an agreement. As well, with regard to the appellant's argument that revealing the pricing information would reveal its long-standing pricing formula, I am not convinced that this is the case. In particular, I find that while the contract value amounts are set out in the record, the appellant has not established that the disclosure of this information would provide insight into the appellant's underlying formula for the provision of similar services.

[27] Accordingly, having found that the information at issue in the record was not supplied within the meaning of that term in the section 17(1) exemption, the appellant has not met part two of the test for its application. As all parts of the test for the exemption under section 17(1) must be satisfied, the information at issue in the record is not exempt and must be disclosed, in full, to the requester.

ORDER:

1. I uphold the hospital's decision to disclose the record to the requester and order it to do so by **July 5, 2013,** but not before **June 28, 2013**.

[8] Order MO-2715, page 13.

2. In order to verify compliance with order provision 1, I reserve the right to require the hospital to provide me with a copy of the record which is disclosed to the requester.

Original signed by: May 30, 2013
Donald Hale
Adjudicator