

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3450

Appeal PA13-451

Cornwall Community Hospital

January 19, 2015

Summary: The requester sought access to the pricing list for the contracted provision of linen services by a third party to Cornwall Community Hospital. The hospital granted full access to the pricing list. The third party appealed the hospital's decision, arguing that its pricing information was exempt under the mandatory third party information exemption in section 17(1). In this order, the adjudicator upholds the hospital's decision that section 17(1) does not apply, and orders the disclosure of the records to the requester.

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: Order PO-2371

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 (B.C.S.C.).

BACKGROUND:

[1] This order addresses an appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) regarding a request submitted to the Cornwall Community Hospital (the hospital) for access to information relating to a Request for Proposals pertaining to the provision of linen and laundry services. The requester was seeking the following information:

1. Awarded price accepted for General Linen;
2. Awarded price accepted for O.R. Linen, please include scrub suits and bundle pricing

[2] The hospital identified a schedule to the complete contract with a specific company as the responsive record and notified the company under section 28(1)(a) of the *Act* to provide it with an opportunity to make submissions respecting disclosure. The company provided submissions. The hospital subsequently issued a decision to the requester granting partial access to the record, while withholding portions it concluded were non-responsive to the request.

[3] The company, now identified as the (third party) appellant in this order, appealed the hospital's decision to this office. A mediator was appointed to explore resolution. During mediation, the original requester decided not to pursue access to the information severed on the basis of non-responsiveness, thereby removing this issue from the scope of the appeal. As the requester continued to seek access to the undisclosed information and the third party opposed such access under the mandatory third party information exemption section 17(1) of the *Act*, it was not possible to resolve the appeal through mediation. The appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry.

[4] I started my inquiry into the appeal by sending a Notice of Inquiry to the third party appellant, seeking representations on the application of section 17(1) of the *Act* to the record. Upon review of the representations received from the appellant, I concluded that it would not be necessary to seek submissions from the other parties.

[5] In this order, I find that section 17(1) of the *Act* does not apply to the record, and I uphold the hospital's decision to disclose it to the requester.

RECORDS:

[6] The record at issue in this appeal is titled "Schedule 2 – Pricing." It is a 12-page appendix to the agreement between the hospital and the third party appellant for the provision of laundry and linen services.

DISCUSSION:

Does section 17(1) apply to the pricing schedule for the appellant's contract with the hospital?

[7] The third party appellant claims that the pricing list is exempt under section 17(1) of the *Act*. Based on the representations provided, the appellant's opposition to disclosure appears to be based on sections 17(1)(a) or 17(1)(c), which state:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; ...

result in undue loss or gain to any person, group, committee or financial institution or agency...

[8] 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

[9] For section 17(1) to apply, the third party appellant 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.

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.) (*Boeing Co.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[10] All three parts of the test must be met for section 17(1) to apply.³

[11] For the reasons set out below, I find that section 17(1) does not apply to the record at issue in this appeal.

Part 1: type of information

[12] The first part of the test for exemption under section 17(1) requires that the record contain one of the listed types of information.

[13] The appellant submits that the information is the “service awarded price accepted for General Linen and the awarded price accepted for OR Linen,” which is financial, and also proprietary, in nature.

[14] The types of information listed in section 17(1) have been discussed in prior orders:

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.⁴

[15] Based on my review of the record at issue, I am satisfied that it contains financial information in the form of a detailed listing of the pricing and fees to be applied to the hospital’s payments to the appellant under the linen and laundry services contract. Accordingly, I find that part 1 of the section 17(1) test has been met for the record. I will now review whether it qualifies as having been “supplied” in confidence to the hospital for the purpose of part 2 of the test in section 17(1).

Part 2: supplied in confidence

[16] In order for me to find that the second part of the test under section 17(1) has been met, I must be satisfied by the evidence that the appellant “supplied” the information at issue to the hospital in confidence, either implicitly or explicitly.

³ See *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (Div.Ct.) and *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998) CanLII 7154 (Ont.CA). In the latter case, the Court stated that “[f]ailure to satisfy the requirements of any part of this test will render the s. 17(1) claim for exemption invalid.”

⁴ Order PO-2010.

Supplied

[17] The requirement that it be shown that the information was “supplied” to the institution reflects section 17’s purpose of protecting the informational assets of third parties.⁵ 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.⁶

[18] As I advised the third party appellant in seeking its representations, 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 in past IPC orders 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.⁷

[19] 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.⁸

Representations

[20] The appellant submits that the pricing information was supplied in confidence to the Cornwall Community Hospital. The appellant states that it regularly competes with other service providers for contracts with hospitals and long term care facilities, both in the region and throughout Ontario, and “any pricing information provided to any of our Customers is implicitly confidential.”

[21] At an earlier stage of the appeal, the appellant argued that the contractual pricing for the linen services falls under immutability exception because his company charges customers by the unit, rather than by weight. According to the appellant, this approach to pricing is “proprietary” due to its uniqueness in the industry. The appellant

⁵ Order MO-1706.

⁶ Orders PO-2020 and PO-2043.

⁷ 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. Loukidelis*, [2008] O.J. No. 3475 (Div. Ct.).

⁸ Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis* (cited above).

explains that it is "one of only a few in North America who bill on unit price which is something that is proprietary to our organization."

[22] With his representations, the third party appellant submitted six sets of RFP/RFQ materials relating to bids it submitted to municipalities, hospitals and seniors' residences.

Analysis and findings

[23] At issue in this appeal is the schedule to the linen services contract that contains the pricing charged to the hospital by the third party appellant for servicing the specified items for each of the five years of the contract.

[24] Section 17(1) protects sensitive business information in a contract only where it is demonstrably the same confidential "informational asset" originally supplied by a third party, and not where the evidence points to that same information representing the negotiated intention of the parties.⁹ Determining whether section 17(1) applies to protect the "informational assets" of a third party, therefore, requires a careful review of the quality and nature of the information in the particular circumstances of each appeal.

[25] In this appeal, the appellant argues that its pricing for the linen services contract was "supplied" to the hospital for the purpose of part 2 of the section 17(1) test because its unique, "proprietary," unit pricing brings the financial information within the scope of the immutability exception. I reject this submission. Based on my review of it, I conclude that the pricing information here is qualitatively indistinguishable from that contained in the type of supply contracts reviewed in past orders and found to have been negotiated, rather than "supplied." Regardless of the basis of the pricing, the appellant's representations do not persuade me that the pricing itself represents anything other than the end product of a negotiation process.¹⁰ Therefore, I find that the pricing was not "supplied."

[26] Further, as I noted above, the "immutability" exception applies to information that is immutable or is not susceptible of change. As discussed in past orders in this province and other Canadian jurisdictions,

... information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) [BC's equivalent to section 17(1) of the *Act*] is to protect information of the third party that is not susceptible of change in

⁹ Order MO-1450.

¹⁰ Order PO-2435.

the negotiation process, not information that was susceptible to change but, fortuitously, was not changed.¹¹

[27] Information about a third party such as its fixed costs (for example, overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract or its financial statements may qualify as "immutable."¹² The record in this appeal does not contain this type of information, and I find that the pricing information does not fit within the "immutability" exception. Additionally, there is no evidence before me that disclosure of the pricing terms of the linen services contract would reveal, or permit the drawing of accurate inferences with respect to, any underlying, non-negotiated confidential information supplied to the hospital by the appellant.¹³

[28] In summary, I find that the pricing information for the hospital's linen services contract reflects the contractually-confirmed intentions of the parties and that it was not "supplied." In this appeal, the pricing information at issue does not meet part 2 of the test for exemption under section 17(1). As all three parts of the section 17(1) test must be met, it is not necessary for me to review the confidentiality requirement of the second part or the third part of the test. I find that section 17(1) does not apply.

[29] Under the *Act*, institutions are required to provide access to information in their custody or control in accordance with the principles that information should be available to the public and that "necessary exemptions from the right of access should be limited and specific." The *Act* expressly recognizes that third party business information should be protected if it fits within the scope of the mandatory exemption in section 17(1). However, individuals or corporations doing business with government institutions must recognize that sometimes their business objectives are balanced with the concurrent objective of transparency in public matters. The potential for disclosure of such information is expressly acknowledged in several of the bid documents submitted by the third party appellant in this appeal.¹⁴

¹¹ See BC Order 01-20; this summary of the BC Commissioner's reasons is excerpted from *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 (B.C.S.C.). Adjudicator Steven Faughnan reviews BC Order 01-20 in greater detail in Order PO-2371, as does Adjudicator Bernie Morrow in Order MO-1706.

¹² See the discussion in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, cited above, paragraphs 72 to 79.

¹³ See Orders MO-1706 and PO-2371.

¹⁴ All of the RFP/RFQ documents submitted by the third party appellant involve institutions that are subject to FIPPA/MFIPPA. The linen services agreement to which the relevant pricing schedule applies contains the following provision: "On January 1, 2012, the [FIPPA] will apply to all records in the custody or control of CCH. Because the application of the Act is retroactive to January 1, 2007, your proposal will be subject to requests for access under the Act as of January 1, 2012. ... All proposals will be received in confidence subject to the disclosure requirements of FIPPA. ..."

[30] Given my finding that the requirements for the application of section 17(1) have not been met, I uphold the hospital's decision that the record at issue does not qualify for exemption and I will order it disclosed to the requester.

ORDER:

1. I order the hospital to disclose the record to the original requester by sending him a copy by **February 24, 2015**, but not earlier than **February 19, 2015**.
2. In order to verify compliance with this order, I reserve the right to require the hospital to provide me with a copy of the record disclosed to the requester in accordance with provision 1 above.

Original Signed by: _____
Daphne Loukidelis
Adjudicator

January 19, 2015