Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3890

Appeal PA16-432

The Hospital for Sick Children

October 12, 2018

Summary: The Hospital for Sick Children (the hospital) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the hospital's highest value software contracts from 2013-2016. The hospital located a contract in response to the request. The hospital notified the company about the request, and asked for its views on disclosure, but the company did not respond. The hospital issued a decision granting full access to the responsive record, which the company (now the appellant) then appealed on the basis of the third party information exemption at section 17(1) of the *Act*. Mediation led to consent to partial disclosure, and the inclusion of an additional responsive record to the scope of the appeal, which was disclosed to the requester. The adjudicator upholds the hospital's decision to disclose the entire contract to the requester.

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

Orders Considered: Order MO-3290.

OVERVIEW:

[1] The Hospital for Sick Children (the hospital) received the following request, under the *Freedom of Information and Protection of Privacy Act* (the *Act)*:

> For the period of March 2013 to March 2016, please provide the 10 largest annual software contracts that the hospital entered into with software vendors, and the total actual amount paid to each vendor under the contracts.

> "Largest" for the purpose of this request is defined as the 10 software vendors which the hospital has paid (or agreed to pay) the greatest sum in total dollars for software and/or software related services over the term of the contract.

[2] In response to the request, the hospital located a contract, which included two schedules to the contract.

[3] Before issuing its access decision, pursuant to section 28 of the *Act*, the hospital notified the company it had entered into the contract with and asked for its views about disclosure of the record. The company/third party objected to disclosure. The hospital then issued its decision, granting full access to the contract.

[4] The company (now the appellant) appealed the hospital's decision to this office, relying on the mandatory exemption of section 17(1) (third party information) of the *Act*. Mediation led to consent to limited disclosure, and the addition of another responsive record to the scope of the appeal, which was disclosed to the requester. However, mediation could not resolve the dispute, and the appeal moved to adjudication.

[5] At adjudication, I sought written representations from the appellant, the hospital, and the original requester in response to a Notice of Inquiry, setting out the facts and issues on appeal. The appellant provided written representations in response. The requester did not, and the hospital sent a letter stating that it would not send representations because its decision letter provided the basis for its position that the section 17(1) exemption does not apply.

[6] For the reasons that follow, I find that the mandatory third party information exemption at section 17(1) does not apply to the information at issue in the contract, and I uphold the hospital's decision to disclose it to the requester.

RECORDS:

[7] The information at issue in the contract falls within two categories:

1. unit pricing – consisting of fees, charges, expected hours and rates for specific product modules or services to be provided by the appellant, and

2. specifications – detailed descriptions of the technical operation of the product, the functions that it performs or the requirements that it must achieve.

DISCUSSION:

[8] The appellant has already agreed to the disclosure of most of the record, so the only issue in this appeal is whether the portions of the record at issue are exempt under section 17(1) of the *Act*. Specifically, the appellant argues that sections 17(1)(a) and

17(1)(c) apply.

[9] The hospital decided that the mandatory exemption at section 17(1) does not apply to any portion of the contract, including the schedules, and for the reasons discussed below, I agree with that decision. Further, since I find that the schedules identified as responsive records were incorporated by reference into the contract, I will refer to these documents together as "the record" or "the contract".

[10] The relevant portions of section 17(1) state that:

> 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,
>
> > (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;
> >
> > . . .

[11] 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]

[12] For section 17(1) to apply, the appellant must prove that each part of the following three-part test applies to the information at issue:

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.

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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.

Part 1: type of information

[13] The parties agree, and I find, that the record is a commercial contract, and therefore, contains commercial and financial information, so part one of the test is met.

Part 2: supplied in confidence

[14] For the reasons that follow, neither the unit pricing nor the specifications information meet the "supplied" element of part two of the test.

[15] Part two of the three-part test itself has two parts: the information at issue must have been "supplied" to the hospital by the appellant, and the appellant must have done so "in confidence", implicitly or explicitly. If the information was not supplied, section 17(1) does not apply, and there is no need to decide the "in confidence" element of part two (or part three) of the test. That is the case here.

[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.[3]

[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 inferences with respect to information supplied by a third party.[4]

[18] 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.[5]

[19] I will discuss part two as it concerns the unit pricing information, and the specifications information in turn.

Unit pricing information

[20] The hospital decided, and I find, that the "pricing/spending information" was not supplied by the appellant because it "indicates amounts SickKids agreed to pay for the products and services provided". In my view, the contract as a whole reflects the agreed-upon terms that were the result of negotiation between the parties. Once the hospital accepted the appellant's pricing, the information became negotiated, rather than supplied.[6]

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[3] Order MO-1706.
[4] Orders PO-2020 and PO-2043.
[5]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*),.
[6] Order PO-2384.

[21] There are two exceptions to the general principle that information within contracts is not "supplied": the "inferred disclosure" and "immutability" exceptions.

[22] The appellant argues that the inferred disclosure exception applies to the unit pricing, but I disagree.

[23] The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[7]

[24] The appellant did not provide sufficient detail about its unit pricing information to establish that it is non-negotiated confidential information. The hospital's decision letter specifically refutes the notion that it is, indicating that these prices were the amounts that the hospital agreed to pay. The appellant submits that the "inferred disclosure" exception applies to the unit pricing in the contract because a competitor could infer from that information what software and services the appellant will supply to customers at what prices, which are submitted as being essential elements of the appellant's overall product/pricing strategy. However, in my view, "overall product/pricing strategy" is too vague to be considered the appellant's non-negotiated information. What a third party will provide in products and/or services to an institution and at what price is the kind of information that would be found in most, if not all, contracts.[8] This is not enough to establish that the "inferred disclosure" except should apply.

[25] Without specific evidence of non-negotiated information that would be revealed by disclosure of the unit pricing, I find that this type of information is precisely the type of information that is negotiable between contracting parties, as many IPC orders have held.[9] Therefore, I find that the "inferred disclosure" exception does not apply to the unit pricing information, so this information fails the "supplied" element of part two of the test. Accordingly, it is unnecessary for me to examine the "in confidence" element of part two, or part three of the test regarding the unit pricing.

Technical and functional specification information

[26] Having reviewed the record and the appellant's representations, I find that the information about product specifications also fails the "supplied" element of part two of the test.

[27] The appellant resists the disclosure of information found within 22 pages in the schedules to the contract appearing in exhibits entitled "Specifications". These 22 pages form part of the contract, but the appellant submits that they are exempt from disclosure under the "immutability exception".

[28] The "immutability exception" applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation.

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[7] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[8] Order MO-3290.
[9] See, for example, Orders PO-2435 and MO-3577.

Examples are financial statements, underlying fixed costs and product samples or designs.[10]

[29] The relevant portion of the appellant's submission that the immutability exception applies to the 22 pages of specifications information is:

> …the Agreement describes the technical and other specifications for [the appellant's] software and services. This information is not susceptible of change, and so the 'immutability exception' applies.[11]

[30] I find that this submission is an assertion and is insufficient evidence that the information contained within the 22 pages at issue is immutable. The appellant has not explained in its representations why this information is not susceptible to change. It is not clear why, for example, the product design or specifications could not change in accordance with the needs of the hospital. Nor is it clear that all of this information is even unique to the appellant and not susceptible to change because some of it relates to legal compliance matters (such as privacy issues), which can change. Without sufficient evidence explaining why the information within these 22 pages is an informational asset of the appellant that is not susceptible to change, I find that the immutability exception does not apply to it. It is, therefore, unnecessary for me to examine the "in confidence" element of part two of the test, or part three of the test.

[31] Since both the unit pricing and the specification information do not meet part two of the test and all three parts of the test must be met for the exemption to apply, I find that the section 17(1) exemption does not apply to the contract.

ORDER:

1. I uphold the hospital's access decision, and dismiss this appeal.

2. I order the hospital to disclose the entire contract to the requester by November 19, 2018 but not before November 14, 2018 .

3. In order to verify compliance with this order, I reserve the right to require the hospital to provide me with a copy of the record sent to the requester, pursuant to paragraph 2 of this order.

Original Signed by: October 12, 2018

Marian Sami
Adjudicator

[10] *Miller Transit*, above at para. 34.
[11] Paragraph 23 of the appellant's representations.