Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4565

Appeal PA22-00572

Ministry of Public and Business Service Delivery

October 31, 2024

Summary: An individual made a request under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Public and Business Service Delivery for access to an agreement with a named company for record storage services. The ministry issued a decision granting full access to the agreement. The named company appealed the decision on the basis that the exemption for third party information at section 17(1) applies to the information the ministry is prepared to disclose. In this order, the adjudicator finds that the information remaining at issue is not exempt under section 17(1). She upholds the ministry's decision to disclose the information and dismisses the appeal.

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

Cases Considered: *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139.

OVERVIEW:

[1] The Ministry of Public and Business Service Delivery (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an agreement with a named company for record storage services.

[2] The ministry notified the named company about the request to seek its views on the disclosure of the records.

[3] Subsequently, the ministry issued a decision granting full access to the form of agreement (FOA) between the named company and the ministry, including an amending agreement, and the request for proposal (RFP) issued by the ministry, including its addendums. It also granted partial access to the named company's submissions made to the ministry in response to the RFP.[1]

[4] The named company, now the appellant, appealed the ministry's decision to disclose the records to the requester to the Information and Privacy Commissioner of Ontario (IPC).

[5] During mediation, the appellant provided its consent to disclose all of the RFP and addendums and some of the FOA[2] to the requester. The ministry disclosed this information to the requester.

[6] Also, during mediation, the requester raised the potential application of the public interest override in section 23 of the *Act*, which was added to the scope of the appeal. Section 23 permits an institution to disclose information subject to certain exemptions, including section 17(1), if a compelling public interest in disclosure is established.[3]

[7] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where I decided to conduct an inquiry under the *Act*. I invited the appellant, the ministry and the requester to provide representations on the issues in this appeal. The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction 7*.

[8] For the reasons that follow, I find that section 17(1) does not apply to the withheld portions of the FOA, and I uphold the ministry's decision to grant full access to it.

RECORDS:

[9] The information remaining at issue is found in pages 78 to 105 of the FOA. Pages 78-79 set out the amending agreement while pages 80-105 make up Appendix 1 to the amending agreement.

[10] Appendix 1 consists of tables of the rates for each separate services for every year during the term of the agreement.

[11] In this order, I will refer to the amending agreement and Appendix 1 collectively

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[1] The appellant's submission to the ministry made in response to the RFP is not at issue in this appeal as the appellant is not challenging the ministry's decision to partially disclose it and the requester did not appeal the ministry's decision to withhold portions of it.

[2] Pages 1 – 77 and 108 – 114 of the FOA were disclosed to the requester.

[3] As a result of my finding on section 17(1), I did not need to consider the possible application of section 23 in this order.

as "the amending agreement".

DISCUSSION:

[12] The sole issue to be determined in this appeal is whether the exemption for third party information in section 17(1) applies to the amending agreement at pages 78 to 105 of the FOA.

[13] The appellant claims that the mandatory exemptions at sections 17(1)(a), (b) or (c) of the *Act* applies to pages 78 to 105 and that therefore they should not be disclosed.

[14] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[4] where specific harms can reasonably be expected to result from its disclosure.[5]

[15] Section 17(1) states, in part:

> 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;
> >
> > (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
> >
> > …

[16] For section 17(1) to apply, the appellant 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;

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[4] *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.*).
[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[17] For the reasons that follow, I find that section 17(1) does not apply because part 2 of the three-part test is not satisfied – the information must have been supplied to the institution in confidence.

[18] Part 2 of the test provides that the information at issue must have been "supplied in confidence" to the institution, either implicitly or explicitly. Information may qualify as "supplied" for the purposes of section 17(1) 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 that is directly supplied by a third party.[6]

[19] Previous orders of the IPC have held that the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1).[7] The terms of a contract are generally treated as mutually generated rather than "supplied" by a third party.

[20] There are two exceptions to the general rule that contracts are not "supplied": the "inferred disclosure" and "immutability" exceptions. 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.[8] The "immutability" exception applies where the contract information is supplied by the third party, but the information is not susceptible to negotiation.[9]

Representations

[21] The appellant submits that the "inferred disclosure" exception applies to the amending agreement. It explains that it supplied to the ministry a 345 page proposal in response to the RFP, which was replete with commercial and financial information. The appellant explains that the pricing information for each separate service, the addresses of its two storage facilities and the amount of storage space at one of its facilities exclusively reserved for the storage of ministry records under the amending agreement is its "confidential information". It submits that a sophisticated competitor with knowledge of the confidential information in the amending agreement could reasonably glean the existence and substance of other such confidential, non-negotiated, information that

[6] Orders PO-2020 and PO-2043.
[7] Orders MO-1706, PO-2371 and PO-2384.
[8] Order MO-1706.
[9] For example, financial statements. See Order PO-2384.

formed the foundation for the terms of the agreement and the amending agreement including:

- Its costs and profits as it relates to each of the services;
- Its process as it relates to the calculation of the prices per services described in the amending agreement;
- Its pricing rational as it relates to minimum volumes and minimum year- end volumes for specific services;
- Its labour costs, including specific investments in upgraded processes and technologies to reduce labour costs; and
- Its capacity to bid on other contracts with the Ontario Government.

[22] Although both the ministry and requester submitted representations, their representations did not address whether the inferred disclosure exception applies. However, the requester, in his representations, submits generally that disclosure of the amending agreement including the pricing information contained in its appendix is critical to assessing the fairness of pricing for record storage services.

[23] In response to the requester's representations, the appellant submits that in stating the requested information would permit the assessment of the fairness of pricing for records storage services, the requester has confirmed that an individual with access to the confidential information could reasonably glean the existence of other confidential, non-negotiated information "that formed the foundation for the terms of [its] RFP submission proposal for the [agreement]".

Analysis and findings

[24] To meet the requirements of part 2 of the test under section 17(1), the appellant must provide sufficient evidence to establish that the information at issue was "supplied" to the ministry by the appellant "in confidence".

[25] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of the appellant.

[26] As noted above, the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1)[10] because the terms of a contract are generally treated as mutually generated rather than "supplied" by a third party. In this appeal, the information at issue is contained in an amending agreement to a FOA. It clearly amounts to the contents of a contract between

[10] Orders MO-1706, PO-2371 and PO-2384.

the ministry and the appellant and, therefore, it is considered to have not been "supplied" for the purpose of section 17(1), unless either the inferred disclosure exception or the immutability exception is found to apply.

[27] In this case, the appellant submits that although the information is contained in a contract, the inferred disclosure exception applies to fulfill the "supplied" requirement of part 2.

[28] In *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.* (*Miller Transit*)[11], the Ontario Divisional Court explained the "inferred disclosure" exception in the following way:

The inferred disclosure exception arises where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure. The onus is on the party to show "convincing evidence that disclosure of the information …would permit an accurate inference to be made of underlying non-negotiated confidential information supplied by the affected party…": see *Order MO-1706*, *Peel District School Board*, [2003] O.I.P.C. No. 238, at paras. 52-53

[29] The Court further stated:

> … [The inferred disclosure exception] applies where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other, confidential, information belonging to the third party may be gleaned by reference to contractual information. That is not the situation here: Miller Transit argues that contractual terms and information mirror documents provided by it to York Region.[12]

[30] The information at issue in this appeal is an amending agreement to a FOA, which includes pricing information. Specifically, Appendix 1 of the amending agreement consists of tables of the rates for each separate services for every year of the term of the agreement contained in the amending agreement.

[31] The appellant submits that a sophisticated competitor with knowledge of its confidential information could reasonably glean the existence and substance of other such confidential, non-negotiated, information that formed the foundation for the terms of the agreement and the amending agreement, including its costs and profits for each of the services, the calculation of the prices per services, minimum volumes and minimum year-end volumes for specific services, labour costs and its capacity to bid on other contracts with the Ontario Government.

[32] In its reply representations, the appellant notes that the requester argues that

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[11] 2013 ONSC 7139 ("Miller Transit").
[12] *Miller Transit*, above at para. 43.

disclosure of the amending agreement including the pricing information contained in its appendix is critical to assessing the fairness of pricing for record storage services. The appellant submits that this assertion made by the requester confirms that "a competitor with knowledge of the confidential information [in the amending agreement] could reasonably glean the existence and substance of other confidential, non-negotiated information that formed the foundation of [the appellant's] RFP submission proposal for the Contact". The appellant further submits that this supports its position that the inferred disclosure exception applies.

[33] I am not persuaded by the appellant's argument. Aside from asserting that it is the case, the appellant has not provided sufficient evidence to establish that the disclosure of the specific pricing information in the amending agreement (the tables of the rates for each service in Appendix 1) would allow a sophisticated competitor to glean non-negotiated information (such as, its costs and profits for each of the services, the calculation of the prices per services, minimum volumes and minimum year-end volumes for specific services, labour costs and its capacity to bid on other contracts with the Ontario Government). In my view, the appellant has not demonstrated how knowledge of the rates for each service would permit a competitor to glean accurate inferences about underlying non-negotiated information.

[34] As I do not accept that the appellant's evidence establishes that the disclosure of the rates for services in the amending agreement would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the ministry, I find that it has not established that the information that remains at issue (including the pricing information), which is contained in a contract, falls within the "inferred disclosure" exception.

[35] Neither the ministry nor appellant has provided substantive representations that support a finding that the "immutability" exception applies to the information at issue, and based on my review, I conclude that it does not.

[36] For the reasons set out above, I find that the information at issue is contained in a contract between the appellant and the ministry and, that neither the "inferred disclosure" nor the "immutability" exception applies. Therefore, I find that the information was not "supplied" by the appellant to the ministry and, accordingly, it does not meet part 2 of the test.

[37] As all three parts of the section 17(1) test must be met for the exemption to apply, it is not necessary for me to consider whether the information at issue meets the "in confidence" requirement of part 2, or parts 1 or 3 of the test. As I have found that part 2 of the test has not been met, the information at issue is not exempt from disclosure under section 17(1). I uphold the ministry's decision to disclose the amending agreement to the requester and dismiss the appeal.

ORDER:

1. I uphold the ministry's decision.

2. I order the ministry to disclose the information to the requester, in accordance with its original decision, by **December 6, 2024** but not before **December 1, 2024.**

3. To verify compliance with provision 2, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the requester upon request.

Original Signed by: October 31, 2024

Lan An
Adjudicator