**Information and Privacy Commissioner,
Ontario, Canada**

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

ORDER PO-3758

Appeal PA16-395

Ministry of Government and Consumer Services

July 31, 2017

Summary: The Ministry of Government and Consumer Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) for a copy of a specific Vendor of Record (VOR) agreement for courier services between the ministry and a named courier company. In this order, the adjudicator finds that the pricing information at issue in the agreement was not supplied by the third party appellant to the ministry and orders disclosure of this information.

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-3246.

Cases Considered: *Toronto-Dominion Bank v. Ryerson University*, 2017 ONSC 1507.

OVERVIEW:

[1] The Ministry of Government and Consumer Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for a copy of a specific Vendor of Record (VOR) agreement for courier services between the ministry and a named courier company.

[2] The ministry identified the responsive record relating to the request. Before releasing the record to the requester, the ministry notified the courier company to obtain its views regarding disclosure of the record.

[3] The courier company provided the ministry with submissions. After considering the representations from the courier company, the ministry issued a decision that granted access to the record in full.

[4] The courier company, now the appellant, appealed the ministry's decision claiming that the mandatory third party information exemption in section 17(1) applies to the information at issue in the record.

[5] During mediation, the appellant consented to the release of some of the record at issue. The ministry released pages 1 to 45 of the record in full and pages 46 to 50 in part pursuant to the consent. The remaining portions of pages 46 to 50 were not released and remained at issue.

[6] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.[1]

[7] In this order, I uphold the ministry's decision and order disclosure of the information at issue in the record.

RECORD:

[8] At issue are portions of pages 46 to 50 of the Vendor of Record Agreement[2] (the agreement), described by the appellant as:

Appendix B –

- B. Rates and Disbursements
- Table 1A: Next Day or Best Available Delivery Service
- Table 2A: Next Day or Best Available Delivery Service to Other Ontario Postal Codes
- Table 3A: Two-Day delivery Service
- Table 4A: Air Domestic Next Day or Best Available Delivery Service

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[1] The parties provided both confidential and non-confidential information in their representations. I will only refer to the non-confidential representations in this order, although I will be considering the representations in their entirety.

[2] Referred to as the Courier Services Agreement by the appellant.

- Table 5.1: Next Day Delivery Service by 9:00 a.m.
- Table 5.2: Next Day Delivery Service by 10:00 a.m.
- Table 5.3: Next Day Delivery Service by 12:00 p.m.
- Table 6.1: Additional Weight Cost (over 1 kilogram) for 10 kilograms and less
- Table 6.2: Additional Weight Cost (over 1 kilogram) for 10.5 kilograms and more
- Table 7: Additional Service-Related Fees

DISCUSSION:

Does the mandatory third party information exemption at section 17(1) apply to the record?

[9] 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.

[10] Section 17(1) is designed to protect the confidential “informational assets” of

businesses or other organizations that provide information to government institutions.[3] 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.[4]

[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 appellant submits that the record contains commercial and financial information. These types of information listed in section 17(1) have been discussed in prior orders:

> *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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
>
> *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.[7]

[13] The appellant states that the pricing rates set out in record relate to the sale of its courier services to the institution, and thus fit within the meaning of commercial information. It submits that the rates refer to money, setting out the price for making

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[3] *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.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[5] Order PO-2010.
[6] Order P-1621.
[7] Order PO-2010.

certain deliveries based on origin, destination and time involved. As well, the appellant states that the service-related fees (as set forth in Table 7) present its pricing practices as it relates to certain types of service contracts.

[14] The ministry submits that the information at issue contains details about the appellant's pricing and is therefore "commercial information." As well, it submits that the record contains "financial information" as it contains a detailed breakdown of the appellant's rates and disbursements in relation to the services contemplated in the VOR agreement.

[15] The requester agrees that the information at issue is pricing information.

Analysis/Findings re: part 1

[16] Remaining at issue is the appellant's pricing information in the agreement. I find that this information is financial information within the meaning of section 17(1) as it is reveals the appellant's pricing practices. It is also commercial information as it relates to the selling of services by the appellant. Therefore, part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

[17] 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.[8]

[18] 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.[9]

[19] 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.[10]

[20] 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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[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] 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.[11] 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.[12]

[21] The appellant states that its pricing or rates data contained in the record fits within the inferred disclosure exception as they were supplied solely by it in response to the ministry's Request for Proposals (RFP) and were accepted by the institution for the agreement. It submits that their revelation would allow for underlying information to be determined and inferred.

[22] The appellant states by releasing rates for the Ontario Government the opportunity exists to calculate its cost structure and that this would allow other organizations ability to impede its ability to compete in Canada's most competitive transportation market. It provided confidential representations on how it perceives disclosure would reveal its cost structure. These confidential representations were shared with the ministry but not with the requester.

[23] The ministry states that the pricing schedules list rates and disbursements for various courier services provided by the vendor under the agreement over the three-year time period. It states that the appellant provided this information in response to the ministry's RFP, however, once the agreement was signed the appendix containing the pricing schedules became a part of the contract and this information was not "supplied".

[24] The ministry submits that the immutability exception is not applicable. It states that the information was provided to enable the ministry to evaluate the appellant's pricing and available delivery services and this information could have been accepted or rejected by the ministry. Therefore, it states that consistent with the previous IPC orders, the information is properly characterized as negotiated and does not qualify for the immutability exception.

[25] The ministry further states that as a consumer of courier services, it is not in a position to assess how a competitor of the appellant could make assumptions about the appellant's profit margin.

[26] The requester states that it does not agree that disclosing the rates will allow for third parties to calculate the appellant's confidential cost information. He states that there is no cost plus formula in the agreement and that pricing in any non-cost plus arrangement is purely what a company is willing to sell its services for in a competitive process.

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

[27] In reply, the appellant states that revealing the pricing in the record would enable a competitor to calculate its overall provincial cost structure within a reasonable level of accuracy tolerance, which falls within the ambit of the "supplied" inferred disclosure exception. It relies on Order MO-2338, where the adjudicator stated:

> 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.

Analysis/Finding re: supplied

[28] The appellant is concerned that its underlying cost structure would be revealed by disclosure of the pricing information in the agreement between it and the ministry. It has provided confidential representations on this issue, which I was able to share with the ministry but not the requester.

[29] I have carefully reviewed the appellant's representations and the information at issue in the record. I do not agree with the appellant that disclosure of this information could reasonably be expected to result in a competitor of the appellant ascertaining its underlying cost structure. Therefore, I find that the inferred disclosure exception does not apply to the pricing information in the record.

[30] The information at issue is contained in an agreement negotiated between the ministry and the appellant. As noted above, the provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by a 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.

[31] In *Toronto-Dominion Bank v. Ryerson University*,[13] the third party appellant, the Toronto-Dominion Bank, brought an application for judicial review to quash Order PO-3598, which ordered disclosure of a contract between it and Ryerson University. In finding that Order PO-3598 should be upheld, the Divisional Court stated:

> I turn now to the reasonableness of the adjudicator's conclusion that the commercial information of the applicant was not supplied in confidence to the University. The applicant argues that the adjudicator improperly focused on the contractual nature of the Agreement, rather than the nature of the information found in it. It argues that there is no basis in the text of s. 17(1) to support the conclusion that third party information loses the protection of s. 17(1) just because it is found in a contract, and the

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[13] *Toronto-Dominion Bank v. Ryerson University*, 2017 ONSC 1507, leave to appeal application dismissed June 14, 2017, Court of Appeal file no. M47677.

approach is not consistent with *Merck Frosst* or the decision of the Alberta Court of Appeal in *Imperial Oil Limited v. Calgary (City)*, 2014 ABCA 231.

The applicant concedes that it is asking this Court to find the approach followed by the adjudicator unreasonable despite the fact that there have been numerous decisions of the Divisional Court that have found the approach to the application of s. 17(1) reasonable (for example, *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (leave to appeal denied M32858); *Canadian Medical Protective Association,* above; *HKSC Developments L.P. v. Infrastructure Ontario*, 2013 ONSC 6776; *Miller Transit Ltd. v. Ontario (Information and Privacy Commissioner)*, 2013 ONSC 7139; and *Aecon Construction Group Inc. v. Ontario (Information and Privacy Commissioner)*, 2015 ONSC 1392 (Div. Ct.)). I note that *Miller* and *Aecon* were decided after *Merck Frosst*. However, the Divisional Court rejected the argument that the IPC's approach to the interpretation of s. 17(1) was no longer good law (*Miller* at para. 44; *Aecon* at para. 13)…

The applicant argues that the adjudicator unreasonably focused on the nature of the document as a contract and reached an unreasonable conclusion because she failed to find that disclosure would reveal information about the applicant's standard form affinity agreements. The applicant argues that it provided a draft standard form agreement to the University which differs very little from the signed document. That draft agreement was provided in confidence…

Having reviewed the Agreement and the earlier draft, I find that the adjudicator reached a reasonable conclusion. The onus was on the applicant to show that the Agreement was supplied in confidence to the University. Given that some of the terms were changed in the Agreement and given that the Agreement was the result of contractual negotiations, it was reasonable for the adjudicator to conclude that the Agreement was not supplied in confidence. The adjudicator's approach is consistent with past decisions of the IPC that have been upheld on judicial review. It is also consistent with the approach to information in contracts adopted in other jurisdictions (see, for example, *Canadian Broadcasting*, above at para. 56 (N.W.T.S.C.); *Canada Post Corp. v. National Capital Commission*, [2002] F.C.J. No. 982 (T.D.) at para. 14; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.) at para. 72; and *Re Atlantic Highways Corp.* [1997] N.S.J. No. 238 (S.C.) at para. 40).

Moreover, the adjudicator's approach is consistent with the purpose of the Act, namely that information should be available to the public and

exemptions should be limited and specific. As this Court stated in *Miller Transit*, above at para. 44:

> The IPC adjudicator's decision was also 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: see *Vaughan (City) v. Ontario (Information and Privacy Commission),* 2011 ONSC 7082, 109 O.R. (3d) 149 (Div. Ct.), at para. 49…

[32] Similarly, in Order PO-3246, the third party submitted that its prices as set out in the contract between it and the Ministry of Tourism, Culture and Sport on their own and in conjunction with the other information in the records reflect, in part, its underlying costs and pricing practices. The third party asserted that the intention of the section 17(1) exemption is to protect information belonging to a third party that cannot change through negotiation, and therefore, the pricing information qualifies for exemption. The third party further submitted that disclosure of the information would permit the requester in that appeal to draw accurate inferences and to know exact details about confidential and proprietary information about it that is not publicly available.

[33] In that order, the adjudicator found that the pricing information in the purchase order, which was the agreement between the affected party and the ministry, was negotiated and not "supplied." She found that the ministry's acceptance of the affected party's price as reflected in the purchase order constituted negotiation as the ministry had the option to reject it, but chose to accept it.

[34] The adjudicator further found that the pricing information in the purchase order did not qualify for the "inferred disclosure" or "immutability" exceptions to the general rule that the contents of an agreement are negotiated and not supplied, as there was no underlying non-negotiated confidential information that was supplied by the third party that could be inferred by disclosure of the pricing information, nor was the pricing information immutable.

[35] The adjudicator also found in Order PO-3246 that the pricing information contained in the price quotation summary prepared by the ministry, was not "supplied" by the third party because it was accepted by the ministry, thereby becoming the essential term of the negotiated agreement between the affected party and the ministry, and included in the agreement.

[36] In this appeal, I adopt the findings in *Toronto-Dominion Bank v. Ryerson University* and in Order PO-3246 and find that the appellant's pricing information in the agreement was not supplied to the ministry. The pricing information at issue is part of a contract, the terms of which, including the pricing terms, as stated by the ministry, could have been accepted or rejected by the ministry. It was provided to enable the ministry to evaluate the appellant's pricing and available delivery services.

[37] I find that neither the inferred disclosure or the immutability exceptions apply to the pricing information at issue in the record. Based on my review of the record and the appellant's representations, I find that the appellant has not established that disclosure of the pricing information in the record would enable a competitor to calculate the appellant's overall provincial cost structure within a reasonable level of accuracy.

[38] Therefore, as I have found the information at issue not to have been supplied by the appellant to the ministry, part 2 of the test under section 17(1) has not been met. Accordingly, the information at issue in this appeal is not exempt by reason of the section 17(1) exemption. As no other mandatory exemptions apply and no discretionary exemptions have been claimed, I will order the pricing information at issue in the record disclosed.

ORDER:

I uphold the ministry's decision and order it to disclose the information at issue in the record to the requester by **September 6, 2017** but not before **August 31, 2017.**

Original Signed by: July 31, 2017
Diane Smith
Adjudicator