

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3622

Appeal PA15-442

Ontario Media Development Corporation

June 23, 2016

Summary: The sole issue in this third party appeal is whether two records are exempt from disclosure under section 17(1) (third party information) of the *Freedom of Information and Protection Privacy Act*. In this order, the adjudicator finds that one of the records, which is a bid, meets the three-part test in section 17(1) and is exempt from disclosure. In the absence of evidence tendered by the third party appellant regarding the second record, however, the adjudicator finds that it is not exempt from disclosure under section 17(1).

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

OVERVIEW:

[1] This order disposes of the sole issue raised as a result of an appeal of a decision made by the Ontario Media Development Corporation (OMDC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester made an access request for all records related to a number of specified grants awarded as part of the 2013-2014 Ontario Music Fund to a named company.

[2] Following third party notification¹, the OMDC issued a decision to a third party advising that it decided to grant the requester full access to the record that was the subject of the third party notice.

[3] The third party, now the appellant, appealed the OMDC's decision to this office.

¹ The third party did not respond to the OMDC's notification.

[4] During the mediation of the appeal, the appellant advised the mediator that it was appealing the OMDC's decision to disclose the record on the basis that it should be withheld in its entirety pursuant to the mandatory exemption in section 17 (third party information) of the *Act*. The requester confirmed an interest in pursuing access to the record at issue.

[5] The OMDC subsequently notified the appellant with respect to an additional responsive record, indicating that it had decided to disclose this record to the requester, as well. The appellant advised the mediator that it was also appealing the OMDC's decision to disclose the additional record to the requester. The requester advised the mediator that he wished to pursue access to both records.

[6] The file then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. Given that the OMDC's decision was to grant access in full to both records, I initially sought representations from the appellant, who is the party claiming the application of the exemption in section 17(1). The appellant did not provide representations during the inquiry of the appeal. However, it did provide submissions at the time it filed the appeal, which I have taken into consideration. The appellant's submissions relate to one of the two records at issue, namely the record it describes as a bid. I also sought representations from the requester, but did not receive any from him.

[7] For the reasons that follow, I find that one of the records is exempt under section 17(1), but that the other is not. I uphold the appellant's appeal, in part, and order the OMDC to disclose one of the records to the requester in its entirety.

RECORDS:

[8] There are two records at issue. The first record is a two-page bid for the appellant's services. The second record is a one-page brand strategy document prepared by the appellant.

DISCUSSION:

[9] The sole issue in this appeal is whether the records are exempt by virtue of the application of the mandatory exemption in section 17(1)(a) and (c). Section 17(1)(a) and (c) of the *Act*, 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;

[10] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² 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.³

[11] 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

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

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

² *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.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁴ Order PO-2010.

⁵ Order P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁶

[13] As previously stated, the appellant's representations address only the bid and not the brand strategy document.

[14] The appellant submits that the record is a confidential bid, in order to secure a third party's business in brand development and website creative concept development. This record was, in turn, supplied by the third party to the OMDC in order to seek funding from the Ontario Music Fund. The appellant goes on to state that the record contains commercial and financial information. In particular, the record sets out the breakdown and characterization of the business steps required in order to undertake the work, which is commercial information. In addition, the appellant states that the record contains the specific pricing of each step in the process, which is financial information.

[15] On my review of the records, I find that the bid contains commercial and financial information as interpreted by past orders of this office. 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.⁷ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁸ I find that the appellant's bid document contains commercial and financial information. The commercial information in the record relates to the buying and selling of services between the appellant and a third party. The financial information in the record relates to money and its use, namely the appellant's pricing breakdown for the provision of its services. I also find that the brand strategy document contains commercial information as it too relates to the buying and selling of services between the appellant and a third party.

PART 2: SUPPLIED IN CONFIDENCE

[16] 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.⁹

[17] 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

⁶ Order PO-2010.

⁷ *Ibid.*

⁸ Order P-1621.

⁹ Order MO-1706.

inferences with respect to information supplied by a third party.¹⁰

[18] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹¹

[19] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; or
- prepared for a purpose that would not entail disclosure.¹²

[20] The appellant submits that the bid was supplied in confidence to the third party, who in turn supplied it to the OMDC, and that it had a reasonable expectation of confidentiality regarding it.

[21] Upon my review of the appellant’s representations and the bid itself, I am satisfied that it was supplied in confidence by the appellant to the third party, and in turn, to the OMDC by the third party. Conversely, in the absence of representations from the appellant to demonstrate that it supplied the brand strategy document in confidence to the third party, I am unable to conclude that this information meets part two of the test. In any event, even if this record was supplied in confidence, I find below that the harms part of the three-part test has not been established.

PART 3: HARMS

[22] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the

¹⁰ Orders PO-2020 and PO-2043.

¹¹ Order PO-2020.

¹² Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

type of issue and seriousness of the consequences.¹³

[23] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁴

[24] The appellant's position is that the disclosure of the bid would significantly prejudice its competitive position. In particular, the appellant submits that if the information in the bid was disclosed and made publicly available, its commercial competitors would have access to the commercial methods, decisions and approach to providing some of its core services. As well, competitors would have access to its pricing strategy, and how it allocates costs among the various steps taken in providing its services, which would be prejudicial to its position in pricing its services.

[25] Further, the appellant argues that the disclosure of the bid would also result in undue loss to it, because if customers had access to the pricing information contained in the record, they would insist on similar or discounted fees.

[26] Based on the arguments made by the appellant and my review of the bid, I find that it qualifies for exemption under section 17(1)(a) of the *Act*. The bid contains detailed commercial and financial information that was supplied in confidence by the appellant to a third party and, in turn, to the OMDC. This bid contains a detailed summary of the appellant's proposal to provide specific services for the third party. I find that disclosure of this information could reasonably be expected to prejudice the appellant's competitive position, as it could be used by a competitor in providing future proposals involving similar issues and services. Accordingly, I find that the third part of the three-part test has been met with respect to the bid. As all three parts of the test in section 17(1) apply to the bid, I find that it is exempt from disclosure.

[27] I will now determine whether the remaining record, which is the brand strategy document, is exempt from disclosure. As previously stated, the onus is on the party claiming this exemption to provide evidence as to the potential for harm if the record is disclosed. In the absence of representations from the appellant in regard to this record, I am left without any evidence on the issue of reasonable expectation of harm from its disclosure. I have also reviewed the record and find nothing in it that would allow me to infer the harms set out in section 17(1) from its disclosure. Consequently, I find that the third part of the test in section 17(1) has not been met, and that this record is not exempt under section 17(1).

¹³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁴ Order PO-2435.

ORDER:

1. I uphold the third party appellant's appeal, in part. The bid is exempt from disclosure under section 17(1) of the *Act*.
2. I order the OMDC to disclose the brand strategy document in its entirety to the requester by **July 28, 2016** but not before **July 22, 2016**.
3. I reserve the right to require the OMDC to provide this office with copies of the record it discloses to the requester.

Original Signed by: _____

Cathy Hamilton
Adjudicator

_____ June 23, 2016