

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3922

Appeal PA16-290

York University

January 30, 2019

Summary: The university received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the York University Bookstore Renovations. The university decided to disclose the records, in part, relying on sections 17(1) (third party information) and 18(1) (economic and other interests) to withhold the remainder of the records. In this order, the adjudicator finds that the records are not exempt under sections 17(1) and 18(1) as disclosure could not reasonably be expected to result in any of the harms set out in those sections. She orders the university to disclose the records to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 18(1).

BACKGROUND:

[1] York University (the university) received a request for records pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) relating to the York University Bookstore Renovations and the York Lanes Pharmacy.

[2] Following clarification with the university, the university wrote to the requester stating that the request for the "York University Bookstore Renovations" would be processed separately from the request for the "York Lanes Pharmacy".

[3] The university issued a decision relating to "York Lanes Pharmacy", which the requester appealed to this office. Appeal PA16-187 was resolved and has subsequently been closed.

[4] In regard to the request for records relating to the "York University Bookstore Renovations", the university and the appellant clarified the scope of the request from January 1, 2014 to February 14, 2016 as follows:

1. [named corporation] documents concerning York University Bookstore renovations;
2. York University Bookstore Lease with [named corporation];
3. Correspondence between Vice-President [named individual] and York University Board of Governors regarding bookstore renovations;
4. Correspondence between York University Bookstore Director [named individual] and York University Bookstore Staff regarding bookstore renovations;
5. Correspondence between York University Bookstore Director [named individual] and Vice-President [named individual] regarding bookstore renovations.

[5] Following a time extension and notice to an affected party, the university issued a decision to the requester and to the affected party (the named corporation) granting access to the records, in part. Access was denied to some responsive records pursuant to sections 17 (third party information), 18.1(1) (information with respect to closed meetings), 19 (solicitor-client privilege) and 21 (personal privacy) of the *Act*.

[6] The requester, now the appellant, appealed the university's decision to this office.

[7] During the mediation stage, the university issued a revised decision to the appellant and the affected party, granting partial access to Record 4 but relying on section 17 of the *Act* to deny access with respect to the remaining portions. Subsequently, the university received consent from the affected party to disclose portions of Record 4.

[8] The university later clarified that it was relying on sections 17 and 18(1)(c) and not 18.1 of the *Act* to deny access to the remainder of Record 4. The university also stated that five records that were not included in the index of records were determined to be not responsive to the request.

[9] The appellant stated that she was not pursuing access to records 1, 5, 7, 8, 9 and 10 and the records that the university stated were not responsive to her request. Therefore, those records are no longer at issue in this appeal. However, the appellant is pursuing access to records 2, 3, 6 and 11 and the withheld portions of Record 4.

[10] As mediation did not resolve this appeal, it was moved to the next stage, where an adjudicator conducts a written inquiry under the *Act*. I invited the university, the

appellant and the affected party to submit representations. The affected party declined to submit representations, but relies on its earlier submissions it submitted to the university dated April 1, 2016. The university's and the appellant's representations were shared with the other party in accordance with the IPC's *Code of Procedure and Practice Direction Number 7*.

[11] In this order, I find that the records are not exempt under section 17(1) or 18(1) as disclosure could not reasonably be expected to result in any of the harms set out in those sections. I order the university to disclose the records to the appellant.

RECORDS:

[12] The records at issue are as follows:

- three memoranda (in their entirety) addressed to members of the affected party's Board of Directors dated March 19, 2014 (Record 2), September 15, 2015 (Record 3), and December 16, 2015 (Record 11);
- A memorandum (only the withheld portions) addressed to members of the York University Board of Governors, Land and Property Committee dated February 10, 2015 (Record 4); and
- a document about York Lanes refinancing and projects (Record 6).

[13] The university claims the exemption at section 17(1) for all the records at issue. It claims the section 18(1) exemption for the withheld portions in Record 4.

ISSUES:

- A. Does the mandatory exemption at section 17(1) apply to the records?
- B. Does the discretionary exemption at section 18(1)(c) apply to the withheld information in Record 4?

DISCUSSION:

A: Does the mandatory exemption at section 17(1) apply to the records?

[14] The affected party claims the application of section 17(1), which reads:

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.

[15] 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

[16] 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

[17] To satisfy the first part of the section 17(1) test, the affected party must show that the records reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

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.

[18] Past orders of this office have defined financial and commercial information 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

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.⁵

[19] Adopting these definitions, from my review of the records at issue, I find that they contain information that qualifies as commercial and financial information for the purposes of section 17(1) of the *Act*. I note that the university and the affected party submit that the records relate to the renovation and leasing of the bookstore. I find that the information at issue is commercial and financial information for purposes of section 17(1). I also note that the appellant provided representations, but she did not address the type of information contained in the records at issue. Accordingly, the first part of the test for the application of section 17(1) has been met.

[20] I will now consider the second part of the test.

Part 2: supplied in confidence

Supplied

[21] 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

[22] 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

[23] At this point, some information about the relationship between the affected party

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order PO-2010.

⁶ Order MO-1706.

⁷ Orders PO-2020 and PO-2043.

and the university may be helpful. The affected party is a wholly owned subsidiary that serves as a development partner to the university (Keele Campus). The affected party, incorporated in 1985, is involved in the planning and development of lands owned by the university.

[24] The affected party submits the following:

[Our] Board of Directors memos and packages are only distributed to members of our Board of Directors, and not to any other parties inside or outside of the university. We have a reasonable expectation that the materials are provided in confidence;

[25] As the university's submissions on this issue are identical to those of the affected party, I will not reiterate them.

[26] The affected party and the university appear to argue that the affected party is an arms-length organization, separate and distinct from the university. However, neither party has satisfied me that the records (with the exception of Record 4) were "supplied" to the university in the manner that is required for the second part of the test for section 17(1). It is unclear to me from the representations and the records themselves that the affected party supplied the memos to the university. These records are memos to the affected party's Board of Directors. While the records clearly made it into the university's hands (as the university now has them), it is not clear how or when, from my review of the records and the representations.

[27] On the other hand, Record 4 appears to have been directed to the university's Board of Governors, Land and Property Committee. However, while I am prepared to find that this record was supplied to the university, I am unable to find that Record 4 was supplied with a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. I am not persuaded by the parties' representations or the content of the record that the withheld information contained in Record 4 would have been supplied in confidence.

[28] In any event, I do not need to make a final determination on whether the records were "supplied in confidence" as required to meet the second part of the test. This is because, as seen below, the university and affected party have not met the third part of the test.

Part 3: harms

[29] To satisfy the third part of the test, the affected party must provide evidence about the potential for harm resulting from disclosure. 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 type of issue and seriousness of the consequences.⁸

[30] The failure of a party resisting disclosure to provide such 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*.⁹

Representations

[31] The affected party submits that disclosure of the information at issue could reasonably be expected to prejudice its competitive position or interfere with its contractual rights. It states:

Disclosing [our] Board level discussions on tenant rents, leasing strategies, financial models and other commercial items will prejudice our competitive position in negotiating leases in York Lanes. Furthermore, the Ground Lease between York University and [us] for York Lanes gives [us] the right to enter into sub-leases and for beneficial use and enjoyment of the property, both of which are contractual rights that will be interfered with if these documents are released.

[32] In addition, the affected party submits that disclosure of the information at issue would result in it no longer supplying this or similar information to the university. It submits that if it must treat its memos to the Board as potentially public documents then it will severely limit what information can be included in these memos.

[33] As the university's submissions on harms for records 2, 3, 6 and 11 are identical to the affected party's, I will not reiterate them.

[34] With respect to Record 4, the university submits that the disclosure of the withheld information in Record 4 would allow competitors to interfere with the negotiations between it, the affected party and private business tenants as Record 4 reflects the strategies and negotiations of proposed lease terms. It submits that in order to protect plans not yet put into operations, it does not wish to share the strategy that the affected party proposes to it.

[35] In addition, the university submits:

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁹ Order PO-2435.

It is not the practice of the [affected party] to share these sensitive, confidential types of records beyond those individuals who need to know for the purpose of decision-making, their own Board and [our] Board of Governors. Disclosure of Board level discussions as described above would prejudice the third party's competitive and contractual positions. This sensitive information is not otherwise disclosed or available from sources from which the public has access.

[36] In response to the university's submissions, the appellant submits that the university states that disclosure "could" result in exploitation – not that it *would* or *will* or for that matter *can*. She submits that there is no clear evidence that the affected party would suffer any specific harms. The appellant also submits that the affected party's claim that disclosure would result in a financial loss to it is not a positive assertion, but a hypothesis.

Analysis and findings

[37] Although the affected party and the university argue that the affected party could reasonably be expected to suffer a number of harms if the records at issue is disclosed, their representations do not provide any further details or evidence in support of their arguments. I find that their representations, especially of the affected party, fall short of the sort of detailed evidence that is required to establish part three of the test. Instead, their representations amount to speculation of possible harms. I also find that the affected party's representations do little more than repeat the harms listed in the *Act* and assert that the disclosure of the records could reasonably be expected to result in these harms. From my review of the records at issue, I find that the harm is not inferable from the face of them. Accordingly, I find that the parties have not established any of the harms that could reasonably be expected to result from disclosure.

[38] As all parts of the three-part test must be met for section 17(1) to apply, I find that the records at issue are not exempt under section 17(1). I will, therefore, order that records 2, 3, 6 and 11 be disclosed to the appellant.

[39] I now turn to the potential application of section 18(1) to Record 4.

B: Does the discretionary exemption at section 18(1)(c) apply to Record 4?

[40] Section 18(1)(c) states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[41] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹⁰

[42] For section 18(1)(c) to apply, the institution must provide detailed 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 type of issue and seriousness of the consequences.¹¹

[43] The failure to provide detailed and evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹²

[44] [44] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.¹³

[45] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.¹⁴

[46] The university submits that the disclosure of the withheld information in Record 4 could reasonably be expected to prejudice its economic interests or its competitive position. It submits that Record 4 contains the affected party's long-term commercial and financial plans and projections for York Lanes, which in turn have a direct impact on the university's economic interests and competitive position. The university also submits that the ability of the affected party to negotiate future agreements with private businesses would become limited and disadvantaged. It further submits that private businesses would be hesitant to enter into negotiations of future contracts

¹⁰ Toronto: Queen's Printer, 1980.

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹² Order MO-2363.

¹³ See Orders MO-2363 and PO-2758.

¹⁴ Orders P-1190 and MO-2233.

without assurances that their own confidential financial information would be protected.

[47] In addition, the university submits:

York University has disclosed the portions of the record that are non-prejudicial to the institution. Disclosure of the information will not increase public confidence in the operation of the institution and would place the University, as well as the affected party, at a commercial and financial disadvantage because it would limit their ability to engage in revenue-generating opportunities with other businesses [Order PO-2619, PO-2676].

[48] Based on my review of the withheld information in Record 4, I am not satisfied that it qualifies for exemption under section 18(1)(c) of the *Act*. I find that the university did not provide me with detailed evidence about the potential for harm. Its representations are vague and lack any specificity with regard to the harms that could reasonably be expected to result if the withheld information is disclosed. Overall, I find that the university's arguments regarding the harms contemplated by section 18(1)(c) are speculative and lacking in detail.

[49] In addition, I note that the university cites Orders PO-2619 and PO-2676. I do not find these authorities are of assistance to the university. The record at issue in order PO-2619 is a contract associated with a donation while the record in PO-2676 (with respect to section 18(1)(c)) is about the fuel unit costs and operations, maintenance and administration unit energy costs for four generating stations. The records in these orders is different from Record 4, which are a named corporation's long-term commercial and financial plans and projections for York Lanes.

ORDER:

1. I order the university to disclose the records at issue to the appellant. This disclosure is to take place by **March 8, 2019** but not before **March 4, 2019**.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the university to provide me with a copy of the records disclosed to the requester.

Original signed by: _____

Lan An
Adjudicator

January 30, 2019