



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

ORDER P-418

Appeal P-9200667

Management Board of Cabinet



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ORDER

BACKGROUND:

The Advertising Review Board (ARB) of Management Board of Cabinet (MBC) conducted a competition to select an advertising agency to promote the Ontario Government's "jobsOntario" program. As part of the competition, the ARB sent questionnaires to a number of advertising agencies, and subsequently short-listed five agencies for detailed consideration. The requester made a request to MBC under the Freedom of Information and Protection of Privacy Act (the Act) for access to the information submitted by the five short-listed agencies in response to questions 1, 2, 3, 4, 6, 7 and 10.

MBC notified the five short-listed agencies pursuant to section 28(1) of the Act. One of them consented to disclose its responses, and MBC released this information to the requester. The four other agencies provided representations to MBC objecting to disclosure of their responses.

After reviewing the representations, MBC decided to provide the requester with access to the responses to questions 1, 4, 6, 7 and 10, but denied the requester access to the responses to questions 2 and 3, pursuant to sections 17(1) and 21 of the Act.

The requester did not appeal MBC's decision to deny access to the responses to questions 2 and 3. However, three of the agencies appealed the decision to provide the requester with access to the responses to questions 1, 4, 6, 7 and 10, claiming sections 17(1) and/or 21 of the Act. This order deals with one of those appeals.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review MBC's decision was sent to MBC, the original requester and the agency (the appellant). Representations were received from the appellant only.

The record at issue in this appeal consists of the appellant's responses to questions 1, 4, 6, 7 and 10 of the questionnaire. These questions read as follows:

1. What is your understanding of the jobs Ontario initiative and its relationship to the Ontario Government's economic and social policy?
4. Please provide detailed information (problem, solution, results) and background about the account(s) you have at present, or have handled in the past, that would translate into relevant experience for the jobsOntario initiative public information requirements.
6. Is your agency in a position to service the Government's jobsOntario account with senior key personnel from among your present staff?
7. Please identify the members of your team (all areas of service) who would be assigned to this account. What other account

assignments would the members of this team have? Please outline their qualifications and experience as it relates to this account.

10. Please provide a list and brief description of your accounts using French language media, and describe your agency's experience with ethnocultural community communications programs.

ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by sections 17(1)(a), (b) and/or (c) of the Act applies to the record.
- B. Whether the mandatory exemption provided by section 21 of the Act applies to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by sections 17(1)(a), (b) and/or (c) of the Act applies to the record.

Sections 17(1)(a), (b) and (c) of the Act read 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;
- (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;

In order for a record to qualify for exemption under sections 17(1)(a), (b) and/or (c), the parties resisting disclosure must establish all of 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 of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Part One of the Test

The appellant submits:

The said information discloses strategies employed and results generated. This information is proprietary in nature and the release thereof amounts to the release of trade secrets. Advertising strategies and the results arising therefrom are just as important to an advertising agency as the design of a new product would be for a manufacturing company or a new drug formula for a pharmaceutical company.

In Order M-29, Commissioner Tom Wright defined "trade secret" in the context of the municipal equivalent of section 17(1) of the Act as follows:

"trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I have reviewed the record and, in my view, none of the information it contains can properly be characterised as a "trade secret". My reasoning is as follows:

Question 1

In response to this question, the appellant sets out its understanding of the "jobsOntario" program.

In my view, this information is not the type of information described in the introductory wording of the definition of "trade secret" and, in any event, the appellant has not established that this information "has economic value from not being generally known".

Question 4

In response to question 4, the appellant describes communications strategies developed for two previous clients, and includes examples of advertisements created for those assignments.

In its representations, the appellant does not explain how this information could or would be used again and, in my view, the appellant has failed to establish that this information "is, or may be used in a trade or business" or "has economic value from not being generally known". Also, it is clear that advertisements themselves were not "the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Questions 6, 7 and 10

In response to these questions, the appellant provides a brief biographical profile of the individuals who would have worked on the "jobsOntario" campaign, and the list of clients to whom it provides French language services.

In my view, these are not the types of information described in the introductory wording of the definition of "trade secret" and, in any event, the appellant has not established any of this information "has economic value from not being generally known".

Other Types of Third Party Information

The appellant did not claim that the record contains any of the other types of information listed in section 17(1) of the Act, namely scientific, technical, commercial, financial or labour relations information. However, after reviewing the record, I find that the response to question 4 contains "commercial" information.

As noted above, the appellant's response to question 4 includes a description of two communications strategies developed for former clients. In my view, this information relates to the "buying, selling or exchange of merchandise or services", and therefore qualifies as "commercial information" under section 17(1) of the Act [Order P-394].

The information contained in the rest of the record does not qualify as scientific, technical, commercial, financial and/or labour relations information.

In summary, I find that only the information contained in the response to question 4 satisfies the first part of the section 17(1) exemption test.

Part Two of the Test

The appellant submits:

"Disclosure of the information would constitute a breach of confidence. The information conveyed by our client was confidential, it was communicated in confidence by our client and our client did not grant authorization for the use of that information in a manner detrimental to our client."

I am prepared to accept that there is a certain degree of confidence implicit in the process of selecting an advertising agency, and, accordingly, I find that the second part of the section 17(1) test has been met in the circumstances of this appeal.

Part Three of the Test

Because I have found that the responses to questions 1, 6, 7 and 10 do not satisfy the requirements of the first part of the test, it is technically not necessary for me to consider these parts of the record under part three of the test. However, because the appellant's representations regarding part three do not differentiate between the various questions, I will consider the responses to all five questions under this part of the test.

To satisfy the third part of the test, the appellant must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that raises a reasonable expectation that the harm described in sections 17(1)(a), (b) and/or (c) would occur if the information was disclosed. Generalized assertions of fact in support of what amounts, at most, to speculations of possible harm do not satisfy the requirements of the third part of the test [Order P-294].

In its representations, the appellant raises the harms contained in all three subsections.

section 17(1)(a)

The appellant submits that it is reasonable to expect that releasing the record to a competitor would significantly prejudice the appellant's competitive position, and that revealing the employment records and experience of members of its staff would prejudice its competitive position by encouraging other advertising agencies to "raid" its staff.

In my view, these claims are speculative statements about possible future harm which have not been supported by detailed and convincing evidence. Accordingly, I find that the appellant has failed to establish that the type of harm described in section 17(1)(a) could reasonably be expected to arise if the record is released.

section 17(1)(b)

Generally speaking, section 17(1)(b) is designed to protect the government's ability to obtain information required in order to discharge its regulatory mandate. In that context, it is significant to note that in this appeal MBC does not raise section 17(1)(b) as an exemption claim.

The appellant claims that:

If information is revealed in this case, advertising agencies would be more guarded in the future in making presentations to governmental departments and agencies. The quality of presentations made by advertising agencies would be of a substantially lower quality, making it more difficult to select the best possible agency for a particular job, thereby harming the public interest.

I do not accept the appellant's position. In my view, it is reasonable to assume that advertising agencies bidding for government contracts would continue to supply the type of information contained in the record, regardless of whether it is disclosed. Accordingly, I find that the appellant has failed to establish that the type of harm described in section 17(1)(b) could reasonably be expected to arise if the record is released.

section 17(1)(c)

The appellant claims that disclosing the information would result in an undue loss to it, and undue gain to its competitors, because competitors could use its work. However, the appellant does not provide specifics to support its claim, and I find that the appellant has failed to provide the detailed and convincing evidence necessary to establish that the type of harm described in section 17(1)(c) could reasonably be expected to arise if the record is released.

In summary, I find that the appellant has failed to establish the requirements of part three of the section 17(1) exemption test and, because all three parts of the test must be satisfied in order for a record to qualify for exemption, I find that the record at issue in this appeal does not qualify for exemption under sections 17(1)(a), (b) or (c) of the Act.

ISSUE B: Whether the mandatory exemption provided for by section 21 of the Act applies to the record.

The appellant submits that "section 21 is also applicable, as the information submitted about [certain named individuals] constitutes personal information" and disclosure of this information would constitute an unjustified invasion of privacy.

In order to qualify for exemption under section 21, the information must first qualify as "personal information" under section 2(1) of the Act.

In response to question 7, the appellant provided a brief summary of past account assignments undertaken by the various individuals who would have been assigned to work on the "jobsOntario" project if the appellant's bid had been successful. Having reviewed this part of the

record, I find that the information provided by the appellant cannot accurately be described as the personal information of these individuals. Rather, in my view, the information is a description of certain past accounts worked on by the named individuals, which was submitted by the agency because the information was felt to be supportive of its bid for the "jobsOntario" project. The individuals are named in their professional not their personal capacities and, in my view, the information provided by the appellant in response to question 7 does not qualify as the personal information of the named individuals. Accordingly, the exemption provided by section 21 of the Act is not available in the circumstances of this appeal.

ORDER:

1. I uphold MBC's decision to release the appellant's responses to questions 1, 4, 6, 7 and 10, and order MBC to release this information to the original requester within 35 days of 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 the provisions of this Order, I order MBC to provide me with a copy of the record which is released to the original requester pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ February 24, 1993