Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3364

Appeal PA12-534

University of Toronto

July 23, 2014

Summary: The University of Toronto received a request under the *Freedom of Information and Protection of Privacy Act* for access to records relating to the provision of food services to its Mississauga campus. The university located a contract and two amending agreements. Following notification of an affected party, the university issued a decision granting full access to the responsive records. The affected party appealed the university's decision to disclose the records, claiming that the mandatory exemption for third party commercial information at section 17(1) of the *Act* applied to discrete portions of the information. This order finds that the mandatory exemption at section 17(1) of the *Act* applies to portions of the records, but that it does not apply to exempt the majority of information from disclosure. The university's decision to disclose the information to the requester is upheld, in part, with portions of the records ordered withheld.

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-2226, PO-2371, PO-2384, PO-2435, PO-2632, PO-3032, and PO-3286.

Cases Considered: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.); 2005 ON SCDC 24249 (CanLII), leave to appeal dismissed, Doc. M32858 (C.A.); *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475; 298 D.L.R. (4th) 134, (Div. Ct.), 2008 ON SCDC 45005 (CanLII); *Merck Frosst Canada Ltd v. Canada*

(Health), 2012 SCC 3 (CanLII) and, *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII).

OVERVIEW:

[1] The University of Toronto (the university) received a request under the *Freedom of Information and Protection of Privacy Act* for access to records relating to the provision of food services to its Mississauga campus. The requester specifically sought access to the following information:

> Records of the exclusivity contract between [named company] and the University of Toronto. Contract was signed in 2004 and will expire in 2014.

[2] The university located the responsive records, a contract and two amending agreements relating to the provision of food services to the university. In accordance with section 28 of the *Act,* the university notified the company, providing it with an opportunity to make representations on the disclosure of the records. The company made submissions to the university opposing the disclosure of the information contained in the records.

[3] The university considered the company's representations and subsequently issued a decision to the requester granting full access to the responsive records, subject to the payment of a fee. The university advised the company of its decision to grant access to the records, in their entirety, and also of its right to appeal the decision to this office.

[4] The company, now the appellant, appealed the university's decision to grant access to the responsive records.

[5] During mediation, in an attempt to resolve the appeal, the appellant advised that it was willing to disclose a redacted version of the contract to the requester with all financial and commercial terms omitted. The contract, as redacted by the appellant, was sent to the university, and subsequently forwarded to the requester. As a result, the information that has already been disclosed to the requester is no longer at issue.

[6] The requester subsequently advised the mediator that the redacted contract did not contain the information that they were seeking and that they wished to pursue access to the entire contract, including attachments.

[7] As mediation could not resolve the appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. In my inquiry into this appeal, I sought and received representations from the appellant, the university and the requester. The appellant's representations were shared with the

university and the requester in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.* The representations submitted by the university and the requester were brief. I deemed that it was not necessary for them to be shared with the appellant.

[8] The sole issue to be determined in this appeal is whether the mandatory exemption for third party commercial information found at section 17(1) of the *Act* applies to the information that remains at issue in the responsive contract and amending agreements.

[9] In this order, I uphold, in part, the university's decision to disclose the responsive records to the requester. For the reasons that follow, I find that the mandatory exemption at section 17(1) does not apply to some of the information at issue, but does apply to other portions of the records.

RECORDS:

[10] The records remaining at issue in this appeal consist of portions of a contract and two amending agreements that the appellant submits are exempt pursuant to the mandatory exemption at section 17(1) of the *Act*.

DISCUSSION:

Does the mandatory exemption at section 17(1) apply to the records?

[11] 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.

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

[13] 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

[14] The types of information listed in section 17(1) have been discussed in prior orders. Those that might be relevant to the current appeal are as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and

[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.)]. 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.

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2]

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[3]

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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]

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.[6]

Representations

[15] The appellant submits that the contract and amending agreements contain trade secrets, commercial, financial, technical and labour relations information.

[16] The appellant points to specific portions of the records and submits that they contain commercial information as they describe its business activities, its business model and details about how it will deliver food services to the university. It submits that the information also outlines how services are to be provided and the roles and responsibilities of each of the parties.

[17] The appellant submits that other portions of the records contain financial information because they relate to financing or money matters and contain information that is integral to its business model and pricing.

---

[2] Order PO-2010.
[3] *Supra,* note 2.
[4] *Ibid.*
[5] Order P-1621.
[6] Order PO-2010.

[18] The appellant also submits that disclosing portions of the records would reveal its trade secrets. It submits that it uses specialized techniques to fulfill its obligations to the university that it developed after many years in the business of food preparation and distribution which may be inferred from the terms of the agreement. It submits that "confidential formula, programmes, methods, techniques, and processes for delivering food services are reflected in the agreement" and disclosure would reveal its unique blend of components for the operation of a successful food services business. It submits generally that this information is (i) used in its business (ii) not generally known in that trade of business (ii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain secrecy. It submits that there is inherent value in this information which is confirmed by the very reasons that it is being sought through an access request.

[19] The appellant further submits that the records contain labour relations information and technical information.

[20] The university submits succinctly that it agrees with the appellant's position that the disclosure of the information in the contract and amending agreements would reveal commercial and financial information.

[21] The requester did not specifically address part one of the test in its representations or make submissions on the type of information that the records may contain.

Finding

[22] Having considered the representations of the parties, as well as the records themselves, I find that they contain information that meets the first part of the three-part test in section 17(1). The records describe in detail the terms of a commercial transaction between the appellant and the university; Therefore, they clearly contain "commercial information" that relates to the buyers, sellers or exchange of merchandise or services. They contain the specifics of a commercial arrangement whereby the appellant provides food services to the university.

[23] I also accept that the records reveal "financial information" as that term has been defined by this office in previous orders as they contain the financial details of the commercial arrangement between the parties, including information regarding the remuneration and the distribution of profits.

[24] As I have found that the records reveal information that is of a commercial and financial nature, I am satisfied that the information for which section 17(1) is claimed meets the requirement set out in part one of the test for the application of that exemption. In the circumstances, it is not necessary for me to make a determination on whether they also contain information that qualifies as a trade secret or any of the

other types of information described in section 17(1), including technical or labour relations information

[25] As a result, I find the first part of the section 17(1) test has been established.

Part 2: supplied in confidence

[26] In order to satisfy part 2 of the test, the appellant must have supplied the information to the university in confidence, either implicitly or explicitly.

Supplied

[27] 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.[7] 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.[8]

[28] 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.[9]

[29] 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.[10]

Representations

[30] The appellant submits that previous orders issued by this office have interpreted the "supplied" component of the second part of the section 17(1) test too narrowly. It

---

[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] 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 and 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.).
[10] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* , *ibid.*

refers to the decision of the Supreme Court of Canada in *Merck Frosst Canada Ltd v. Canada (Health)*[11] and submits that the Court unequivocally held that it is the content, rather than the form of the information, that must be analyzed in order to decide whether the information was "supplied," which is a question of fact. It cites from paragraphs 157 and 158 of that decision, where the Court stated:

> A third principle is that whether or not information was supplied by a third party will often be primarily a question of fact. For example, if government officials correspond with a third party regarding certain information, it is possible that the officials have prior knowledge of the information gained by their own observation or other sources. But it is also possible that they are aware of this information because it was communicated to them beforehand by the third party. The mere fact that the document in issue originates from a government official is not sufficient to bar the claim for exemption. But, in each case, the third party objecting to disclosure on judicial review will have to prove that the information originated with it and that it is confidential.
>
> To summarize, whether confidential information has been "supplied to a government institution by a third party" is a questions of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue. The exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.

[31] The appellant also submits that in paragraphs 93 to 95 of the *Merck* decision the Court held that the Court of Appeal in that case erred when it imposed a heavy burden on the third party to establish the information at issue was "supplied in confidence." The appellant submits that in light of this decision, previous jurisprudence holding that "negotiated" information generally does not fall within the meaning of "supplied" is now "of limited use."

[32] The appellant argues that the narrow approach previously taken by this office that holds that contracts do not generally qualify for exemption fails to protect third parties from the harms that the exemption was intended to protect against and that the proper approach to the interpretation of section 17(1) requires consideration only of whether the information at issue is treated as confidential, the disclosure of which would reasonably be expected to lead to the enumerated harm. The appellant submits that this approach is consistent with the underlying purpose of the section, the *Williams*

[11] 2012 SCC 3 (*Merck).*

Commissioner Report[12] which it submits made clear that the exemption should not be read in an overly restrictive matter, and the French version of the *Act* which it submits does not reference "supplied" but refers only to its confidential character.

[33] Turning specifically to the information at issue in the current appeal, the appellant submits that it supplied the information at issue to the university in confidence in response to a request for proposals issued by the university with respect to its food service requirements. It submits that through the proposal process, it provided the university with confidential information upon which the agreement itself (including the amending agreements) was negotiated. The appellant submits that disclosure of the information that it has identified would permit an outside party to reasonably infer the existence and substance of the confidential information that formed the foundation for the terms of the agreement. As a result, this would permit a competitor to accurately infer non-negotiated confidential information, including its business philosophy, model, and terms by which it bids on a contract. It also submits that disclosure of the financial terms set out in the agreement will allow both public and private sector purchasers to accurately infer information that will be used to establish a benchmark or reference for pricing.

[34] The appellant concludes its representations by asserting that this office has taken a restrictive interpretation of "supplied" that is not in keeping with the *Act* and suggests that the proper interpretation requires consideration only of whether the disclosure of information that is treated as confidential would reasonably be expected to lead to the enumerated harms.

[35] The university submits that the contract and the amending agreements were negotiated and, therefore, mutually generated between the university and the appellant. It submits that it considered whether any of the information fell under the "inferred disclosure" and/or "immutability" exception and concluded that it did not. Therefore, it states, that it concluded that the records at issue were not supplied by the appellant and did not qualify for exemption pursuant to section 17(1) of the *Act*.

[36] The requester did not specifically address whether the information at issue was "supplied" to the university by the appellant.

Finding

[37] I will first address the appellant's position that this office's interpretation of part two of the three-part test for the application of section 17(1) is restrictive and ultimately inconsistent with the wording of the *Act* itself and its legislative history. Specifically, the appellant argues that the *Williams Commission Report* and the French version of the *Act* should be considered when contemplating the concept of "supplied"

[12] Ontario, The Report of the Commission on Freedom of Information and Individual Privacy, *Public Government for Private People,* vol. 2 (Toronto: 1980) (*Williams Commission Report*).

in part two of the section 17(1) test and that the Supreme Court of Canada's decision in *Merck* suggests that previous jurisprudence holding that "negotiated" information generally does not fall within the meaning of "supplied" is now "of limited use."

[38] Previous orders issued by this office, as well as decisions issued by the courts, have addressed arguments that are similar to those raised by the appellant in this appeal.[13] In Order PO-3032, former Senior Adjudicator John Higgins considered similar arguments raised by one of the affected parties in that appeal. Following his consideration of the affected party's arguments he stated:

> One of the drug manufacturers argues that this jurisprudence about the meaning of "supplied," and in particular, its exclusion of the information that is the product of negotiations, must be rejected because the word "supplied" does not appear in the French language version of the *Act*. The same argument was rejected by the Divisional Court in *Canadian Medical Protective Association v. John Doe.*[14] The Court stated:
>
> > In any event, the French version of s. 17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s. 17(1) incorporates the idea that the exemption is designed to protect information "received from" third parties, a notion that conforms with the concept of "supplied." Thus, the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.
>
> This same manufacturer also alleges that this interpretation is overly narrow; is inconsistent with the legislative history of the *Act*, which counsels against a restrictive application;[15] and is inconsistent with the purpose of avoiding interference with negotiations. I disagree. In addition to being upheld in *Canadian Medical Protective Association,* this approach was also expressly upheld by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade).*[16] In my opinion, this is not a restrictive interpretation, but rather, one that respects the purposes of the section as reflected in the extract from *Canadian Medical Protective Association* that I have just quoted. As well, the legislative history implicitly accepts the requirement that in order to be exempt, information must have been "supplied," given its advice to enact a broad exemption for information "*submitted* by a business to the government …" (emphasis added). Moreover, the purpose of avoiding

[13] Orders MO-2164 and PO-3032.
[14] *Supra,* note 16.
[15] *Williams Commission Report, supra* note 18, v. 2 at 314.
[16] *Supra,* note 1.

> interference with negotiations relates to ongoing or future negotiations, which this interpretation does not affect, since it deals with the contractual results of negotiations that have concluded.

[39] I agree with Senior Adjudicator Higgins' reasoning. I recently followed it in Order PO-3286 and adopt it for the purposes of this appeal.

[40] Additionally, as previously noted, this office has generally found that, absent evidence to the contrary, the content of a negotiated contract involving a government institution and a third party is presumed to have been generated in the give and take of negotiations and therefore not "supplied" for the purposes of exemption under section 17(1). This interpretation of the "supplied" component of the section 17(1) test in the context of contracts was recently considered again and upheld by the Divisional Court in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*[17] In response to an argument that the approach approved in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)* was no longer good law in light of a decision of the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*,[18] the Court stated:

> *Merck* does not alter the law on this point. Rather, the presumption that contractual information was negotiated and therefore not supplied is consistent with *Merck.* A party asserting the exemption applies to contractual information must show, as a matter of fact on a balance of probabilities, that the "inferred disclosure" or "immutability" exception applies.

[41] I adopt the reasoning of the Divisional Court for the purposes of this appeal.

[42] I have considered the Divisional Court's findings in *Canadian Medical Protective Association v. John Doe* and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* Senior Adjudicator Higgins' reasoning in Order PO-3032, the appellant's representations on the interpretation of "supplied", the relevant portions of the *Williams Commission Report* and the French version of section 17(1) of the *Act*. I find that I have not been provided with sufficient evidence for me to determine that the concept of "supplied" in part two of the section 17(1) test should be interpreted any differently than it has been in prior orders, particularly given that line of reasoning has been consistently upheld by the courts. Accordingly, I find that in order for part two of the section 17(1) test to be established in this appeal, the information must have been directly "supplied" to the university by the appellant.

[43] Based on my review of the contract between the university and the appellant, and the amending agreements to that contract and having considered the

[17] 2013 ONSC 7139 (CanLII).
[18] 2012 SCC 3 (CanLII); [2012] 1 S.C.R. 23.

representations of the appellant and the requester, I find that none of the information contained in those records qualifies as having been "supplied" as required by part two of the section 17(1) test.

[44] In Order PO-2632, Adjudicator Daphne Loukidelis set out this office's approach with respect to the determination of whether information has been supplied for the purposes of section 17(1) in the context of an agreement. She stated:

> Many previous orders have reached the conclusion that contracts between government and private businesses do not reveal or contain information "supplied" by the private business since a contract is thought to represent the expression of an agreement between two parties. Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1) [Order PO-2018].
>
> In Order PO-2226, former Assistant Commissioner Tom Mitchinson considered the appeal of a decision regarding a request for access to various sale agreements entered into by the Ontario government and Bombardier Aerospace relating to de Havilland Inc. As in the present appeal, the records at issue in Order PO-2226, consisted of a complex, multi-party agreement with other smaller agreements that flowed from the main one, all of which were multi-faceted with customized terms and conditions. In that appeal, the former Assistant Commissioner was not persuaded by the evidence that the records were "supplied" to the Ministry or would reveal information actually supplied to the Ministry, and had the following to say about the complex multi-party agreement at issue:
>
> > [I]t is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as "the informational assets of non-government parties", but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".
>
> Further, Adjudicator Steve Faughnan provided the following summary with respect to the interpretation of "supplied" in Order PO-2384:
>
> > As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except

> in unusual circumstances, **agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation.** In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
>
> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1) … **The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed** [see also *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.), Orders PO-2433 and PO-2435] [emphasis added].

[45] I agree with the reasoning articulated in Order PO-2632 and the orders excerpted above, and will apply it in my analysis of the records before me.

[46] Having considered the representations of the parties and having reviewed the portions of the contract and the amending agreements carefully, I am satisfied that the terms of these agreements were mutually generated and, therefore, do not qualify as having been "supplied" for the purposes of part two of the section 17(1) test.

[47] The records are executed agreements setting out the terms by which the appellant is to provide food services to the university's Mississauga campus. From the appellant's representations, including an affidavit sworn by its Vice President, Operations, the appellant does not appear to dispute the fact that the records were negotiated. As explained in Order PO-2384 by Adjudicator Faughnan, except in unusual circumstances, agreed upon terms of a contract are considered to be the product of a negotiation process and not "supplied" for the purposes of section 17(1) whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. Additionally, in Order PO-2435, Assistant Commissioner Brian

Beamish observed that an institution's option of accepting or rejecting a consultant's bid is a "form of negotiation."

[48] In my view, the records at issue clearly fall within the general rule that has been well established by this office and upheld by the courts that the provisions of a contract are treated as having been mutually generated, rather than supplied. Accordingly, I find that these agreements were "negotiated" between the parties and therefore, subject to the possible application of either of the two exceptions to the general rule, cannot be considered to have been "supplied" to the university by the appellant for the purposes of the second part of the section 17(1) test.

[49] While I do not accept that the majority of the information at issue in the contract and amending agreements falls under either of the two exceptions to the general rule that the contents of a contract do not qualify as having been "supplied" for the purposes of section 17(1), I find that a small portion of information contained in the first amending agreement falls under the "immutability" exception.

[50] As noted above, 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.[19] On a review of the portions of the records that the appellant objects to being disclosed, I accept that the dollar amount at paragraph 5(b) of page 3 of the first amending agreement and Schedule A to that agreement, in its entirety, falls within the "immutability" exception. The dollar amount at paragraph 5(b) and the information in Schedule A, which breaks down that dollar amount, represents money paid by the appellant to outside parties, not to the university, and represents fixed, underlying costs that it incurred in order to provide the services agreed to in the contract. In my view, given that this information is not susceptible of change and not negotiable by the parties, it falls within the "immutability" exception. Therefore, I find that it can be considered to have been "supplied" by the appellant to the university within the meaning of part two of the section 17(1) test.

[51] With respect to the other information at issue, I do not accept that any of it consists of the appellant's operating philosophy or any other information that can be said to be "immutable."

[52] I also do not accept that the disclosure of any of the other information at issue would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the institution, thereby meeting the "inferred disclosure" exception. The appellant submits that disclosure of specific portions of the records would allow its competitors to accurately infer non-negotiated information such as its confidential business philosophy, strategies and plans regarding the provision of food services. Based on my review of the agreements themselves, as

---

[19] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* , *ibid.*

well as the representations submitted by the appellant, there is insufficient evidence to support such a conclusion. I do not accept that any of the other information at issue consists of the appellant's operating philosophy or any other information that can be said to be "immutable." From my review of the agreements themselves, with the exception of the dollar amount in section 5(b) of the amending agreement and the affiliated Schedule A, the information that they contain is negotiated information, that was agreed upon by both parties and does not qualify as underlying, non-negotiated confidential information supplied by the appellant to the university.

[53] I have found that, with the exception of section 5(b) of the first amending agreement the affiliated Schedule A, none of the remaining information in the agreements falls under either the "immutability" or the "inferred disclosure" exceptions. As a result, it does not qualify as having been "supplied" to the university by the appellant for the purposes of part two of the section 17(1) test. As all parts of the three-part test must be established for the exemption at section 17(1) to apply, I find that it does not. Therefore, I uphold the university's decision with respect to this information and, as no other exemptions have been claimed, I will order it disclosed to the requester.

[54] The only portions of the records at issue that I have found to have been "supplied" within the meaning of part two of the section 17(1) test are the dollar amount identified in paragraph 5(b) of page 3, of the first amending agreement and Schedule A to that agreement. Consequently, I will now go on to examine whether that information was supplied "in confidence."

In confidence

[55] 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.[20]

[56] 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;

[20] Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access; and

- prepared for a purpose that would not entail disclosure.[21]

Representations

[57] The appellant submits that it entered into the agreement with the understanding that the information that it provided to the university was supplied "in confidence." It argues that this was implied by the commercial context of the agreement, its relationship with the university and the confidentiality surrounding the Request for Proposal process, as well as the contract negotiation process. It further submits that the agreement includes a confidentiality clause and that this office has held that the presence of such confidentiality clause, even if not binding, is evidence of an expectation of confidentiality.[22] The appellant points out that although the confidentiality clause does not state that it is subject to the *Act*, the *Act* was not applicable to universities at the time the original agreement was entered into and the subsequent amending agreements did not alter that broad confidentiality protection.

[58] The appellant concludes by stating that it consistently treated the agreement and the terms and conditions therein as confidential and in a manner that indicates a concern for its protection. It submits that the portions of the records that it requests to have withheld are not available from sources to which the public has access.

[59] Neither the university nor the requester make specific representations on whether the information at issue was supplied "in confidence" by the appellant.

Finding

[60] Having considered the representations and the information at issue, I find that the appellant has established that it had a reasonably held expectation of confidentiality with respect to the limited amount of information that I have found to have been supplied to the university. I accept that this information has not been, nor was intended to be, publicly disclosed and is not available from sources to which the public has access. In my view, given the sensitive, financial nature of the information, which consists of the total amount of monies paid to other parties in order to enable the appellant perform the services agreed to in the contract with the university, the appellant had a reasonably held, implicit expectation of confidentiality with respect to this specific information.

[21] Orders PO-2043, PO-2371, PO-2497.
[22] Order PO-1875.

[61] Accordingly, I find that the dollar amount listed in paragraph 5(b) on page 3 of the first amending agreement and Schedule A to that agreement, were "supplied in confidence" within the meaning of the section 17(1) test and part two has been established for that information. I must now consider part three of the test and determine whether the disclosure of this limited information that I have found to have been "supplied in confidence" could reasonably be expected to give rise to any of the harms enumerated in section 17(1).

Part 3: harms

[62] This part of the test for exemption under section 17(1) is based on a conclusion that disclosure of the information at issue may result in one of the harms described in that section. As noted above, information of third parties is exempt if disclosure "could reasonably be expected to" lead to those harms.

[63] This office has stated that the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[23]

[64] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*. The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[24]

Representations

[65] The appellant submits that disclosure of portions of the records at issue could reasonably be expected to prejudice significantly its competitive position (section 17(1)(a)), result in similar information not being supplied to the institution (section 17(1)(b)), and result in an undue loss to itself and a correlative undue gain to its competitors (section 17(1)(c)). The appellant's representations focus on how the disclosure of pricing and terms of service could reasonably be expected to give rise to these enumerated harms.

[66] The appellant submits that disclosure of portions of the records at issue would prejudice its competitive position (section 17(1)(a)). It submits that it operates in a highly competitive marketplace and disclosure would provide a competitor with information regarding its strategies for food services, how its business is structured and

---

[23] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[24] Order PO-2020.

operates. It submits that disclosure of this type of information would permit a competitor to "springboard the planning, promotion and launch of its operation instead of having to research and develop its own plan" which would result in a competitive loss to it, including the loss of sums already invested, potential customers, and future profits. It submits that disclosure would allow a competitor to know the financial terms offered to the university and put that competitor in a position to undercut a proposal by the appellant in future negotiations. It also submits that it prices differently in different competitive markets and also reflects the market conditions at the time the agreement was reached. Accordingly, it submits that if financial terms were disclosed they will set a benchmark for pricing or will allow competitors to infer confidential proprietary information and this will negatively affect the appellant's negotiating position in the future.

[67] The appellant also submits that if portions of the records at issue were disclosed, similar information will no longer be supplied (section 17(1)(b)). It submits that were the information disclosed it would consider restricting the type and amount of information that it provides to a university in the bid process for food services. The appellant submits that it is in the public interest to ensure that it feels free in giving its best and most creative proposals in order to ensure that the university can run its food services on a safe, efficient and quality basis. It submits that were the information at issue disclosed it, "will be less likely to, and indeed would be forced not to, supply such confidential information" to public institutions in the future.

[68] Finally, the appellant submits that disclosure of portions of the agreement could reasonably be expected to result in undue financial loss within the meaning of section 17(1)(c), resulting from:

- competitors' knowledge of the approach used by the appellant in contractual negotiations;

- interference with the appellant's contractual or other negotiations with purchasers of its service; and

- the appellant's inability to offer the same type of terms and conditions in similar future agreements.

[69] The university makes no submissions on the reasonable expectation of harm as it takes the position that none of the information at issue meets part two of the section 17(1) test.

[70] The requester submits that the appellant did not provide sufficiently detailed evidence to support the reasonable expectation of any of the harms listed in section 17(1). It submits that its purpose in seeking this information is to examine the institutional spending in the interest of student government and is not an attempt to give the appellant's competitors any advantage.

Finding

[71] Having carefully reviewed the only information remaining at issue, the dollar amount listed in paragraph 5(b) on page 3 of the first amending agreement and Schedule A to that agreement, in its entirety, I am sufficiently persuaded that the disclosure of this information could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the appellant (section 17(1)(a)), resulting in undue loss to the appellant and gain to other competitors (section 17(1)(c)).

[72] In my view, the appellant has provided detailed and convincing evidence to demonstrate how the disclosure of this specific information could reasonably be expected to result in any of the types of harms described in sections 17(1)(a) and (c). The information that remains at issue represents the fixed, underlying costs incurred by the appellant and, I am sufficiently persuaded that disclosure of this information could be used by its competitors to undercut its pricing when competing for future contracts.

[73] Accordingly, I find that part 3, the harms component of the section 17(1) test has been established for the limited portions of the records that I have found to have been supplied in confidence by the appellant to the university, specifically, the dollar amount listed in paragraph 5(b) on page 3 of the first amending agreement and Schedule A to that agreement, in its entirety. This information should not be disclosed.

ORDER:

1. I do not uphold the university's decision to disclose the dollar amount identified in paragraph 5(b) of page 3 of the first amending agreement and Schedule A to the first amending agreement, in its entirety, and order it not to disclose this information to the requester.

2. I uphold the university's decision to disclose the remaining information at issue to the requester and order it to do so by **August 28, 2014** but not before **August 22, 2014.**

3. 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 2.

Original signed by: July 23, 2014
Catherine Corban
Adjudicator