Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3790

Appeal PA16-47

Ontario Power Generation

November 28, 2017

Summary: The requester sought a specific submission relating to a Request for Proposal. The OPG granted partial access to the responsive records, but relied on the mandatory exemption at section 17(1) (third party information) to withhold the remaining portions. In this order, the adjudicator upholds the OPG's decision, in part.

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-2952, MO-3058-F, and PO-2853.

BACKGROUND:

[1] Ontario Power Generation (the OPG) received a request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all information relating to a specified Request for Proposal (RFP) submission of a named company.

[2] After notifying the named company (the affected party) pursuant to section 28 of the *Act*, the OPG issued a decision granting partial access to the responsive records. The remaining portions of the records were withheld pursuant to the mandatory exemption at section 17(1) third party information of the *Act*.

[3] The requester, now the appellant, appealed the OPG's decision.

[4] During the mediation process, the appellant narrowed the scope of his appeal to include only those records and portions of records listed below. The affected party did not consent to the disclosure of any additional information within the records.

[5] As no further mediation was possible, the appeal was moved to the next stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[6] I commenced my inquiry by inviting the parties to provide representations. I received representations, reply representations and sur-reply representations from the appellant and the affected party. The OPG confirmed that it will not be providing any representations on this appeal. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the parties' representations were shared with the other parties.

[7] Due to a specific reference in the appellant's representations, the affected party asserted that the appellant has amended its request to "product and pricing" information only. However, in sur-reply representations, the appellant confirmed that it has not and it still seeks all the withheld information.

[8] In this order, I uphold the OPG's decision, in part.

RECORDS:

[9] The following are the only records and portions of the records that remain at issue in this appeal:

RECORD	TITLE	PAGE	WITHHELD INFO
#1	Schedule 1 – Pricing Info for Alternative Proposal	1	Bottom of page – dollar value
#1	Appendix 1 – Product Market Basket	4	Entire spread sheet attachment
#2	Schedule 3(a) – Historical Performance	2 - 6	Estimated contract value
#2	Schedule 3(a) – Historical Performance	6-8	Entire chart
#2	Schedule 3(h) – Additional Information Questionnaire	Q. 2	Entire question and answer
#2	Schedule 3(h) – Additional Information Questionnaire	Q. 4	# of FT Employees

#2	Schedule 3(h) – Additional Information Questionnaire	Q. 7	Percentage figure
#2	Schedule 3(h) – Additional Information Questionnaire	Q. 12	Numerical value
#2	Schedule 3(h) – Additional Information Questionnaire	Q. 27	Percentage figure
#2	Schedule 3(h) – Additional Information Questionnaire	Q. 28	Percentage figure
#2	Schedule 3(h) – Additional Information Questionnaire	Q. 33	Entire response to question
#2	Schedule 3(h) – Additional Information Questionnaire	Q. 42	Entire chart
#2	Schedule 7 – Other Info Expansion Capabilities		Severance in fourth paragraph
#3	Volume Rebate		Percentage figure

DISCUSSION:

[10] The only issue in this appeal is whether the mandatory exemption at section 17(1) of the *Act* applies to the records at issue.

[11] 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, if 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;
> >
> > (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.

[12] 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]

[13] 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 10(1) will occur.

Part 1: type of information

[14] The types of information listed in section 17(1) have been discussed in prior orders. Relevant to this appeal are the following:

> *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.[3]
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> *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

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[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 PO-2010.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
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> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy,
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> (iii) has economic value from not being generally known, and
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> (iv) is not generally known in that trade or business.[6]

[15] The appellant submits that the records do not contain trade secret, scientific, technical, commercial, financial or labour related information but information about product and pricing. On the other hand, the affected party submits that the records contain financial information, commercial information and/or trade secret.

[16] In particular, the affected party asserts that question 33 of Schedule 3(h), record 2 (which contains a description of its web-based ordering system) is a trade secret. Although the affected party's web service meets the first, third, and fourth requirements of the definition for trade secret, it does not meet the second requirement. I note that the Oxford Dictionary defines "secret" as "not known or seen or not meant to be known or seen by others". In this case, the affected party's web service is known by its customers, and its customers' employees. I find it difficult to accept that it is a "secret" when it is known by many people outside of the company. I also note that the affected party has not provided submissions or evidence that its customers' employees promise to keep the web service confidential or to maintain its secrecy. As such, I do not find that question 33 of Schedule 3(h), record 2 contains a trade secret.

[17] However, I am satisfied that the records at issue as a whole contain commercial information as they are part of a commercial document – a proposal to the RFP. They were created for the purpose of entering into a commercial arrangement with the OPG. Accordingly, I find that the first part of the section 17(1) test has been met.

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[5] Order P-1621.
[6] Order PO-2010.

Part 2: supplied in confidence

Supplied

[18] 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]

[19] 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]

In confidence

[20] 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.[9]

[21] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances 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
- prepared for a purpose that would not entail disclosure[10]

[22] Although the appellant provided representations, its representations did not address this issue.

[23] In its representations, the affected party submits that the records at issue were supplied to the OPG. It points out that it directly supplied the records to the OPG when it submitted its submission in response to the RFP. The affected party also points out that the records are not the product of negotiations between it and the OPG.

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[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] Order PO-2020.
[10] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[24] With respect to the "in confidence" requirement of part 2, the affected party submits that it has not published or disclosed the records in its totality at any time, other than in its confidential submission of the proposal to the OPG. It also submits that the RFP stated that the OPG would "under no circumstances" disclose any of the information contained in a proposal to any other bidder without its author's approval, subject to the requirements of the *Act*. The affected party further submits that it had a reasonable expectation that the contents of the proposal would be kept in confidence by the OPG.

[25] I note that section 17 of the RFP states the following about confidentiality:

> **Except with the approval of a Proponent, under no circumstances, however, will OPG disclose any information contained in a Proposal of that Proponent to any other Proponent, including a Preferred Proponent.** OPG will, however, disclose that part of any Proposal that OPG is obliged to disclose under the *Freedom of Information and Protection of Privacy Act* (Ontario). In addition, OPG may disclose, on a confidential basis, to OPG's advisers any information contained in a Proposal.

[26] In the circumstances, I am satisfied that the records at issue were "supplied" by the affected party to the OPG in response to the RFP issued by the OPG. I am also satisfied that the affected party had a reasonable expectation that all or parts of its RFP submission would be kept confidential, subject to the OPG's disclosure obligations under the *Act*. Accordingly, I find that the second part of the section 17(1) test has been met.

Part 3: harms

[27] This part of the test for exemption under section 17(1) is based on a conclusion that disclosure may result in one of the harms described in that section. As noted above, information of third parties is exempt if disclosure "could reasonably be expected to" lead to those harms.

[28] The institution and/or the third party must provide sufficient evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[11] How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[12]

[29] Parties should not assume that the harms under section 17(1) are self-evident or

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[11] *Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. 93d) 464 (C.A.).

[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

can be proven simply by repeating the description of harms in the *Act*.[13] 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 other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[14]

Representations

[30] The appellant submits that the affected party will not suffer any harms from the withheld information being disclosed. It points out the following:

> "…the assertion in the March 28th 2017 representations by [the affected party] that they are 'not free to participate in future competitive procurement processes without fear' and 'it will have a definite chilling effect on [it]'s willingness and ability to offer the same types of information in the future' is disingenuous. The MO-2952 ruling in September 2013 by the IPC in no way deterred [the affected party] from fully participating 15 months later in [a subsequent RFP with OPG]."

[31] The affected party submits that disclosure of the withheld information could reasonably be expected to cause the harms noted in sections 17(1)(a), (b) and (c).

Competitive position

[32] With respect to 17(1)(a), the affected party argues that if the overall, summarized values of its previous contracts were disclosed, its competitors would be better positioned to determine whether it would be financially lucrative to enter into contracts with OPG, and the extent to which it relies on OPG contracts as a source of revenue. It also argues that information about contract values would enable third parties, through other available information about those contract (e.g. if they were disclosed pursuant to an access request), to determine how it has previously priced its product and services, and to undercut that pricing in future bids.

[33] The affected party argues that if the identities of other customers, the values of contracts with those customers, and the proportion of its sales that are attributable to utility customers were disclosed, competitors would have a partial roadmap to its business. It states:

> "…If disclosed, there is a risk that [the affected party's] competitors would begin to focus, or increase their focus, on [its] existing customers in an effort to obtain their business, thereby undermining [the affected party's]

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[13] Order PO-2435.
[14] Order PO-2020.

> competitive position. Equally, [its] competitors could unfairly enjoy significant undue efficiencies and costs savings with disclosure of [its] customers and contract values because the information would enable the competitor to decide to focus sales efforts on other customers (to the detriment of [the affected party], which might also focus or choose to focus on those other customers), which again would prejudice significantly [its] competitive position."

[34] It also argues that if its proportion of sales from mobile fleets was disclosed, it would reveal the relative value of its mobile business, and could result in competitors unfairly (based on confidential information about its business) implementing, improving upon, or adjusting the deployment of their own mobile services.

[35] The affected party further argues that if the total number of stock keeping units was disclosed, its competitors would be able to estimate the number of pairs of shoes that it sells each year as shoe retailers turn their inventory 2.5 to 3 times annually. Competitors could then use their own pricing information to estimate the affected party's annual sales. Furthermore, it argues that:

> "… disclosing the number of stock keeping units would allow competitors to assess the value of the markets in which [it] has a presence and how [it] does business in those markets, thereby prejudicing [its] competitive position in those markets because [its] competitors could make more informed decisions about whether and how to outbid [it] in future bids in those markets, and whether to focus on different markets where [it] may place less focus."

[36] It finally argues that it competitive position would be prejudiced significantly by disclosure of its order fill rate and error rate, and pricing information and volume rebate were disclosed. The affected party argues that disclosure of its fill rate and error rate would provide its competitors with the "benchmarks" that they must meet or exceed in order to compete with the affected party. On the other hand, disclosure of its pricing information and volume rebate would result in competitors knowing the prices that they need to offer potential customers in order to undercut it.

Similar information no longer being supplied

[37] With respect to 17(1)(b), the affected party argues the following about a chilling effect:

> Disclosure of the Confidential Information will have a definite chilling effect on [its] willingness and ability to offer the same types of information in the future, since its competitive and negotiating position would be compromised as described herein. This effect would be contrary to the public interest – the public receives a benefit when public bodies

> such as OPG are able to secure the most competitive prices for goods that they need to purchase in order to fulfill their respective mandates. If [it] and other suppliers are not free to participate in competitive procurement processes without fear of undermining their own competitive positions, such processes would not be effective and their public benefit would be lost.

Undue loss

[38] With respect to 17(1)(c), the affected party argues the following:

> Disclosure of the Confidential Information can reasonably be expected to result in undue financial loss to [it] and gain to its competitors in the ways described above, which may be summarized as including: (a) financial losses to [it] resulting from loss of its competitor advantage – both with respect to future contracts with OPG and in the market generally – and a corresponding gain to [its] competitors through costs savings identified above, as well as to the gain of contracts that otherwise would have been obtained by [it]; and (b) financial losses to [it] associated with the inability to offer the same type of terms and conditions in similar future agreements.

Analysis and findings

[39] As seen above, the affected party asserted that it will suffer a number of harms if the withheld information at issue was disclosed.

[40] I am satisfied that significant portions of the records at issue meet the "harms" part of the test for exemption under section 17(1). In particular, I find that disclosure of the proportion of sales from mobile fleets, proportion of sales that are attributable to utility customers, total number of stock keeping units, pricing information and volume rebate could reasonably be expected to prejudice significantly the competitive position of the affected party, or result in undue loss. I am persuaded that the proportion of sales from mobile fleets would reveal the relative value of the affected party's mobile business while proportion of sales that are attributable to utility customers would reveal how much it relies on utility companies. I am also persuaded that the total number of stock keeping units (if disclosed) would allow competitors to assess the value of the markets in which the affected party has a presence and how it does business in those markets. I find that the pricing information and volume rebate reveal proprietary information of the affected party, which its competitors will likely use to undercut it. I also note that pricing information has been found to meet the harms test under section 17(1) where, for example, information could be extrapolated by a knowledgeable party to reveal the actual dollar values of various components of an affected party's

proposal.[15]

[41] In Order MO-3058-F, Assistant Commissioner Sherry Liang dealt with records pertaining to the winning RFP proposal and evaluation materials. She concluded that the size and value of previous projects performed by the affected party could not reasonably be expected to lead to the harms in section 10)(1)(a) and/or (c) (the municipal equivalent of section 17(1)(a) and (c)). I find the circumstances present in that appeal distinguishable from those before me. In this appeal, the estimated values of the affected party's previous contracts with the OPG and the estimated values of contracts with its other customers are proprietary information, which would not be contained in the contracts themselves, and has been kept confidential. I am satisfied that disclosure of the estimated values of previous contracts, along with the identities of its customers, could reasonably be expected to prejudice the affected party's competitive position, or result in undue loss.

[42] However, I find that the remaining withheld information do not meet the third part of the test. I note that this information includes the numbers of full time employees at its retail stores in Ontario[16] and details of its web-based ordering system.[17] I have not discussed them earlier under the sub-heading "Representations," as I do not find these two types of information to have met the third part of the test.

[43] In my view, the numbers of full time employees at the affected party's retail stores in Ontario would not allow its competitors to infer the relative sizes of safety footwear markets in Ontario and Alberta. I note that the information at issue is about the number of full time employees in the affected party's retail stores in Ontario. It does not include Alberta. I also note that the affected party has not identified how competitors duplicating the affected party's numbers would prejudice it. It appears that the affected party assumes that its competitors will have the resources to duplicate their numbers. Overall, I find that I have not been provided with sufficient evidence to support a finding that disclosure of the numbers of full time employees could reasonably be expected to provide a partial roadmap to the affected party's confidential business operations, or could reasonably be expect to interfere significantly with the affected party's contractual or other negotiations.

[44] I am also not satisfied that the withheld information about the affected party's web-based ordering system, if disclosed, could reasonably be expected to prejudice its competitive position. As noted earlier, I did not find this type of information to be a trade secret. Although it may be a major selling feature of the affected party's business, the affected party has not established that it has monetary value from not being known. It is not clear from the affected party's representations whether it is the only company to provide this feature in the safety footwear retail industry. Regardless, given the

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[15] Order PO-2853.
[16] Question 4, Schedule 3(h), record 2.
[17] Question 33, Schedule 3(h), record 2.

ubiquitous nature of web-based ordering systems, I find that disclosure could not reasonably be expected to result in the harm stated in section 17(1)(a) and (c).

[45] I am likewise not convinced that the withheld information about the order fill rate and error rate, if disclosed, could reasonably be expected to prejudice the affected party's competitive position. Although these are two key performance metrics, I have not been provided with sufficient evidence to establish that they will provide competitors with a roadmap for how to help achieve similar success. In my view, competitors are well aware that these performance metrics need to be high to obtain commercial success similar to the affected party. As such, I find that disclosure of the affected party's values could not reasonable be expected to prejudice significantly the competitive position of the affected party.

[46] I note that the affected party provided no submissions on the withheld information on its pandemic response plan and the planned expansion to a named Canadian city. As I have no submissions nor any evidence on how the disclosure of this information could possibly harm the affected party, I do not find that they have met the third part of the test.

CONCLUSION

[47] In conclusion, I order disclosure of some of the withheld information contained in the proposal to which the section 17(1) exemption does not apply. I order disclosure of the withheld information on the numbers of full time employees at the affected party's Ontario retail stores, details of its web-based ordering system, its pandemic response plan and its plan to expand to a named Canadian city. I also order disclosure of the withheld information on its order fill rate and shipping error rate.

[48] I uphold the OPG's decision to exempt the remaining withheld information at issue under section 17(1).

ORDER:

1. I uphold the OPG's decision to withhold all the information at issue in records #1 and #3.

2. I also uphold the OPG's decision to withhold the information at issue in the following portions of record #2:

    - Schedule 3(a) – Historical Performance, pages 2-8

    - Schedule 3(h) – questions 2, 7, and 12

3. I order the OPG to disclose to the appellant the remaining information in the records at issue by **January 9, 2018**, but not before **January 4, 2018**.

Original Signed by: November 28, 2017

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Adjudicator