



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-385

Appeal P-910041

Ministry of Natural Resources



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ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a five year contract for the growing of tree seedlings between the Ministry and a named company (the affected person). The request included access to all copies of correspondence between the Ministry and the affected person, the tender submitted by the affected person, the number of additional seedling orders from the affected person between 1983 and 1991, and all grants received by the affected person between 1983 and 1990.

Following notification of the affected person, the Ministry granted partial access, denying access to the remainder of the records pursuant to section 17(1)(a) of the Act.

The appellant appealed the Ministry's decision.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and the affected person. Written representations were received from the Ministry and the affected person.

During the processing of the appeal, the affected person agreed to the disclosure of additional records. These records were released to the appellant by the Ministry.

The records remaining at issue in this appeal are listed and described in Appendix A to this order.

The sole issue in this appeal is whether the mandatory exemption provided by section 17(1)(a) of the Act applies to the records.

Section 17(1)(a) of the Act reads as follows:

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;

In order to qualify for exemption under section 17(1)(a), the Ministry and/or affected person must satisfy the requirements 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 must give rise to a reasonable expectation that one of the types of injuries specified in subsection 17(1)(a) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17(1) claim invalid [Order 36].

PART ONE

With respect to the first part of the test, I have reviewed the records and I am satisfied that the information contained in all of the records qualifies as "commercial" and/or "financial" information. The records contain the contractual agreements, negotiations and correspondence between the Ministry and the affected person relating to the growing of seedlings and the amounts of money involved in the transactions.

PART TWO

In order to meet the second part of the test, the information at issue must have been supplied to the Ministry in confidence, either implicitly or explicitly. This part of the test has dual requirements. The parties resisting disclosure must prove not only that the information was **supplied** to the Ministry, but also that it was supplied to it **in confidence**, either implicitly or explicitly.

In its representations, the Ministry indicates that "the records in question constitute third party information as defined by section 17 of [the Act]" and states that it "relies upon the representations and other evidence presented by the affected person".

In a letter sent to the Appeals Officer clarifying the tendering process and responding to certain questions regarding Record 2 in Appendix A, the Ministry stated:

The original tender was for five years with new prices being negotiated for years two through five. These were the result of confidential negotiations and should not be released. The legal agreements ... contain negotiated prices which may provide information about the company which is not part of the public record.

It has been established that information which is the result of contractual negotiations between a governmental institution and an affected person, does not qualify as information which has been "supplied", regardless of whether this information may have been treated confidentially [Order 87].

In my opinion, any information that relates to prices and other stipulations contained in the various contracts and correspondence, was the result of negotiations between the Ministry and the affected person. Therefore, this information cannot be considered to have been supplied to the Ministry. It should be noted that I would have found that such information was supplied to the Ministry, had I been satisfied that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

With respect to information which is not the result of negotiations, the affected person submits:

... the tendering process has always been considered confidential except when otherwise expressed. When one is requested to explain and defend costs in both operational expenses and capital expenses, it is natural to assume the information requested by the government would of necessity be confidential or bidders would not release information intimately connected with their practice of doing business.

I find the affected person's representations to be general assertions of fact which do not provide sufficient evidence to enable me to conclude that the information contained in all of the records was supplied to the Ministry in confidence.

Despite the dearth of representations, I am prepared to accept that, based on my own review of the records, some of the records contain information that was supplied to the Ministry during the process of contract negotiations and/or contract performance; and is not the result of contractual negotiations. I am also prepared to accept that some of this information was probably supplied to the Ministry in confidence, implicitly. However, I am not satisfied that the affected person has discharged the burden of proof that the information in the remaining records was supplied to the Ministry in confidence.

The representations of the affected person appear to relate, in essence, to the issue of how the information should be treated now, as opposed to whether it was supplied to the Ministry in confidence, originally. In my opinion, the affected person's representations speak to the third

part of the test. Therefore, rather than make a conclusive finding on part two of the test, I have decided to base my decision on the application of the third part of the test.

PART THREE

In order to satisfy part three of the test, the Ministry and/or the affected person must present evidence that is detailed and convincing and must describe a set of facts and circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Order 36].

In its representations, the affected person has claimed that the harm specified in section 17(1)(a) would occur if any of the records were to be disclosed. It submits that disclosure would prejudice significantly its competitive position.

The affected person submits in its representations:

... when one bids on a commercial contract and an integral part of the bidding process is to expose financially as to how one will conduct its affairs under the contract, it is assumed these figures will not be given to those who might want to be in competition. A great deal of time and effort is put into the bidding process and it is assumed that the party with whom one contracts will not give your financial information and your methods to others.

In its representation specific to each record, the affected person provides no more facts or arguments other than repeating the assertion that disclosure of the information could reasonably be expected to result in significant harm to its interests.

Whereas the affected person has advanced general arguments that the disclosure of the records could be harmful to its competitive interest, in my view, it has failed to provide any objectively reliable evidence as to how its competitors could use the information in a way which could result in a **significant prejudice** to its competitive position. Accordingly, I find that the affected person has failed to establish the requirements of part three of the test.

As indicated above, failure to satisfy any part of the three-part test will render the section 17 exemption inapplicable. Therefore, I find that none of the records at issue in this appeal is exempt under section 17(1)(a) of the Act.

ORDER:

1. I order the Ministry to disclose to the appellant the records listed under Appendix A of this order within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.

2. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records which it disclosed to the appellant pursuant to Provision 1, only upon my request.

Original signed by: _____
Asfaw Seife
Inquiry Officer

_____ December 18, 1992

APPENDIX A

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| Record 1A (Pages 1A and 1B) | Invitation to tender dated August 16/1982 and Tender Bid, submitted by the affected person. |
| Record 1 (Pages 1-5A) | Letter dated September 30, 1983 from the Ministry to the affected person and a three page 1983 projected cost estimates. |
| Record 2 (Pages 6-18) (Pages 10 and 16 appear to be duplicates of pages 9 and 18, respectively) | Extracts from four agreements between the Ministry and the affected person respecting the growing of forest tree seedlings, with information relating to production targets of the number of seedlings and the delivery dates severed. |
| Record 3 (Page 19) | Letter from the affected person to the Ministry dated November 7, 1985 respecting dates for crop removal from greenhouses. |
| Record 5 (Page 22) | Attachment to an October 15, 1985 letter from the Ministry to the affected person. The attachment includes calculations of the number of trees, number of acceptable trees and total cost. |
| Record 7 (Page 26) | Attachment to an October 4, 1985 letter from the Ministry to the affected person. The attachment relates to inventory summary. |
| Record 9 (Page 28) | Letter from the affected person to Ministry respecting crop removal. |
| Record 26 (Page 58) | Attachment to a November 16, 1984 letter from the Ministry to the affected person. The attachment relates to excess inventory. |

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| Record 33 (Page 70) | Second page of a letter from the affected person to the Ministry dated December 18, 1985 respecting the 1986-1987 agreement. |
| Record 34 (Pages 73-76) | The affected person's estimated cost schedule for 1986/87. |
| Record 36 (Pages 83 - 89) | Letter from affected person to the Ministry dated March 15, 1985 and the affected person's cost schedules. |
| Record 38 (Pages 92-100) | Letter from the affected person to the Ministry dated February 19, 1985 and the affected person's bid rates and cost schedules. |
| Record 39 (Page 108) | Attachment to a February 13, 1985 letter from the Ministry to the affected person regarding changes to Agreement. The attachment relates to the affected person's cost schedule. |
| Record 40 (Pages 109-110) | Letter from the affected person to the Ministry dated January 22, 1985 respecting the 1985/86 contract. |
| Record 41 (Pages 111-117) | Appendix to the 1985/86 contract. |
| Record 43 (Page 129) | Second page of an internal Ministry memo dated May 14, 1984 respecting agreements between the Ministry and the affected person to changes in the five year contract. |
| Record 45 (Pages 132-133) | Letter from the Ministry to the affected person dated February 16, 1984 regarding the Ministry's review of the crops. |
| Record 46 (Pages 135-138) | Summary of January 12, 1984 meeting between the Ministry and the affected person respecting 1984/85 price proposal. |