ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-32

August 2, 2018

NORTHERN ALBERTA INSTITUTE OF TECHNOLOGY

Case File Number 0003893

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Summary: An applicant requested access to a third party's response to the public body's request for quotes. The third party disputed the public body's decision that s. 16(1) of the *Freedom of Information and Protection of Privacy Act* (disclosure harmful to third party business interests) did not apply to the record.

The adjudicator confirmed the public body's decision that s. 16(1) did not apply and ordered the public body to disclose the disputed information to the applicant.

The adjudicator did not make a decision regarding the public body's decision to refuse access to other information under s. 17 (disclosure harmful to personal privacy) because that was not an issue in dispute in the inquiry.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25, ss. 1(r), 16(1)(a), 16(1)(b), 16(1)(c).

Orders Cited: AB: Orders F2017-82, F2016-65, F2016-64, F2015-12, F2014-44, F2010-036, F2009-28, F2009-015.

Cases Cited: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

I. BACKGROUND

[para 1] The Northern Alberta Institute of Technology (NAIT) received a request under Alberta's *Freedom of Information and Protection of Privacy Act* (FOIP Act) for access to "the successful submissions (winning bid) for the response to RFQ 1211 – Citrix XenDesktop." Before issuing its decision to the applicant, NAIT wrote to Compugen Inc. (Compugen),[1] the successful proponent, to give it the opportunity to consent to disclosure or provide written representations explaining whether disclosure would harm its business interests pursuant to s. 16(1). Compugen did not respond to NAIT's letter within the time frame specified, and NAIT made its decision without Compugen's input. NAIT decided to refuse access to only a small amount of personal information pursuant to s. 17 (disclosure harmful to personal privacy). NAIT informed Compugen of its decision.

[para 2] Compugen requested the Office of the Information and Privacy Commissioner of Alberta review NAIT's decision on the basis that s. 16(1) applied to some of the information in the record. Compugen did not dispute NAIT's decision to refuse to disclose personal information under s. 17. Mediation did not resolve the s. 16 matter and Compugen requested that it proceed to inquiry.

[para 3] Commissioner Clayton advised NAIT and Compugen that her office could not conduct the inquiry because of a conflict of interest. She delegated the power to conduct the inquiry and issue an order under Part 5 of the FOIP Act to me, as an adjudicator with the Office of the Information and Privacy Commissioner for British Columbia (BC OIPC). The BC OIPC issued a fact report and notice of inquiry to the parties. The applicant was invited to participate in the inquiry but declined to do so. Inquiry submissions were received from both NAIT and Compugen.

II. RECORD AT ISSUE

[para 4] The record at issue is Compugen's four page response to NAIT's request for quote (RFQ). Only a small part of the response is at issue. The information in dispute is as follows:

1. Unit and total prices for licenses and software maintenance;

2. Three sentences under the heading "Compugen Value Add Proposition";

3. A two sentence answer to a question posed in the RFQ about prorated credit for NAIT's existing licenses;

4. The name, work phone numbers and email address of the Compugen account executive who prepared the response.

[1] Compugen is a third party under the FOIP Act. Section 1(r) says a "third party" means a person, a group of persons or an organization other than an applicant or a public body.

III. ISSUE

[para 5] The only issue to be decided in this inquiry is whether NAIT must refuse to disclose the information in dispute under s. 16(1) of the FOIP Act. NAIT's decision to withhold information under s. 17 is not an issue in dispute between NAIT and Compugen.

[para 6] Section 71(3)(b) states that when an inquiry involves a third party's request for review of a public body's decision to disclose information that is not personal information, it is up to the third party to prove that the applicant has no right of access to that information.

IV. DISCUSSION

Harm to third party business interests, s. 16(1)

[para 7] Section 16 of the FOIP Act requires the head of a public body to withhold specific kinds of information whose disclosure could harm a third party's business interests. The portions of s. 16 which are relevant to this inquiry state:

> 16(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
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> (b) that is supplied, explicitly or implicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
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> (iii) result in undue financial loss or gain to any person or organization, or
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> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 8] Section 16 applies "to protect the informational assets of third parties in situations where those assets have been supplied to government in confidence, and that harm could result from the disclosure of these informational assets."[2] Previous orders have consistently stated that all three parts of the following test must be met in order for s. 16(1) to apply:

1. Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

2. Was the information supplied, explicitly or implicitly, in confidence?

3. Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?[3]

I will apply this same test here.

Parties' positions

[para 9] Compugen's entire submission is as follows:

> Compugen objects to the release of the information highlighted in yellow as this is competitive information that was provided to NAIT in confidence and the disclosure of which will cause irreparable harm to its business relationship with the public body in question:
>
> 1. The name of the Account Executive, telephone number and E-mail address of Compugen's Account Executive is private and was provided to NAIT in a confidential manner. Compugen has a duty to maintain such 'personal' information of its employees and to safeguard its confidentiality vis-à-vis the public.
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> 2. The trade for Subscription based licenses is competitive in nature and its disclosure would significantly interfere and harm Compugen's negotiating position in the market.
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> 3. The Unit Price and Extended Total for the Quote itself is also financial and competitive in substance, which would reveal information about Compugen's 'pricing' to a potential competitor in the market.
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> 4. The Compugen Value Add Proposition would reveal Compugen's commercial 'competitive edge' information as an IT service provider in the industry and this would compromise its relationship with the public body.

[2] Order F2016-65 at para. 34.
[3] Order F2016-65 at para. 24 and Order F2014-44 at para. 7.

[para 10] NAIT submits that the information in dispute is "commercial information." It makes no submission about whether the information was "supplied," although it says that the word "confidential" appears in the footer of each page. NAIT submits that Compugen has not established that s. 16(1) applies because it has not provided evidence establishing a reasonable expectation of harm from disclosure of the information in dispute.

Type of information, s. 16(1)(a)

[para 11] Compugen submits the information in dispute is financial and commercial information. NAIT says the information is commercial information.[4] Previous orders have said that "commercial information" is information belonging to a third party, at the time the information is supplied, about its buying, selling or exchange of merchandise or services and "financial information" is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.[5]

[para 12] Section 16(1) is intended to protect the informational assets, or proprietary information, of third parties that might be exploited by competitors in the marketplace if disclosed.[6] It is not sufficient that the information is commercial or financial in a general sense. The information must be proprietary and "of" the third party before s. 16(1)(a) can apply. For instance, in Order F2014-44 Adjudicator Cunningham found that information in a third party's proposal was not commercial information of the third party. She said:

> Moreover, in my view, it is not necessarily the case that information about services a third party *proposes* to provide to a third party is information about its buying, selling, or exchange of merchandise or services at the time the third party supplies the information. When a third party proposes providing services for a price, it is not necessarily describing its commercial information as it is, but rather, what would be its commercial information should its proposal be successful and be implemented. I recognize that a third party may include in a proposal its commercial information (i.e. information about the way it buys, sells, or exchanges goods or services outside the proposal) or that it may use proprietary methodology to develop the proposal, which may be revealed by disclosure; however, I am unable to identify information of this kind among the items of information severed by the Public Body under section 16 and neither Aon nor the Public Body has spoken to the information in the records.
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> With regard to the proposed services and proposed fees, the information does not describe how Aon conducts commercial activities, such that it could be said to be commercial information belonging to it or an informational asset; rather the information is about the services Aon proposes to provide to the Public Body in the future and the price it is seeking, should the proposal it submitted be accepted.

[4] NAIT also says the information at issue does not meet the definition of "trade secret" in the FOIP Act; however, Compugen did not submit that it does.
[5] Order F2017-82 at para. 29, Order F2015-12 at para. 45, Order F2014-44 at para. 21 and Order F2009-28 at para. 42.
[6] Order F2016-64 at para. 57 and Order F2009-015 at para. 46-47.

> Once the terms of the proposal were accepted, and the Public Body and Aon negotiated a contract, the information about how it actually supplies the proposed services and fees to the Public Body could possibly be said to reveal something about Aon's commercial activities; however, at the time Aon submitted the proposal, the services in question were a proposal only, rather than information about Aon's actual commercial activities. Under section 16, information must meet the requirements of section 16(1)(a) *when* it is supplied by the Third Party within the terms of section 16(1)(b). As stated in Order F2010-36:
>
> > Proposed terms, such as those in bids, tenders, and proposals, do not become the commercial information of an organization until a public body elects to accept them. Moreover, accepting proposed terms amounts to a form of negotiation, given that once a public body accepts the terms, the terms reflect what both parties have agreed to.[7]

[para 13] In the present case, although the unit and total prices, the Value Add Proposition information and the answer about prorated credit for existing licenses is commercial and or financial information, there is insufficient evidence to establish that it is the commercial or financial information "of" Compugen in the sense previous Alberta orders interpret s. 16(1)(a). Information that only affects a third party, or relates to it in some way, but does not belong to it, is not information that is "of a third party" under s. 16(1)(a).[8]

[para 14] In my view, the facts of this case are similar to Order F2014-44 as the information here is also about what the third party proposed, and there is no evidence that what was proposed would reveal commercial or financial information belonging to Compugen or information that could be characterized as its informational asset. For instance, there is no indication that the information in dispute reveals Compugen's proprietary method for developing its proposals or the costs it incurs providing services or its "bottom line" such that a competitor could draw an accurate inference as to its financial resources or profit margins. Instead, the information is about Compugen's prospective services and fees, should the proposal be accepted. It is not Compugen's commercial information in the sense of being about the way it actually buys, sells, or exchanges goods or services outside the proposal. It is also not about Compugen's monetary resources and their use and distribution. I am not satisfied based on the information that Compugen provides, that disclosing the unit and total prices, the Value Added Proposition information and the answer about prorated credit reveals commercial or financial information "of" Compugen.

[para 15] Further, Compugen did not explain how the account executive's name and work contact details are commercial and/or financial information of Compugen, and I find that s. 16(1)(a) does not apply. This is consistent with what other Alberta orders have found regarding that type of information.[9]

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[7] Order F2014-44 at paras. 28-29 citing Order F2010-036 at para 46.
[8] F2015-12 at para. 40.
[9] Order F2010-036 at para. 32-38 and Order F2014-44 at para. 28.

[para 16] In conclusion, I find that Compugen has not established that s. 16(1)(a) applies to any of the information in dispute. Given that s.16(1) only applies if all three parts of the s. 16(1) test are met, it is not necessary to consider whether ss. 16(1)(b) and (c) might apply. However, I will do so for completeness.

Supplied in confidence, s. 16(1)(b)

[para 17] Compugen and NAIT did not make submissions about whether the information in dispute was "supplied". However, based on the nature of the information and its context, I conclude that it was. The information is in Compugens' response to NAIT's call for quotes and it contains the details of what Compugen proposes to do. There is no information to indicate that the disputed information originates with NAIT or is information resulting from negotiations.

[para 18] I also find that the information in dispute was supplied "in confidence" because the word "Confidential" appears in the footer on each page of the response.

Harm, s. 16(1)(c)

[para 19] The Supreme Court of Canada said the following about the standard of proof for exceptions that use the language "reasonably be expected to harm" and the type of evidence required to meet that standard:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"….[10]

[para 20] The onus is on Compugen to establish that s. 16(1)(c) applies. It's submission regarding this is quoted in its entirety in paragraph 9 above. NAIT submits that Compugen has not provided evidence that disclosure could reasonably be expected to cause harm under s. 16(1)(c).

[para 21] I find that Compugen's submissions about harm are vague and general assertions that do not establish a clear and direct link between disclosure of the information

[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.

and a reasonable expectation of the harms in s. 16(1)(c). In particular, Compugen does not provide persuasive evidence or explanations to back up what it claims about harm. For instance, there is no information that would help me assess whether disclosure could reasonably be expected to harm or interfere significantly with Compugen's competitive and negotiating positions. Compugen also does not explain how its proposal in a response to an RFQ would reveal information about its pricing to its competitors. Further, it did not explain how disclosing the Value Add Proposition would reveal what it calls its "competitive edge" information or compromise its relationship with NAIT.

[para 22] In conclusion, I am not persuaded by what Compugen says about harm. I find that Compugen has not met the burden of establishing that disclosure of the information in dispute could reasonably be expected to cause any of the harms listed in s. 16(1)(c).

V. ORDER

[para 23] For the reasons above, I make the following order under s. 72 of the FOIP Act:

1. NAIT is required to give the applicant access to the information in dispute.

2. NAIT must comply with this Order not later than 50 days after being given a copy and notify me in writing that it has complied with the Order.

August 2, 2018

Elizabeth Barker
External Adjudicator