Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4610

Appeal PA23-00305

Sheridan College Institute of Technology and Advanced Learning

February 20, 2025

Summary: The college received a request for a copy of a certain contract. A company whose interests might be affected by disclosure of the contract asked that the college not release the contract to the requester, claiming that the college had to withhold it under the mandatory exemption at section 17(1) (third party information). However, the college decided that the contract did not meet one of the requirements of section 17(1) and said that it would release it.

The company appealed the college's decision. The adjudicator finds that the contract (or any part of it) was not "supplied" to the college, so she upholds the college's decision and dismisses the appeal.

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

Cases Considered: *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 SCR 17; *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.); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139; *Toronto-Dominion Bank v Ryerson University*, 2017 ONSC 1507 (CanLII); *Canadian Home Healthcare Inc. v. Halton Healthcare Services and Information and Privacy Commissioner of Ontario*, 2024 ONSC 5966 (CanLII).

OVERVIEW:

[1] This order resolves an appeal made to the Information and Privacy Commissioner of Ontario (IPC) because an institution decided that a contract that was requested under

the *Freedom of Information and Protection of Privacy Act* (the *Act*) was not exempt from disclosure and was to be released to the requester.

[2] Sheridan College Institute of Technology and Advanced Learning (the college) received a request under the *Act* for "[a] copy of the awarded and executed Resource Management Services Agreement (or equivalent)" that the college awarded for a certain time period.

[3] The college notified a third party whose interests may be affected by disclosure of the contract, as required by the *Act*.[1] The third party objected to disclosure but the college ultimately issued a decision granting full access to the record because the college took the position that the contract did not meet the three-part test for the mandatory exemption at section 17(1) (third party information) of the *Act*. The college did not release the contract to the requester, to allow for the 30-day appeal period.[2]

[4] The third party (now the appellant) appealed the college's decision to the IPC. The IPC appointed a mediator to explore resolution but a mediated resolution could not be reached.

[5] I conducted a written inquiry under the *Act* on the issues in the appeal. Although the appellant raised other exemptions during IPC mediation, it did not pursue most of those claims at adjudication. As a result, the only issue in this appeal is section 17(1). I will also discuss the appellant's reference to the mandatory personal privacy exemption at section 21(1) that it raised at mediation, and its views about responsiveness of the information at issue as preliminary issues below.

[6] For the reasons that follow, I uphold the college's decision and dismiss the appeal.

RECORD:

[7] The record at issue is a 33-page service agreement.

DISCUSSION:

[8] The only issue in this appeal is whether the mandatory exemption at section 17(1) for third party information applies to the record. I find that it does not.

[9] Before explaining why section 17(1) does not apply to the record, I will discuss two preliminary issues, below.

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[1] See section 28(1) of the *Act*.
[2] Under section 50(1) of the *Act.*

Preliminary issues

Should all names and other "identifying information" be redacted?

[10] At IPC mediation, the appellant raised the mandatory exemption at section 21(1) of the *Act* for portions of pages 2, 10 and 12 of the record. As a result, I included the following issues in the Notice of Inquiry:

- Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?
- Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[11] If information is not "personal information" as defined in the *Act*, then the personal privacy exemption is not considered because only information that is "personal information" can be considered for that exemption.

[12] The appellant did not provide representations about the above two issues but asked that all names and "identifying information" be redacted from the record if I was going to order it released.

[13] Section 2(3) of the *Act* excludes some information from the definition of "personal information." Section 2(3) of the *Act* says: "Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity." Based on my review of the contract, this is the type of information that appears on certain pages of it. Although in some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual,[3] the appellant did not provide evidence of that here. As a result, and due to the business context and the wording of section 2(3) of the *Act*, the names and "identifying information" in the contract is not personal information and I will not order that it be withheld.

Is the whole record responsive to the request?

[14] Although the appellant acknowledges that the record says that its three parts are collectively "'the contract,'" it also argues that only one part was requested, so at most, that is what should be released. The appellant describes the three parts as:

- the Resource Management Services Agreement,
- Schedule of Deliverables, Rates, and Specific Provisions, and

[3] Orders P-1409, R-980015, PO-2225 and MO-2344.

- Standard Terms and Conditions.

[15] I do not accept the appellant's position and I find that the whole record is responsive to the request.

[16] To be considered responsive to the request, records must "reasonably relate" to the request.[4] Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.[5]

[17] Here, the requester used the word "agreement" and not "contract." The terms "agreement" and "contract" are interchangeable in the context of the type of record that was requested: the contractual agreement between the college and the appellant for a certain timeframe. As a result, the whole contract is responsive to the request since the contract itself says that it consists of the agreement and two schedules (not just the part of the contract that the requester knew the name of, "Resource Management Services Agreement"). These schedules "reasonably relate" to the part of the record that the requester knew the name of. To interpret the request as only being for the part of the contract that uses the word "agreement" as found in the request would be an unreasonably narrow interpretation of the request because the requester is unlikely to know whether the record that they are seeking includes schedules.

[18] Therefore, based on my review of the request and the record, I find that the responsive record is the whole contract, which includes two schedules. I turn to whether this contract is exempt from disclosure under section 17(1) of the *Act*, next.

Section 17(1) of the *Act*

[19] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[6] where specific harms can reasonably be expected to result from its disclosure.[7]

[20] 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, [harms specified in paragraph (a), (b), (c), and/or (d), which are not relevant in this appeal].

[21] For section 17(1) to apply, the party arguing against disclosure (in this appeal,

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[4] Orders P-880 and PO-2661.
[5] Orders P-134 and P-880.
[6] *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.*).
[7] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

that is 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;

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 one of the test for section 17(1) is met – the contract reveals commercial information

[22] The college's decision acknowledged that the contract contains information that is commercial in nature, and the appellant does not dispute this.

[23] Based on my review of the contract, I agree and find that the contact contains information that is "commercial information," as that term has been described by the IPC:

> ***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[8] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[9]

[24] Therefore, the contract meets part one of the test for section 17(1).

Part two of the test for section 17(1) is not met – the contract was not "supplied"

[25] Part two of the test itself has two parts: the appellant must have *supplied* the record to the college, and must have done so *in confidence*, either implicitly or explicitly. If the record was not *supplied*, then there is no need to consider the *in confidence* portion of the test. That is the case here.

[26] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[10]

[27] 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

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[8] Order PO-2010.
[9] Order P-1621.
[10] Order MO-1706.

inferences with respect to information supplied by a third party.[11]

[28] As I will discuss further below, 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). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.

[29] As will be explained in more detail below, the IPC has identified two exceptions to this general rule:

1. **the "inferred disclosure" exception**. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.[12]

2. **the "immutability" exception.** This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[13]

The college's position

[30] The college's access decision stated that the record would not meet part two of the test. The college's decision explained that:

> A negotiated agreement between an institution and a third party generally does not qualify as having been supplied because terms of contracts are generally mutually generated by both the institution and the third party, rather than "supplied" by the third party. This applies even when the contract is preceded by little or no negotiation or where the final agreement reflects information that originated [from] a single party. While we recognize that there are two exceptions to this general rule, the College does not have a basis to apply either of these exceptions based on the information available to it.

[31] As a result, the college's decision was that the record is not exempt under section 17(1) and that it would disclose it (though it has not done so yet due to the intervening appeal that I am resolving in this order).

The appellant's representations

[32] The appellant argues that I am not bound by past IPC orders or past court

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[11] Orders PO-2020 and PO-2043.
[12] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[13] *Miller Transit*, cited above at para. 34.

decisions that found the IPC's approach to the contracts at issue in those cases to be reasonable and asks that I accept a different interpretation of part two of the test for section 17(1). The appellant also argues that, in any event, the contract meets part two of the test under the IPC's longstanding approach to contracts.

The appellant's proposed interpretation of "supplied in confidence implicitly or explicitly"

[33] The appellant states that past IPC orders and court decisions about section 17(1) have focused on the word "supplied" and not the words "in confidence." The appellant argues that this is not the natural reading of the *Act* (which should be preferred),[14] but rather that in a natural reading of the *Act*, the "operative words are 'in confidence' and not supplied."

[34] In addition, the appellant argues that the word "supplied" was not intended to form an element of the test for section 17(1), saying:

> If the word "supplied" was intended to form an element of the test, from a grammatical and syntactic standpoint, it would require a comma after "supplied". If the comma were following the word "supplied", the act of supplying the record(s) would form an element of the test. There is no comma.

[35] The appellant argues that by "emphasizing 'in confidence' as opposed to 'supplied,'" the IPC would be using a "more contextual approach" to section 17(1) that is "more in line with the normal reading of the sentence found in the statute." The appellant argues that "emphasizing 'in confidence'" would also be more aligned with part three of the test (regarding harms).

[36] The appellant states that the contract contains the word ""CONFIDENTIAL" at the bottom of each page, so it was clearly intended by its drafters to be confidential. As a result, the appellant argues that the IPC would be well within the bounds of reasonably interpreting the *Act* in finding that the contract was "supplied in confidence" and should not be released. The appellant argues that this more "nuanced approached" to "supplied in confidence" would balance the competing rights of the parties more properly.

The appellant's alternative position, applying past IPC orders and court decisions

[37] The appellant submits that under the longstanding approach to contracts, the contract at issue meets part two the test for section 17(1).

[38] The appellant says that the college "did not consider the two exceptions to the general presumption" (the "inferred disclosure" exception and the "immutability" exception, set out above). The appellant says that the onus of proof is on the party

[14] The appellant cites the Supreme Court of Canada in *La Presse Inc v. Quebec*, 2023 SCC 22 (CanLII) at para. 22.

resisting disclosure to show immutability.

[39] The appellant notes that the court has said than an example of the immutability exception is when an agreement contains underlying fixed costs. The appellant asserts that the information at issue "contains underlying fixed costs, for example at pages 29-33."

[40] The appellant also submits that some facts in *Canadian Medical Protective Association v. Loukidelis*[15] (*CMPA*) are similar to the facts in this appeal and may help show whether portions of the information at issue were "supplied." More specifically, the appellant notes that in *CMPA*, the court upheld the IPC's finding that a table in an appendix was "supplied." The appellant submits that here, "similar tables" are found at the end of the information at issue, as part of the second schedule, and "[a]t a minimum, the similarities between these tables and the one noted in [CMPA] are such that the tables must be considered to have been "supplied."

[41] In addition, the appellant argues that the second schedule, which contains the above noted tables, is entitled "Standard Terms and Conditions" and that this title "reinforces the fact that this portion was clearly 'supplied.'" The appellant argues: "If terms and conditions are "standard" they were not negotiated and cannot be considered mutually generated; they were supplied by [the appellant]."

[42] Therefore, the appellant submits that even if I find that the rest of the information at issue was not "supplied," the tables on page 31 should be withheld.

Analysis and findings

[43] I have considered the appellant's proposed alternative interpretation of part two of the test in relation to the contract in this appeal, and I reject that interpretation, as explain below. I also find that the evidence before me does not establish that the record (or page 31) was "supplied."

The appellant's proposed alternative interpretation of part two of the test is not reasonable

[44] The appellant argues that its proposed approach is a more natural and fair reading of section 17(1). Its approach appears to be contradictory, on the one hand, claiming that the word "supplied" was not meant to be a part of the test for section 17(1), and on the other hand, arguing that it is there but should not be emphasized as much as the words "in confidence."

[45] However, I reject these arguments as unreasonable and unsupportable. The Legislature included the word "supplied" in section 17(1), so the suggestion that the word "supplied" was not meant to be a part of the test for section 17(1) is absurd and cannot

[15] 2008 CanLII 45005 (ON SCDC).

be justified by the "only one principle or approach" to interpreting a statute, as stated by the Supreme Court of Canada, which is:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature].[16]

[46] I similarly do not accept the notion that the word "supplied" can simply and reasonably be de-emphasized in favour of the words "in confidence" in section 17(1), and that this would be more balanced and fair to the rights of third parties. This approach would be inconsistent with the purpose of section 17(1) because the requirement that the information have been "supplied" to the institution reflects the *purpose* in section 17(1) of protecting the *informational assets* of third parties from certain types of harms.[17] The appellant's proposed approach to interpreting "supplied in confidence" would also be inconsistent with one of the purposes of the *Act*. As a recent Divisional Court decision ruled, "severely limit[ing] public transparency into government contracts with third parties, . . . is contrary to the legislative intent of [the *Act*]."[18] The balance and fairness to third parties that the appellant raises is only relevant if the contents of the contract are "supplied" by the third party, and those interests are addressed under part three of the test.

[47] The fact that the pages of the contract all include the word "CONFIDENTIAL" does not change my finding. Accepting this argument would mean that government institutions can contract out of their transparency and accountability obligations under the *Act* by using the word "confidential" in their contracts with third parties. This would also essentially involve not considering the word "supplied" as being part of the test or interpreting the words of section 17(1) in light of its purpose and the purpose of the *Act*, and I reject the call to do so for the reasons discussed above.

[48] For these reasons, I do not accept the appellant's proposed approach to interpreting the words "supplied in confidence."

[49] Rather, I will follow the consistent approach of the IPC, which the courts have found as reasonable in relation to other contracts. 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). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties. This approach to contracts (that they are not "supplied" even if there was little *or* no negotiation) has been found by the Divisional Court to be a reasonable

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[16] *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 SCR 17.
[17] Order MO-1706.
[18] *Canadian Home Healthcare Inc. v. Halton Healthcare Services and Information and Privacy Commissioner of Ontario*, 2024 ONSC 5966 (CanLII).

interpretation of section 17(1).[19] As the courts have noted, this approach to contracts is also consistent with the purpose of the *Act* itself.[20] The Divisional Court recently rejected a call to depart from this approach in October 2024, in *Canadian Home Healthcare Inc. v. Halton Healthcare Services and Information and Privacy Commissioner of Ontario*.[21]

The evidence does not establish that the contract was "supplied"

[50] The appellant had the onus of proof in this appeal because it objects to disclosure. I disagree that the college did not consider either exception to the general rule about contracts in coming to its decision. The college, rather, said that it does not have a basis to apply either exception based on the information available to it. In any event, since it is the appellant that objects to disclosure in this appeal, the appellant had the onus of establishing that either exception applies.

[51] The appellant mentions the two exceptions to the general rule that contracts are not "supplied" in its comments about the college's decision but does not make any additional arguments in support of a finding that the inferred disclosure exception applies. Therefore, I find that the appellant has not established that that exception applies, and I see no basis for finding otherwise.

[52] Regarding the immutability exception, it is worth noting that the Notice of Inquiry sent to the appellant included examples of what would qualify for this exception: "This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[22]" The IPC consistently held that the prices agreed to be paid that are set out in a contract are *not* "underlying fixed costs."[23]

[53] The appellant's representations also do not establish that the immutability exception applies. Simply asserting that the information at issue "contains underlying fixed costs" is a vague statement that does not establish that the exception applies to the record, which is 33 pages long. The appellant specifies that pages 29-33 are an example of "underlying fixed costs." However, I do not accept that characterization of the contents of those pages, based on my review of them. Page 29 contains agreed upon terms of the contract, page 30 is nearly blank, and pages 32 and 33 contain information that I find cannot be said to be "informational assets" of the appellant but is actually information that is generally found in many public areas. I cannot elaborate on this further in this public order. Therefore, I am not persuaded that the immutability exception applies to

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[19] 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*).
[20] See, for example, *Toronto-Dominion Bank v Ryerson University*, 2017 ONSC 1507 (CanLII) and *Canadian Home Healthcare Inc. v. Halton Healthcare Services and Information and Privacy Commissioner of Ontario*, 2024 ONSC 5966 (CanLII).
[21] 2024 ONSC 5966 (CanLII).
[22] *Miller Transit*, cited above at para. 34.
[23] There are many examples of this but see Orders MO-3577 and MO-4588 for two.

them.

[54] As for page 31, while it does contain tables, I find that the appellant has not established that these tables contain underlying fixed costs. Rather, based on my review of this information, it consists of the fixed rates to be paid by the college to the appellant for various services. As rates that the college agreed to pay, I find that this is not information that can reasonably be considered non-negotiated information supplied by the third party such that the immutability exception can apply.

[55] I have considered the reasoning in *CMPA* about a table attached to the contract in that appeal and I distinguish that from the information on page 31 in the contract before me. The court in *CMPA* describes the table that the IPC found was "supplied" as being related to a previous year and attached for the purpose of illustrating the format for future tables, and the data was to be used for future calculations. The adjudicator in that appeal therefore concluded that unlike other information in an appendix, this table was not being negotiated. However, the evidence before me does not establish that the tables on page 31 are similar in purpose and function to the table that was found to be "supplied" in *CMPA*. As a result, the reasoning in *CMPA* is not helpful to the appellant here on the issue of whether the tables on pages 31 were "supplied."

[56] For these reasons, I find that the record was not "supplied" within the meaning of section 17(1). This means that it cannot meet part two of the test, so I will not consider the "in confidence" portion of part two of the test. Likewise, it means that I do not need to consider part three of the test.

[57] Since all three parts of the test for section 17(1) must apply and part two does not apply to the contract here, the exemption at section 17(1) does not apply to the contract.

ORDER:

1. I uphold the college's decision and dismiss the appeal.
2. The college shall disclose the record at issue to the requester by **March 27, 2025**, but not before **March 20, 2025**.

Original Signed by: February 20, 2025

Marian Sami
Adjudicator