Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3499

Appeal PA14-230

Ontario Securities Commission

June 16, 2015

**Summary:** A requester seeks access to the pricing information attached to a contract between a transcription company and the OSC. The OSC granted the requester full access to the pricing information and the company appealed the OSC's decision to this office. The company takes the position that the pricing information qualifies for exemption under the mandatory third party information exemption under section 17(1). This order finds that the information at issue cannot be said to have been "supplied" to the OSC 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 MO-3175, MO-3180, PO-1791, PO-3174 and PO-3450.

**Cases Considered:** *Merck Frosst Canada Ltd. v Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3.

## BACKGROUND:

[1] A requester submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Securities Commission (the OSC) for copies of all contracts relating to court reporting/ transcription services issued on or about February 12, 2012.

[2] The OSC located two contracts and notified two transcription companies (the affected parties) pursuant to section 28(1) of *Act.* After considering the views of the affected parties, the OSC decided to release the records to the requester. One of the affected parties (now the appellant), objected to the proposed disclosure and appealed the OSC's decision to this office. The appellant claims that its contract with the OSC qualifies for exemption under the third party exemption at section 17(1) of the *Act*. A mediator was assigned to the appeal and the parties explored settlement.

[3] During mediation, the appellant consented to the disclosure of its contract, but for the pricing information contained in an exhibit attached to it. The OSC subsequently forwarded a severed copy of the contract to the requester. No further mediation was possible as the requester advised that he or she continues to seek access to the withheld pricing information.

[4] 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*. During the inquiry process, the parties provided written representations to this office.

[5] In this order, I dismiss the appeal and uphold the OSC's decision to disclose the pricing information at issue.

## RECORDS:

[6] The information at issue in this appeal is the pricing information contained in Exhibit A-2 which is attached to the contract between the OSC and the appellant.

## DISCUSSION:

[7] The appellant claims that the pricing information at issue qualifies for exemption under sections 17(1)(a) and (c). These sections 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,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; and
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> (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 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 pricing information contains commercial and financial information. The representations of the OSC and the requester do not challenge the appellant's claim.

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

> *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.[3] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[4]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

[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.
[3] Order PO-2010.
[4] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[5]

[12] Having regard to the appellant's representations, along with the records themselves, I am satisfied that the pricing information attached to the contract contains information describing various rates the appellant is to charge the OSC for its services. Accordingly, I find that this information contains "commercial information" and/or "financial information" within the meaning of those terms defined by this office.

[13] Accordingly, I find that the first part of the three-part test has been met.

**Part 2: supplied in confidence**

***Supplied***

[14] 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.[6]

[15] 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.[7]

[16] 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 has been upheld by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* and a number of other decisions.[8] Most recently, it was once again upheld by the Divisional Court in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*.[9]

[17] 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

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[5] Order PO-2010.
[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] *Supra,* note 1. See also, Orders PO-2018, and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 (Div. Ct.) (*Grant Forest Products Inc.*) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct) (*CMPA*). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (Can LII) and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[9] 2015 ONSC 1392 (CanLII) (*Aecon Construction*), upholding PO-3311.

inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[10] The appellant did not provide specific representations on whether the "inferred disclosure" exception applies and I am satisfied that it does not.

[18] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. The appellant also did not provide specific representations on whether the "immutability" exception applies and I am satisfied that it does not. In making my decision, I note that the pricing information at issue does not contain information such as financial statements, underlying fixed costs and product samples or designs which have been found in prior orders to meet the "immutability" exception.[11]

[19] The parties do not appear to dispute that the pricing information at issue was prepared by the appellant and submitted with its bid. In addition, there is no evidence before me suggesting that the OSC or requester dispute the appellant's evidence that the pricing information attached to its contract with the OSC is the same pricing information it provided to the OSC with its bid.

[20] Accordingly, this appeals turns on whether or not the pricing information attached to the contract was "supplied" for the purposes of the second part of the three-part test under section 17(1).

*Representations of the parties*

[21] In its representations, the appellant acknowledges that this office's approach to the application of section 17(1) to negotiated agreements has been repeatedly upheld by the courts. However, the appellant argues that this office's "… current interpretation of "supplied" has created an "irrebuttable presumption" that once information from a third party is incorporated into a contract with a government institution it cannot be said to have been supplied unless it meets one of the narrow exceptions. The appellant states that:

> … the appropriate approach, whether the information has been incorporated into a contract or not, is to consider the nature of the information and the harm that could reasonably be expected to be suffered if it is disclosed.

[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.

[22] In support of this position, the appellant refers to the Williams Commission Report[12] and three federal court cases[13]. The most recent of the federal court cases referred to by the appellant is *Merck Frosst Canada Ltd. v Canada (Health)*. In that decision, the Supreme Court of Canada stated:

> To summarize, whether confidential information has been "supplied to a government institution by a third party" is a question 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.

[23] The appellant also submits that its proposed approach to the "supplied" test is consistent with Order PO-1791. Finally, the appellant also submits that its proposed approach is in line with decisions from this office which found that pricing information forming a part of the documents submitted to the government as part of a bid meets the "supplied" test in section 17(1). In this regard, the appellant states:

> When the information contained in a contract originates from the third party and has not [been] changed or amended by virtue of any contract negotiation, [the appellant] submits that to find that the information is not "supplied" within the meaning of the Act is contrary to, and inconsistent with, the previous orders of the Commissioner that have found that information contained in a proposal submitted by a third party to a government institution *is* "supplied" within the meaning of the Act.
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> Where a proposal is accepted without any negotiation on the part of the government institution, it is a distinction without a difference for that same underlying information to be "supplied" prior to acceptance by the institution, but not after. In either case, it is information that is provided by the third party and made available to the government institution with no impact or input. [Emphasis in the original]

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[12] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vol. 3 (Toronto: Queen's Printer, 1980) at 709-710 ("The Williams Commission Report").

[13] *Aventis Pasteur Ltd. v. Canada (Attorney General*), 2004 FC 1371 *(Aventis)*; *Canada (Minister of Public Works and Government Services) v. The Hi-Rise Group Inc.*, 2004 FCA 99 *(Hi-Rise Group)*; *Merck Frosst Canada Ltd. v Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 *(Merck).*

[24] The OSC submits that its decision to disclose the information at issue to the requester "was based on the application of clearly established IPC jurisprudence that has been confirmed by the courts to be a reasonable interpretation of the statute and consistent with important public accountability considerations". The OSC also submits that the appellant's proposed approach could result in inconsistent outcomes and does not address the public transparency and accountability considerations that underpin this office's approach to the "supplied" test. Finally, the OSC submits that the appellant's submissions fails to appreciate meaningful distinctions between the different types of information at issue in the case law referred to in its representations. In support of this submission, the OSC states the case law:

> …reflects a meaningful distinction between the initial procurement phase, when proposals may be submitted on a confidential basis, and the final stage of the process when the contract is issued and public accountability considerations come to the fore.

[25] The requester submitted brief representations which did not address this specific issue.

*Decision and analysis*

[26] One of the appellant's main arguments is that this office's current approach to the "supplied" test in section 17(1) is "… contrary to, and inconsistent with" previous decisions from this office, notably Order PO-1791. I recently considered Order PO-1791 in Order MO-3180, but ultimately found that the price information at issue in that appeal was "mutually generated" and not "supplied" for the purposes of section 17(1).

[27] The price information at issue in Orders PO-1791 and MO-3180 are similar to the information at issue in this appeal. The price information in these appeals consisted of the service provider's price list for services it is to provide a government institution as the result of being awarded a contract. In Order PO-1791, the service being provided was shredding and recycling services; in Order MO-3180 the party resisting disclosure provided cleaning services; and in the current appeal the appellant provides transcription services.

[28] In Order MO-3180, I stated:

> In Order PO-1791, the requester sought access to a contract between the Management Board Secretariat (MBS) and a private contractor providing shredding and recycling services. Attached to the contract was an appendix which specified the unit and total prices for each year of the contract and the private contractor objected to the release of this information. In that order, Adjudicator Sherry Liang ultimately ordered

> the pricing information disclosed, but in her analysis found that this information was "supplied" to the institution.
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> However, I note that the Notice of Inquiry sent to the appellant specifically referred to recent orders from this office, which were upheld by the Divisional Court, which found that even where the terms of the contract were incorporated without change from the proposal or draft that originate with one party or the other, it is still treated as having been "mutually generated" and not "supplied" for the purposes of section 10(1).

[29] The OSC submits and I agree that the appellant's position fails to address the public transparency and accountability considerations which underpin this office's current approach to the "supplied" test in section 17(1). Adjudicator Catherine Corban's comments in Order MO-3175 summarize the desire of the courts to grant access to information contained in government contracts:

> … it is well established that the agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied" even when "negotiation" amounts to acceptance of the terms proposed by the third party [See Orders PO-2384, PO-2497 (upheld in *CMPA)* and PO-3157]. In Order MO-1706, Adjudicator Bernard Morrow stated:
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> > …[T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects the terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.
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> Also … the Divisional Court has affirmed this office's approach with respect to the application of section 10(1) to negotiated agreements and specifically confirmed in *Miller Transit* and *Aecon Construction* that the approach is consistent with the intent of the legislation, which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds.

[30] In my view, this office's current approach to the "supplied" test is consistent with the purposes of the *Act*, namely that information should be available to the public. In addition, I find that this approach is also consistent with the purposes of the third party information exemption taking into consideration that the information at issue in these

types of appeals is the amount of monies a government institution has contractually agreed to pay for a service.

[31] With respect to the line of the decisions from this office considering the treatment of the information which potential service providers provide to governments when they submit a bid as part of a Request for Proposal process, I share the OSC's view that these decisions reflect a "meaningful distinction" between the procurement process and the final contractual terms the government has agreed to.[14] Adjudicator Daphne Loukidelis succinctly summarized the distinction in Order PO-3450, as follows:

> 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.

[32] As stated above, the most recent of the federal court cases referred to by the appellant is the Supreme Court of Canada's decision in *Merck*. The information at issue in the *Merck* decision were notes prepared by Health Canada scientists regarding a drug company's submissions to the federal government. The appellant submits that I should abandon this office's current approach to the "supplied" test and adopt the approach taken in the *Merck* decision.

[33] In Order PO-3174, Adjudicator Colin Bhattacharjee found that the Supreme Court of Canada's finding in *Merck* did not provide a basis to overturn this office's approach to the supplied test in section 17(1). In Order PO-3074, Adjudicator Bhattacharjee states:

> The appellant acknowledges that previous IPC orders have found that the provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, for the purposes of section 17(1). However, it submits that in light of the Supreme Court of Canada's recent decision in [*Merck*] which considered the third party information exemption in section 20(1)(b) of the federal *Access to Information Act*, these previous IPC orders are "clearly incorrect." It states, in part:
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> > In *Merck*, the Supreme Court of Canada noted that whether information was supplied by a third party will often be primarily a question of fact, and the mere fact that a document in issue originates from a government official, such as in an internal government e-mail, is not sufficient to bar a claim for exemption.

[14] For example, Orders MO-1450 and MO-1705.

> The Supreme Court was clear that: 1) the content rather than the form, of the information must be considered, and the mere fact that information appears in a document does not resolve the issue; and the 2) the exemption must extend to information that reveals confidential information supplied by the third party as well as to that information itself.

I am not persuaded by the appellant's line of argument. In the appeal before me, the records at issue are severed agreements between the Ontario government and a drug manufacturer. In *Merck*, the Supreme Court was not considering whether the third party information exemption in the federal *Access to Information Act* applies to a contract or agreement between a drug manufacturer and the government. Instead, the records at issue were reviewers' notes prepared by scientists retained by Health Canada to evaluate a drug, and correspondence between Merck and Health Canada.

Because the records at issue in *Merck* did not include a contract, the Supreme Court's analysis and findings on the "supplied" test in section 20(1)(b) of the federal *Access to Information Act*, do not in any way address whether the provisions of a contract should generally be treated as mutually generated, rather than "supplied" by the third party. This was not an issue that was before the Supreme Court and not one that it discussed, either directly or indirectly. In my view, the appellant's suggestion that the *Merck* decision essentially overturns the IPC's jurisprudence on the meaning of "supplied" in section 17(1) of *FIPPA* is unfounded.

[34] I agree and adopt Adjudicator Bhattacharjee's reasoning for the purposes of this appeal. In my view, the appellant's position that this office should adopt the approach the Supreme Court of Canada adopted in *Merck* to the "supplied" test in section 17(1) is unfounded.

[35] For the reasons stated above, I find that the pricing information at issue in this appeal was the product of a mutual negotiation process between the appellant and the OSC. Accordingly, this information was not "supplied" to the OSC for the purposes of section 17(1) and does not meet the second part of the three-part test for the third party information exemption in section 17(1). 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. I find that section 17(1) does not apply and dismiss the appeal.

## ORDER:

1. I uphold the OSC's decision to disclose the records at issue to the requester.

2. I order the OSC to disclose the records at issue to the requester by **July 22, 2015** but not before **July 17, 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 city to the requester to be provided to me.

Original Signed By: June 16, 2015
Jennifer James
Adjudicator