



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

ORDER P-1195

Appeals P-9600033 and P-9600059

Ministry of Economic Development, Trade and Tourism



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEALS:

The Ministry of Economic Development, Trade and Tourism (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information pertaining to a loan granted to a named company (the Company) for the purchase of equipment used to manufacture sodium hypochlorite in Ontario. In particular, the requester sought access to any application made by the Company for financial support.

The Ministry identified the responsive records and, pursuant to section 28 of the Act, notified the Company of the request. The Company objected to the disclosure of all the records. The Ministry then issued a decision granting partial access to the records.

The Ministry denied access to the loan application (Record 1), the business plan (Record 2), the Ontario Development Corporation (the ODC) Credit Submission (Record 3) and personal guarantees (Record 6) in their entirety and granted partial access to the Offer of Loan (Record 4) and Loan Agreement (Record 5). Access was denied to the records, in whole or in part, on the basis of section 17(1) of the Act (third party information) and section 21(1) of the Act (invasion of privacy).

The requester appealed the Ministry's decision to deny access, in whole or in part to the records described above and Appeal Number P-9600033 was opened by the Commissioner's office. The Company also appealed the Ministry's decision to grant partial access to Records 4 and 5 and Appeal Number P-9600059 was opened. Because the records at issue and the parties are the same in both appeals, this order will resolve the issues arising in both appeals P-9600033 and P-9600059.

During the mediation stage of the appeal, the Ministry issued a supplementary decision claiming that the exemption under section 13(1) of the Act also applied to Record 3.

A Notice of Inquiry was provided by the Commissioner's office to the requester (now the appellant), the Company, another company referred to in the records (the affected party) and the Ministry. Representations were received from the Ministry only. In its representations, the Ministry withdrew the section 13(1) exemption claim.

Subsequent to the deadline for the receipt of representations, the Company provided the Commissioner's office with a copy of its letter to the Ministry, objecting to the Ministry's decision to disclose part of the records. The Company did not make any submissions on the issues raised in the Notice of Inquiry.

DISCUSSION:

Under section 53 of the Act, where a head refuses access to a record or part of a record, the burden of proof that the record or part falls within the specified exemption, lies upon the head. Under section 17(1) of the Act, the burden of proof lies upon the parties resisting disclosure of the records.

In the appeal by the requester (Appeal Number P-9600033), the Ministry is withholding access to all of Records 1, 2, 3, 6 and part of Records 4 and 5, which are the records at issue in that

appeal and the burden of proof lies on both the Ministry and the Company as they are the parties resisting disclosure.

In Appeal Number P-9600059, it is the Company that is objecting to the Ministry's decision to disclose parts of Records 4 and 5. Therefore, in this case, it is the Company that bears the burden of proof to establish that section 17(1) applies to those parts of Records 4 and 5 that the Ministry has agreed to disclose.

As I have indicated above, the Company has made no submissions on why section 17(1) should apply to the records. However, section 17 is a mandatory exemption and I will therefore examine the application of the exemption to all the records for which section 17(1) has been claimed.

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 17(1)(a) or (c) the Ministry and/or the Company 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), (b) or (c) of section 17(1) will occur.

All three parts of the above test must be met in order for the exemption to apply.

[Order 36]

Part One

I have reviewed the information in the records and I find that the records contain financial details of the business operation of the Company and relate to the Company's application for financial assistance. On this basis, I am satisfied that the records contain financial and commercial information. The first part of the section 17(1) test has been met.

Part Two

In order to satisfy part two of the test, the information must have been supplied by the Company to the Ministry, either implicitly or explicitly in confidence. I will first consider the "supplied" part of this test.

Previous orders of the Commissioner have determined 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 institution (Orders P-472 and P-581).

The Ministry states that the information in Records 1, 2, 3, 6 and the withheld portions of Records 4 and 5 was supplied by the Company to the Ministry as part of and in support of the loan application.

As I have indicated, the Company has not made any submissions and I have no evidence to show which portions, if any, of the records contain information that was supplied by the company to the Ministry. However, from my review of the records, it is clear that Records 1 and 2 were provided to the Ministry by the Company in support of its application. Therefore, I find that Records 1 and 2 contain information that was “supplied” to the Ministry. Records 3, 4 and 6 are pro-forma documents used by the Ministry in the administrative processing of applications for financial assistance. I find that portions of these records contain information that was provided by the Company to the Ministry. I find that this information also qualifies as being “supplied” for the purposes of this exemption.

Record 5 is a loan agreement between the Company, the affected party and the ODC which contains the final terms and conditions for the loan to the Company. Previous orders of this office have concluded that information contained in an agreement between an institution and a third party is not “supplied” for the purposes of section 17(1) of the Act (Orders P-581 and P-807). This is so because such information usually represents the final position negotiated by the parties, as opposed to the information actually supplied by a third party to the institution.

However, based on my review of the record, I find that parts of Record 5 contain information such as the total cost of the project and the amount of the owners’ equity, which information can only have been supplied to the Ministry by the Company. I find that this information qualifies as having been supplied for the purposes of the exemption.

I will now consider whether the information that I have found to be supplied to the Ministry by the Company was done so, explicitly or implicitly, in confidence.

The Ministry submits that the information was supplied implicitly in confidence and that the Ministry has always treated this type of information as such.

None of the records are marked “confidential” and therefore, I find that the information at issue was not supplied explicitly in confidence. In order for me to find that the information was supplied implicitly in confidence, it must be demonstrated that the Company had an expectation of confidentiality and that this expectation had a reasonable basis (Order M-169).

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the information was:

- (1) communicated to the institution on the basis that it was confidential and that it was to be kept confidential;

- (2) treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- (3) not otherwise disclosed or available from sources to which the public has access;
- (4) prepared for a purpose which would not entail disclosure.

[Order P-561]

In light of the Ministry's submissions and the information contained in the above-noted records, I am prepared to accept the claim that the information contained in the records was communicated to the Ministry on the basis that it was confidential and that it was intended to be kept confidential. I find that this information was treated in a manner indicating a concern for its disclosure and was prepared for a purpose which would not entail disclosure.

Based on all the circumstances of this case, and considering the nature of the information, I find that the Company held a reasonable expectation, on an objective basis, that the materials it submitted to the Ministry would be kept confidential. Accordingly, I find that part two of the section 17(1) test has been met.

Part Three

With respect to this part of the section 17(1) test, the Ministry states that, in many instances, the Ministry has no direct evidence to conclusively determine that the disclosure of the records would or could reasonably be expected to cause the harms set out sections 17(1)(a) and (c). In this case, the Ministry submits that the records contain specific facts and information about the Company but that it is not in a position to determine what effect the disclosure of this information would have on the Company. The Ministry further submits, however, that the Company has been made aware of this inquiry and that it supports the Company's arguments that disclosure of the records will result in the harms envisioned by sections 17(1)(a) and/or (c).

As I have indicated previously, the Company has not made any representations other than its letter of appeal.

I have reviewed the Ministry's representations together with the records at issue and I make the following findings. With respect to Records 1, 2, 3 and 6 and the withheld parts of Records 4 and 5, the Ministry is relying on the Company's submissions and since the Company has made none, I find that neither the Ministry nor the Company has provided me with sufficient evidence to establish any of the harms in section 17(1)(a) and/or (c).

With respect to the parts of Records 4 and 5 that the Ministry is prepared to disclose, in the absence of submissions from the Company, I am unable to conclude that disclosure of the records could reasonably be expected to result in any of the harms specified in section 17(1)(a) and/or (c).

Accordingly, I find that sections 17(1)(a) and/or (c) do not apply.

INVASION OF PRIVACY

Under section 2(1) of the Act, “personal information” is defined to mean recorded information about an identifiable individual. The Ministry claims that the records contain personal information.

I have carefully examined the records and I find that the records contain the names, addresses, dates of birth, citizenship and salary amounts of identifiable individuals together with other personal information relating to these individuals. The records do not contain the personal information of the appellant.

Section 21(1) of the Act prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f), which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of this case.

The Ministry claims that disclosure of the personal information would constitute an unjustified invasion of the identifiable individuals’ personal privacy in accordance with sections 21(3)(d) (employment or educational history) and 21(3)(f) of the Act (individual’s finances, income, assets or liabilities).

The appellant has not submitted representations. In this appeal, I have found that the records contain the personal information of individuals other than the appellant. I find that this information includes the employment history, salary and assets of identifiable individuals and therefore falls within the presumptions provided by sections 21(3)(d) and (f) of the Act. I find that section 21(4) is not applicable to the records and the appellant has not raised the applicability of section 23 of the Act. Accordingly, I find that the exception contained in section 21(1)(f) does not apply, and the personal information described above is properly exempt from

disclosure under section 21 of the Act.

I have highlighted the portions of the records that I have found to be exempt on the copy sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions should not be disclosed.

ORDER:

1. With respect to Appeal Number P-9600033 I uphold the Ministry's decision to deny access to the portions of the records highlighted on the copy provided to the Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose the remaining (non-highlighted) records or parts thereof, by sending a copy of the records to the appellant no later than **July 3, 1996** but not earlier than **June 28, 1996**.
3. With respect to Appeal Number P-9600059, I uphold the Ministry's decision to allow partial access to Records 4 and 5 to the appellant.
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 to the appellant pursuant to Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ May 29, 1996