Federal Court  Cour fédérale

Date: 20150929

Docket: T-1273-14

Citation: 2015 FC 1128

Ottawa, Ontario, September 29, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RECALL TOTAL INFORMATION MANAGEMENT INC.

Applicant

and

MINISTER OF NATIONAL REVENUE AND THE INFORMATION COMMISSIONER OF CANADA

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is a review pursuant to s 44 of the *Access to Information Act*, RSC 1985 c A-1 [Act], in respect of the disclosure of a Contract Amendment of November 22, 2013 [Contract Amendment]. These Reasons have been prepared in public so that the Court's reasoning can be understood without the need for confidential versions of the Reasons.

[2] This litigation has had the odd twist and turn. The Applicant [Recall] received notice of an information request in accordance with s 27 of the Act. It ignored the notice and, in the absence of any evidence, the Minister through the Canada Revenue Agency [CRA] decided to release the information requested subject to the redaction of unit pricing. (The Minister of National Revenue is the relevant Minister for purposes of CRA's decision to release information.)

[3] CRA gave Recall notice that it intended to release the subject information in the absence of a request for court review under s 44 of the Act. Recall then filed the relevant s 44 application and produced evidence to support its position that the information to be released was subject to s 20(1)(*a*), (*b*) and (*c*) exemptions from disclosure.

[4] The litigation proceeded in the usual manner. The requestor did not participate, but the Information Commissioner of Canada [the Information Commissioner] was added as a party.

[5] Upon review of Recall's evidence filed in this litigation, the Minister changed her opinion, formed the view that some of the information should not be disclosed and purported to make a second decision to release much less information than originally contemplated.

[6] As the result of a request for a ruling, this Court in *Recall Total Information Management Inc v Canada (National Revenue)*, 2015 FC 848, held that the Minister could not issue a second decision but could change its position in the litigation. As a result, the parties filed amended Memoranda of Fact and Law and proceeded with the s 44 review.

II. Factual Background – Records at Issue

[7] On October 26, 2012, CRA published a tender for:

> … records management services associated with the secure off-site storage and management of information records in paper-based, microform and electronic storage media forms, on an "as and where required basis". The CRA requires records management life-cycle services of accession, storage, retrieval, transportation and disposition for CRA records.

As a consequence of the tender bids being non-compliant, a second tender was issued.

[8] Recall won the second tender on May 2, 2013. The contract [Initial Contract] for $40 million was for a five year term after which the contract could be renewed annually for a further five years.

[9] As a result of discussions between CRA and Recall, it became apparent that CRA had other needs which were not addressed in the Initial Contract.

The parties then agreed to a Contract Amendment, which is the subject of this litigation.

[10] The Contract Amendment stipulated a new price, and Recall set out a step-by-step process to scan 2D barcodes into Recall's computer base (called IMCS).

Whereas the Initial Contract set forth what Recall was to do, the Contract Amendment described how Recall was to do it.

[11] The document proposed to be released includes both the new price and this step-by-step process [the Records]. Recall says in part that insertion of the step-by-step process in the Contract Amendment was an "inadvertent error"; however, it took no steps to correct the error, nor did it demand of CRA any corrective steps to address the error.

[12] The parties filed in this Court a copy of the relevant pages (pages 34-40 of the Records), "yellow lined" by the Minister, showing the information on those pages which should be exempt from disclosure. That information is largely the step-by-step process.

[13] Recall takes the position that the information on these pages, as well as the new price – a large part of the Contract Amendment – is exempt from disclosure pursuant to s 20(1)(*a*), (*b*) and/or (*c*) of the Act. The question before the Court is whether Recall has established that any of those provisions are applicable. The submissions of the parties primarily focus on whether the step–by-step process description is exempt from disclosure under s 20 of the Act. As to the contract price, the issue turns on whether the Contract Amendment price is publicly available.

III. Analysis

A. *Section 20(1)*(a) – *Trade Secrets*

[14] Section 20(1)(*a*) of the Act reads as follows:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	**20.** (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

(*a*) trade secrets of a third party;	*a*) des secrets industriels de tiers;

[15] Recall claims that pages 34-40 of the Records disclose trade secrets. It submits that the information has industrial application and was built into Recall's proprietary tool known as Re Quest Web for purposes of the Contract Amendment and is proprietary to Recall. It further claims that it acted with intention to keep the information confidential and expected CRA to likewise keep the information confidential. Finally, it says that it has an economic interest in maintaining secrecy because of the competitive edge it has, both with government and a wider market, by virtue of the process it developed.

[16] The Minister takes no position on this matter but accepts that the yellow lined parts of the Records are exempt from disclosure under s 20(1)(*c*). The Information Commissioner submits that Recall has failed to meet the tests set forth in the jurisprudence.

[17] The Supreme Court in *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23 [*Merck Frosst*], laid out the definition of trade secret:

> [112] … A "trade secret" for the purposes of s. 20(1) of the Act should be understood as being a plan or process, tool, mechanism or compound which possesses each of the four characteristics set out in the Guidelines which I have quoted above. This approach is consistent with the common law definition of "trade secrets" and takes account of the clear legislative intent that a trade secret is something different from the broader category of confidential commercial information which is separately and specifically protected under the Act. This approach is also consistent with the use of "*secrets industriels*" in the French version of the Act, as discussed above.

[18] The four characteristics laid out in the Guidelines referred to are:

> - the information must be secret in an absolute or relative sense (i.e. known only by one or a relatively small number of persons);
> - the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
> - the information must be capable of industrial or commercial application;
> - the possessor must have an interest (e.g. an economic interest) worthy of legal protection. [Annex A]
>
> *Merck Frosst* at paragraph 109

[19] As the Supreme Court noted at paragraph 119 of *Merck Frosst*, the question on review is simply whether the party claiming the exemption has established on the balance of probabilities that the records fall within the Court's definition of trade secrets. The analysis is a "class of information" exercise as distinct from a "harm caused" analysis as required under s 20(1)(*c*).

[20] Upon review of the Records, the step-by-step process meets the first element of being "a plan, or process, tool mechanism or compound".

[21] Recall has made out that the information was secret. The process was internally designed, and knowledge of it was limited to Recall employees. Importantly, only employees of Recall's IT department had access to the script and code; neither of which was provided to CRA.

[22] Where Recall fails is in treatment of the information as secret. While Recall took some steps to treat the information as secret, its efforts were inadequate. Other than the standard,

bottom-of-e-mail disclaimer of confidentiality, Recall took no steps, even in the Contract Amendment, to mark the information as secret or confidential. It provided CRA with a Word version of the document upon request, an action inconsistent with an intention of secret treatment.

[23] Fatally, Recall took no steps to protect the information when it was "inadvertently" included in the Contract Amendment. Its silence and inaction until this litigation started is inconsistent with the actions of a person who intended to treat, and did in fact treat, the information as secret and requiring special treatment against disclosure.

[24] Recall exhibited a casualness towards what it now claims is a secret process. From taking no action upon insertion of the information in the Contract Amendment, to ignoring the s 27 notice, to waiting until this litigation was necessary to claim secrecy, Recall did not exhibit the requisite intention of secrecy. Recall provides no explanation for its lack of action or concern.

[25] As Recall has failed the second characteristic referred to by the Supreme Court, it is not strictly necessary to deal with the other issues of industrial/commercial application and an interest worthy of protection. However, on these points, Recall is on more solid ground.

B. *Section 20(1)(*b*) – Commercial/Technical – Confidential Treatment*

[26] Section 20(1)(*b*) of the Act reads as follows:

20. (1) Subject to this section, the head of a government institution shall refuse to	**20.** (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres

disclose any record requested under this Act that contains	dispositions du présent article, de refuser la communication de documents contenant :
…	…
(*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;	*b*) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

[27] There is no serious debate that the critical information – the step-by-step process – is more technical in nature than commercial, as discussed in *Brainhunter (Ottawa) Inc v Canada (Attorney General)*, 2009 FC 1172, 182 ACWS (3d) 244.

[28] With respect to whether the information is "confidential information treated in a confidential manner" as described by Justice MacKay in *Air Atonabee Ltd v Canada (Minister of Transport)* (1989), 27 FTR 194 at paragraph 42, 16 ACWS (3d) 45, and adopted in *Merck Frosst* at paragraph 133, the criteria for "confidential information" is:

> a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
>
> b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the

> public interest, and which relationship will be fostered for public benefit by confidential communication.

[29] The test is an objective one, and merely repeating the words of the statute or asserting confidentiality without concrete evidence of such treatment is not sufficient.

[30] The Minister took no position on this issue and the Information Commissioner limited itself to an argument that the Records should be considered as documents arising from a bidding or tendering process. This would make the documents more susceptible to disclosure.

[31] The difficulty with the Information Commissioner's position is that the Contract Amendment did not arise from a bidding or tendering process. The Contract Amendment arose from a request, after the tendering phase was completed, to amend the Contract to meet CRA's new needs. There is no suggestion that the Contract Amendment was a guise to avoid disclosure requirements or an artifice to undermine contractual disclosure requirements which might support the Information Commissioner's view that it was in reality part of the tendering process.

There is no factual or legal basis supporting the Information Commissioner's argument.

[32] There is no evidence to suggest a conclusion that the Records were publicly available. Nor is there any question that the information was supplied to the government by the "third party".

[33] As to the issue of whether the information originated and was communicated in a reasonable expectation of confidence, Recall may have assumed as much, but it did not behave in a manner consistent with that assumption. There is no evidence of a basis for this assumption.

[34] As outlined in the discussion of s 20(1)(*a*), Recall's actions were significantly deficient, on an objective view, with that of a party who considered the information confidential.

[35] On the question of whether the relationship is "not contrary to the public interest and will be fostered for public benefit by confidential communication", Recall's submissions are bereft of any indication of how the relationship would be fostered for the public benefit. It is not for the Court to substitute arguments supporting the public benefit arising from confidential treatment.

[36] In *AstraZeneca Canada Inc v Canada (Minister of Health)*, 2005 FC 189, 275 FTR 133 at paragraph 69 (affirmed 2006 FCA 241) [*AstraZeneca*], this Court pointed to a way in which that public interest might be addressed:

> [69] To meet this test, one must have regard for the nature of the relationship between the government and the third party… The expectation of confidentiality must be less where a third party is attempting to persuade government to grant it some concession or licence, then [*sic*] where the third party is assisting government in carrying out its mandate.

However, Recall has provided virtually no substance to this element of s 20(1)(*b*).

[37] The Federal Court of Appeal addressed a situation similar to this case in the following words:

> … However, in the case at bar, NAV CANADA has provided no supporting explanation as to how or why the maintenance of confidentiality serves the public interest, in the circumstances of the records at issue. A bald assertion in this regard is insufficient to overcome the general right of access established by the *Access Act*.
>
> *Information Commissioner of Canada v Canadian Transportation Accident Investigation and Safety Board*, 2006 FCA 157 at paragraph 78

[38] Recall has not made out a case for exemption from disclosure under s 20(1)(*b*) of the Act.

C. *Section 20(1)(c) – Harm from Disclosure*

[39] Section 20(1)(*c*) of the Act reads as follows:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains	**20.** (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
…	…
(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party;	*c*) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

[40] The thrust of Recall's position is that the step-by-step process is Recall's property and that competitors could use that information to commercially harm Recall's position with CRA. This would arise most particularly in the bidding for contract renewal.

Recall's position on this issue is entwined with its objection to disclosure of page 56 of the Records – the contract price. The Court has dealt separately with the pricing disclosure issue.

[41] The Minister essentially agrees with Recall in regards to the disclosure of the step-by-step process. It was as a result of the new evidence from Recall on this point that the Minister reversed her position on release of this information.

[42] The burden imposed on Recall to establish harm is set out by this Court in *AstraZeneca* at paragraph 46 (adopted in principle in *Merck Frosst* at paragraph 204):

> [46] Recognizing the inherently speculative nature of proof of harm does not however relieve a party from putting forward something more than internally held beliefs and fears. Evidence of reasonably expected results, like forecasting evidence, is not unknown to courts and there must be a logical and compelling basis for accepting the forecast. Evidence of past documents of information, expert evidence, evidence of treatment of similar evidence or similar situations is frequently accepted as a logical basis for the expectation of harm and as evidence of the class of documents being considered.

[43] There must be a clear and direct linkage between the disclosure of specific information and the harm alleged.

[44] The understanding of the Information Commissioner's position caused some dispute between the parties. It was thought that the Information Commissioner's position is that in order to find harm flowing from disclosure, it was necessary to find that the party resisting disclosure had a proprietary interest in the information – the information was owned by that party.

[45] In argument, the Information Commissioner clarified its position that where there is a proprietary interest in the information, it is easier to make out the case of harm from disclosure. In my view, the merits of that position depends on the facts in each case.

[46] The Information Commissioner also raised the issue of whether the information was owned by Recall in part because it was said to be part of the Statement of Work and therefore paid for and thus owned by the Minister. The genesis of this argument is the General Conditions that form part of the contract.

> 2035 01 (2013-03-21) Interpretation
>
> In the Contract, unless context otherwise requires:
>
> …
>
> "Work" means all the activities, services, goods, equipment, matters and things to be done, delivered or performed by the Contractor under the Contract
>
> …
>
> 2035 19 (2008-05-12) Ownership
>
> 1. Unless provided otherwise in the Contract, the Work or any part of the Work belongs to Canada after delivery and acceptance by or on behalf of Canada.
>
> …
>
> 2035 20 (2008-05-12) Copyright
>
> In this section, "Material" means anything that is created by the Contractor as part of the Work under the Contract, that is required by the Contract to be delivered to Canada and in which copyright subsists. "Material" does not include anything created by the Contractor before the date of the Contract.
>
> Copyright in the Material belongs to Canada and the Contractor must include the copyright symbol and either of the following notice on the Material: © Her Majesty the Queen in right of

> Canada (year) or © Sa Majesté la Reine du chef du Canada (année).
>
> …
>
> 2035 22 (2008-05-12) Confidentiality
>
> …
>
> 3. Subject to the *Access to Information Act*, R.S., 1985, c A-1, and to any right of Canada under the Contract to release or disclose, Canada must not release or disclose outside the Government of Canada any information delivered to Canada under the Contract that is proprietary to the Contractor or a subcontractor.
>
> …
>
> 5. Wherever possible, the Contractor must mark or identify any proprietary information delivered to Canada under the Contract as "Property of (Contractor's name), permitted Government uses defined under Public Works and Government Services (PWGSC) Contract No. (fill in Contract Number)". Canada will not be liable for any unauthorized use or disclosure of information that could have been so marked or identified and was not.
>
> …
>
> 2035 44 (2012-07-16) Access to Information
>
> Records created by the Contractor, and under the control of Canada, are subject to the *Access to Information Act*. The Contractor acknowledges the responsibilities of Canada under the *Access to Information Act* and must, to the extent possible, assist Canada in discharging these responsibilities…

[47] On the issue of harm itself, the Information Commissioner submitted that Recall has not established that there is a market for the step-by-step process beyond CRA. Further, the Information Commissioner argues that the harm Recall asserts is from the disclosure that Recall offers to CRA the service of capturing metadata from its 2D bar code. In other words, it is

knowledge that a service is provided which causes the harm, not the disclosure of how that service is accomplished.

[48] The Information Commissioner was acting in the public interest in testing the basis of Recall's claim to exemption; however, with due respect, raising these issues does not show that Recall's basis for concern is not made out.

[49] On the question of a proprietary interest, the Minister confirms that it never contemplated ownership of the intellectual property rights to the step-by-step process. It is also CRA policy as set forth in the Intellectual Property Ownership Directive that, except in certain circumstances not applicable here, the intellectual property remains vested in the owner.

[50] It is clear from such factors as keeping the script and codes within Recall, Recall's control of the computer base, and the contemplation of the parties, as admitted by the Minister, that Recall retained its proprietary interest in the process. The Minister was not free to do with the process whatever it wished after it had paid the contract price.

[51] On the issue of harm, I find that Recall has made out its case. While some aspects of the services to be provided are described in portions to which Recall does not object (as shown in the yellow lined version of the Records), not all aspects of the services are to be disclosed. It is important for Recall to be able to negotiate what services it will provide on a customer by customer basis without each potential customer knowing what Recall has done in the past or might be prepared to do in the future.

[52] Release of certain parts of the Records would undermine Recall's position in future negotiations with CRA and others because of the advantage competitors would gain from disclosure of how Recall addressed CRA's problems.

[53] Further, release of information on the process would allow competitors (of which there is a small number – 1 or 2) to recreate the technology developed by Recall's R&D work. The evidence supporting this competitive loss is well described in the affidavits of Michaud, Dino, Camp and Mueller.

[54] The situation in which Recall finds itself was addressed at paragraph 219 of *Merck Frosst*:

> …disclosure of information, not already public, that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements of s. 20(1)(*c*). The evidence would have to convince the reviewing court that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure: [citations omitted]. Even if information taken in isolation may not seem to fall within the exemption, the information should nonetheless be examined in its entirety in order to determine the likely impact of its disclosure. [Emphasis added]

[55] Recall's evidence does more than merely repeat the words of the statute. The evidence discloses how software engineers could replicate Recall's technology. Recall further outlines how its competitors could potentially use this knowledge in bidding on other government contracts. In addition, the Initial Contract has a five year term which could open up the field of competitive rebidding using Recall's technology to undermine either its service or pricing (especially given that total pricing has been publicly disclosed).

D. *Contract Pricing*

[56] Recall has objected to disclosure of the Contract Amendment price. It has failed to make out its case in this regard.

[57] That price (inclusive of HST) was published on CRA's website on or about May 26, 2014. The information objected to at page 56 of the Records discloses the Contract Amendment price minus HST.

[58] Whatever the difficulties a competitor may face in discerning the Contract Amendment price amount, it is relatively simple mathematics to arrive at what is substantially the price. Therefore, the price is sufficiently publicly disclosed to dispose with any objection from Recall.

IV. Conclusion

[59] For these reasons, the Court orders that those portions marked in yellow in the version of the Contract Amendment, pages 34-40 of the Records, are to be exempted from disclosure.

[60] The Minister is to circulate to the other parties a version of the Records reflecting this Court's disposition. Upon agreement, that version shall be released by the Minister and a copy thereof filed with the Court.

In the event of any disagreement between the parties, the Court will resolve any outstanding issues.

[61] Submissions as to costs were made. The Information Commissioner, on behalf of the requestor and the public interest, was the principal losing party, while Recall was not successful on the pricing disclosure issue. However, this litigation was precipitated by Recall's failure to make proper submissions to the Minister.

[62] I conclude that the most equitable result is that each party bear its own costs except that Recall shall pay costs to both the Minister and the Information Commissioner on Recall's motion to file additional affidavits.

JUDGMENT

THIS COURT'S JUDGMENT is that the portions marked in yellow in the version of the Contract Amendment, pages 34-40 of the Records, are to be exempted from disclosure. Each party is to bear its own costs except that Recall Total Information Management Inc. shall pay costs to both the Minister of National Revenue and the Information Commissioner of Canada on its motion to file additional affidavits.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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