

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3517

Appeal PA14-285

St. Joseph's Health Centre

July 31, 2015

Summary: The requester seeks access to the purchase orders the hospital issued to a software development company. The purchase orders describe the amounts of monies the hospital paid the company for its services. The hospital granted the requester full access to the records but the company appealed the hospital's decision claiming that the third party information exemption under section 17(1) applies. This order finds that the information contained in the purchase orders was not "supplied" to the hospital for the purposes of section 17(1). Accordingly, the records do not qualify for exemption and the appeal is dismissed.

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-3347 and MO-3062

OVERVIEW:

[1] An individual submitted a request to St. Joseph's Health Centre (the hospital) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for contracts and purchase orders related to a specified software program.

[2] The hospital located responsive records and notified the software development company (the third party) pursuant to the notification provisions in section 28 of the *Act*. After considering the third party's submissions, the hospital decided to grant the

requester access to the responsive records. The third party (now appellant) appealed the hospital's decision to this office and a mediator was assigned to the appeal file.

[3] During mediation, the parties explored settlement but mediation was not possible. The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*.

[4] During the inquiry process, the parties were invited to file written representations in support of their positions. The appellant submitted representations in response but the requester and hospital did not.

[5] In this order, I find that the records do not qualify for exemption under the third party information exemption under section 17(1).

RECORDS:

[6] The records at issue consist of 3 purchase orders, dated October 29, 2009, November 20, 2012 and April 8, 2014.

DISCUSSION:

[7] The sole issue in this appeal is whether the third party information exemption at sections 17(1)(a) and (c) apply to the purchase orders. Sections 17(1)(a) and (c) 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,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency

[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

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.*).

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 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

[10] The appellant submits that the records contain commercial, financial and technical information. In its submissions to the hospital, the appellant advised that the information contained in the records describe a "confidential commercial and financial arrangement" between itself and the hospital.

[11] Technical, commercial and financial information have been discussed in prior orders, as follows:

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

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

³ Order PO-2010.

⁴ Order PO-2010.

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

[12] Having regard to the appellant's evidence, along with the records, I am satisfied that the purchase orders contain "technical information", "commercial information" and/or "financial information" within the meaning of those terms as defined by this office. The appellant provides software solutions and technical support to various industries, including the hospital sector. Given that the purchase orders breakdown the financial cost of services the appellant provided the hospital, I am satisfied that this information meets the first part of the three-part test for section 17(1).

Part 2: supplied in confidence

Supplied

[13] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁷

[14] 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

[15] 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

[16] 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

⁵ Order P-1621.

⁶ Order PO-2010.

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹⁰ The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.¹¹

Representations of the parties

[17] The requester and the hospital did not provide representations. However during mediation, the hospital confirmed that it issued the purchase orders at issue. The appellant's submissions do not specifically address the issue of whether it directly supplied the information at issue to the hospital. Instead, the appellant made the following submissions:

These documents not only show all of our pricing structure they also show the cost of our conversion service...

The records being requested also detail our licensing policies and costs which can be easily be extrapolated by a third party to calculate not only the annual licensing costs but also the actual cost of any full system.

...

All information in regards to invoicing and pricing proposals is provided in confidence with no expectation it will be disseminated to third parties having been provided with the full expectation of confidentiality.

[18] The appellant goes on to state that the confidentiality statement it includes in its emails strictly forbids dissimulation of any information transmitted by email. The appellant states that the confidentiality statement states that "[t]his email and any files transmitted with it are proprietary and intended solely for the use of the individual or entity to whom they are addressed". The appellant also submits that this confidentiality statement would have accompanied any proposal or invoice it sent by email to the hospital.

[19] The appellant also argues that its software licence agreement provides that "all information [provided in] association with this licence whether that be technical or commercial is strictly confidential and shall not be [disseminated] to any third parties without the specific written consent of [the appellant].

¹⁰ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹¹ *Miller Transit*, above at para. 34.

Decision and analysis

[20] There is no dispute that the purchase orders at issue were prepared by the hospital. Accordingly, for these records to meet the "supplied" test in section 17(1), there must be evidence that the "inferred disclosure" or "immutability" exceptions apply.

[21] For the "immutability" exception to apply there must be evidence that the information at issue is the appellant's information that is immutable or is not susceptible to change. The examples provided above include financial statements, underlying fixed costs and product samples or designs. The appellant's representations do not claim that the records contain this type of information and I am satisfied that they do not.

[22] The appellant's representations appear to suggest that the "inferred disclosure" exception could apply. In this regard, the appellant submits that the information contained in the purchase orders were taken from the invoices, pricing structure and cost information it provided the hospital. However, I note that the appellant's submissions to the hospital described the arrangement by which it provides services to the hospital as being based on proposals it submitted to the hospital during "contractual discussions". The appellant goes on to state that the "... contracts received from these proposals are also intended to be documents describing a confidential commercial and financial arrangement".

[23] I have carefully reviewed the records, along with the appellant's submissions, and find that the purchase orders contain information which reflects the mutually-agreed upon price the hospital agreed to pay for the appellant's services. Previous decisions from this office have consistently found that purchase orders prepared and issued by government institutions to a service provider do not meet the "supplied" test in section 17(1).¹² Furthermore, based on the appellant's evidence, I am satisfied that disclosure of the amounts of monies the hospital paid the appellant for its services would not reveal non-negotiated confidential information. In my view, the contractual discussions the appellant advised took place which involved the hospital's acceptance and/or rejection of the appellant's proposed price structure clearly describe a process which resulted in a negotiated agreement. Though the appellant submits that the contractual arrangement between the parties is confidential, I find that the confidentiality statements relied upon by the appellant fails to establish that the hospital also had an expectation that the amounts of monies it paid the appellant for its services would be kept confidential and that this was one of the terms of the negotiated agreement between the parties. In any event, the appellant's evidence fails to establish that its "full expectation of confidentiality" is reasonable taking into consideration that the payments the appellant received from the hospital involve the expenditure of public funds.

¹² Orders PO-3347 and MO-3062

[24] Having regard to the above, I find that there is insufficient evidence to support an argument that the "inferred disclosure" exception applies in the circumstances of this appeal. Accordingly, it cannot be said that the appellant "supplied" the purchase orders to the hospital for the purposes of section 17(1), nor would disclosure of these records reveal any underlying non-negotiated confidential information. As a result, the second part of the third part test in section 17(1) has not been met.

[25] As all three parts of the section 17(1) test must be met, it is not necessary for me to also review the confidentiality requirement of the second part or the harms contemplated in the third part.

[26] I find that section 17(1) does not apply to the records and dismiss the appeal.

ORDER:

1. I uphold the hospitals' decision to disclose the records.
2. I order the hospital to disclose the records to the requester by **September 8, 2015** but **not before** August 31, 2015.
3. In order to verify compliance with order provision 2, I reserve the right to require a copy of the records disclosed by the hospital to the requester to be provided to me.

Order Signed By: _____
Jennifer James
Adjudicator

_____ July 31, 2015