



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

ORDER P-1139

Appeal P-9500594

Ministry of Economic Development, Trade and Tourism



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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of Economic Development, Trade and Tourism (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The request was for records relating to agreements between an Ontario Development Corporation (ODC) and a named corporation (the corporation).

Under section 28 of the Act, the Ministry notified the corporation of the request and asked for its views on disclosure. The corporation advised the Ministry that it opposes disclosure, and the Ministry denied access to the responsive records in their entirety, relying on the following exemption in the Act:

- third party information - sections 17(1)(a) and (c).

The appellant filed an appeal of this decision to deny access.

This office sent a Notice of Inquiry to the appellant, the corporation and the Ministry. The corporation submitted two sets of representations. The Ministry also submitted representations.

The ODC is listed as a separate institution under the schedule to R.R.O. 1990, Reg. 460 (a regulation made under the Act). Its “head” is the Minister of Economic Development, Trade and Tourism. The Ministry has confirmed that it acted on ODC’s behalf at the request stage, and that it has also acted and continues to act on behalf of the ODC with respect to this appeal. In this regard, the Ministry indicated that separate notification of the ODC is not required.

The records at issue consist of an agreement between the corporation and the ODC, with attached schedules (Record 1) and three amending agreements (Records 2, 3 and 4).

DISCUSSION:

THIRD PARTY INFORMATION

Sections 17(1)(a) and (c) of the Act state 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

For a record to qualify for exemption under section 17(1)(a) or (c) the Ministry and/or the corporation 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; **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) or (c) of subsection 17(1) will occur.

Part One

The records at issue outline the commercial relationship between the ODC and the corporation. Some specific clauses include dollar figures and outline financial commitments and responsibilities undertaken by the ODC and the corporation. In my view, the information contained in all four of the records is commercial and/or financial information, and the requirements of Part One of the test have been satisfied.

Part Two

Previous orders of this office have addressed the issue of whether information contained in an agreement entered into between a Ministry and a third party was “supplied” by the third party (Orders 36, 87, P-385 and P-581). These orders stand for the proposition that, generally speaking, information which is the product of a negotiation process will not qualify as having been “supplied” for the purposes of section 17(1) of the Act.

A number of previous orders have also held that information contained in a record would reveal information “supplied” by a third party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-218, P-385 and P-581).

The corporation’s representations do not address the issue of which information in the records was “supplied” by the corporation to the ODC. The only comment which appears remotely related to this question is the statement that the records at issue were “executed and delivered by [the corporation] and [the ODC] ...”. However, this describes the execution of the completed agreements, and does not indicate which information in the agreements was “supplied” by the corporation to the ODC.

The Ministry’s representations indicate that the nature of the agreement between the corporation and the ODC required the corporation

... to provide ODC with confidential information and projections relating to its expenditures, jobs and job creation, job training, skills development, and product sales, both domestic and for export.

I accept the Ministry's evidence that information meeting this description was supplied by the corporation to the ODC. I must next decide whether it was supplied in confidence. The corporation and the Ministry submit that there was an intention by both the corporation and the ODC to treat the information provided as confidential, and I accept this evidence. Therefore, Part Two of the test is met for information which was supplied to the Ministry, as described above.

I have reviewed the records to locate the information which meets the Ministry's description of information supplied to the ODC. It consists of the following:

- Record 1: Parts of pages 2 and 7 of the agreement, and Schedule "A" in its entirety;
- Record 2: Schedule "A-1", in its entirety;
- Record 3: All of the text in paragraph 2(a);
- Record 4: Part of subparagraphs B and C of paragraph 2(a), and part of paragraph 2(b), as well as Exhibits "A" and "B" in their entirety.

I find that this information meets Part Two of the test.

However, based on the information provided to me, including the contents of the records themselves, I find that the corporation and the Ministry have not met the onus on them to prove, on a balance of probabilities, that the remaining information in the records was "supplied" to the ODC. Therefore, the remaining information in the records does not meet Part Two of the test. Since all three parts must be met in order for the exemption to apply, the remaining information is not exempt under section 17.

Part Three

The corporation's representations indicate that disclosure of much of the information in the records could be used against the corporation by its competitors. The corporation's business is in the international electronics field, which is highly competitive and volatile. I accept the corporation's evidence in this regard, and I find that disclosure of the information which I have found to meet Part Two of the test, as described above, could reasonably be expected to cause significant prejudice to the corporation's competitive position within the meaning of section 17(1)(a). Therefore, this information meets Part Three of the test. As this information meets all three parts of the test, it is exempt under section 17(1) of the Act.

For greater certainty, I have highlighted the exempt information found on pages 2 and 7 of Record 1, and in Records 3 and 4, on copies of those records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

ORDER:

1. I uphold the Ministry's decision to deny access to the following:
 - the parts of pages 2 and 7 of Record 1 which are highlighted on the copies of those pages which are being sent to the Ministry's Freedom of Information and

Privacy Co-ordinator with a copy of this order, and Schedule "A" of Record 1 in its entirety;

- Schedule "A-1" of Record 2 in its entirety; and
- the parts of Records 3 and 4 which are highlighted on the copies of those records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose the following:

- Record 1 in its entirety, **except** Schedule "A" and the parts of pages 2 and 7 of the agreement which are highlighted on the copies of those pages which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order (i.e. the highlighted passages are **not** to be disclosed);
- Record 2 in its entirety, **except** Schedule "A-1"; and
- Records 3 and 4 in their entirety, **except** the passages which are highlighted on the copies of those records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order (i.e. the highlighted passages are **not** to be disclosed).

Disclosure is to be effected by sending copies of these records to the appellant on or before **April 4, 1996** but not earlier than **April 1, 1996**.

3. If the Ministry is unable to comply with Provision 2 of this Order due to the current OPSEU strike, I order the institution to contact me through the Registrar of Appeals by **March 29, 1996** so that I may then consider any required adjustment to the compliance date and respond accordingly with notice to all parties.

4. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed in accordance with Provision 2.

Original signed by: _____

John Higgins
Inquiry Officer

February 29, 1996