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

ORDER P-1496

Appeal P_9700240

Ministry of the Environment

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

A named company (the affected party) submitted an application to the Industry Conservation Branch of the Ministry of Environment and Energy, now the Ministry of the Environment (the Ministry), for a grant pursuant to the Environmental Technologies Program (the ETP). The grant, which related to an innovative container, was given to the affected party. The contract signed between the Ministry and the affected party provided a total of $250,000 for five milestones after successful completion of the project.

NATURE OF THE APPEAL:

A lawyer (the appellant) made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry. The request was for records relating to the grant issued to the affected party for this innovative container.

The Ministry located records responsive to the request and, pursuant to section 28(1) of the Act, notified the affected party and requested that it provide its views to the Ministry regarding disclosure. The affected party responded, indicating that certain portions of the record should not be disclosed because section 17 applied. The affected party's reasons focused on the research and developmental work that it was performing in the area of this particular innovative container. The affected party was concerned that disclosure of the information would provide an advantage to a competitor who has not spent the resources and efforts in research and development.

The Ministry subsequently issued a decision to the appellant granting partial access to the responsive records. The Ministry withheld the remaining records from disclosure on the basis of section 17(1) of the Act (third party information). The appellant appealed the denial of access.

In his letter of appeal, the appellant indicated that he was limiting the appeal to the identity of sub-contractors/customers and expenditures by the third party for specific milestones which are found in the following records:

(a) Record 1 - page 30 of the agreement (estimated projects costs, cash flow and timing);

(b) Records 2 - 6, respectively - page 2 of four task reports and the final report (project costs and cash flow);

(c) Record 7 - financial statements for year ending March 31, 1996, Auditor's Report; and

(d) Record 8 - statements of subcontractor accounts.

This office provided a Notice of Inquiry to the Ministry, the appellant and the affected party. Representations were received from all three parties.

DISCUSSION:

THIRD PARTY INFORMATION

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

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

Type of Information

The Ministry and the affected party both submit that the records contain commercial and financial information. Records 1 - 6 all contain the same categories of information. This information is found under the following headings: direct labour/ benefits/ travel/ equipment/ materials/ plant cost/ subcontracts/ overhead. In my view, these records all contain information pertaining to the costs of the project, which qualifies as financial and commercial information. Record 7 contains the financial statements of the affected party and qualifies as financial information. Record 8 contains the statements of account from subcontractors and similarly represents the cost of the project. This information also qualifies as financial and commercial information. Accordingly, I find that the first requirement of the exemption has been met.

Supplied in confidence

In order for this part of the section 17(1) test to be met, the information must have been supplied to the Ministry in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

Previous orders have addressed the question of whether the information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must have been the same as that originally provided by the third party. Since the information in an agreement is typically the product of a negotiation

process between the institution and the third party, that information will not qualify as originally having been "supplied" for the purpose of section 17(1) of the Act.

As I indicated above, Record 1 contains page 30 of the agreement between the Ministry and the affected party. The portion which has been denied is the detailed breakdown of the estimated project costs, cash flow and timing. Both the Ministry and the affected party state that the information contained in Record 1, although part of the agreement, is the estimated cost of the project and is based on information supplied directly by the third party in support of the grant application.

It is clear that the information in Records 2 through 8 was supplied to the Ministry by the affected party. In the circumstances, I am satisfied that the disclosure of the information in Record 1 would reveal information supplied to the Ministry.

With respect to whether the records were supplied to the Ministry "in confidence", the Ministry states that it is the Ministry's practice to keep applications and all subsequent documentation pertaining to grants confidential as these types of records reveal information that is often considered as having scientific, technical, commercial or business value by the proponent.

The Ministry indicates further that its guideline for completing the application states that:

> Ontario will waive its rights to the intellectual property developed through the R and D carried out under the ETP provided that certain conditions are met. As long as the proponent commercializes the product or process in Canada and does not default on the requirements of the contract, the proponent can sell the product or process without royalties to Ontario.

The Ministry points out that Article 10 of the agreement between the Ministry and the affected party provides that:

> To the extent permitted by law, the Province shall not divulge to any person other than employees, agents or servants of the Province who need to know, any information arising out of, related to or connected with the Project which the Company requests the Province to handle in a confidential manner so long as the information with respect to which confidentiality is sought is not in the public domain.
>
> The Company acknowledges that this agreement and any material submitted to the Province pursuant to it may be subject to disclosure under the [Act].

The Ministry notes that the affected party has not marked any of their records as "CONFIDENTIAL." However, the Ministry reiterates that it has always treated the grant application and subsequent information as confidential. The Ministry indicates that if it discloses any information publicly, it would only be a very brief summary of the project and the amount of the grant.

The Ministry indicates further that proponents are aware of its practices to keep applications and supporting documentation confidential. The Ministry states that, as a result of its practices, not all companies mark all of their records as confidential, as is the case for the records at issue.

The affected party indicates that the agreement provided, inter alia, that the Ministry would monitor the project and the affected party would report in the manner prescribed throughout the duration of the project. The affected party states that, in accordance with the reporting requirements set out in the agreement, it provided the records at issue to the Ministry, subject to the terms of Article 10.

Having carefully considered the representations on this issue and the records themselves, I find that the affected party supplied this information to the Ministry with an implicit expectation of confidentiality. Moreover, in my view, this expectation of confidentiality had a reasonable basis. Therefore, I find that the second requirement for exemption has been satisfied.

Harms

The affected party submits that the disclosure of any of the records could reasonably be expected to give rise to the harm set out in sections 17(1)(a) and (c) of the Act, which 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to meet this part of the test, the Ministry and/or the affected party must show how disclosure of the information in the record could reasonably be expected to result in the harms described in sections 17(1)(a) and/or (c) of the Act.

According to the Ministry, the affected party made submissions to it relating to the harm in terms of the research and development resources and costs spent. The Ministry indicates that the affected party has spent several years developing the project to commercialize a water based coating for corrugated cardboard.

The affected party adds that its financial statements for the year ended March 31, 1996, contain detailed information in respect of, among other things, the affected party's assets, liabilities, income and expenses which could prejudice significantly its competitive position by allowing detailed financial information to be disclosed to individuals who would not normally be privy to such information.

The affected party is particularly concerned about the potential damage to it if disclosure was made to one of its competitors, which is what the affected party believes would be the case if disclosure is permitted in this case. In this regard, the affected party outlines its reasons for believing that the appellant intends to attempt to use the information contained in the records to gain a competitive advantage over it.

The appellant submits that the harm envisioned by section 17(1)(a) must be substantial. In effect, the appellant argues that:

> It is our submission that the "significant" component can only be satisfied if the head demonstrates by clear and cogent evidence that [the affected party] either would likely go out of business by disclosure of the information or would in all likelihood suffer significant financial loss which is irreparable.

With respect to the harm in section 17(1)(c), the appellant argues that:

> ... the head could only satisfy the burden if the head could show that access to their record would result in "undue" loss or gain to some other group or person. Again, it is clear that the legislation contemplates that there could be a loss to [the affected party] or a gain to some other group but such would have to be "undue" ...

I disagree with the appellant's view of the degree of harm required by section 17(1). The wording of this section does not require that the described harm would occur should the records be disclosed. The wording of section 17(1) only requires that there be a reasonable expectation that the harm could occur. Many previous orders of this office have held that this phrase should be read to mean that the expectation not be fanciful or imaginary, but rather one based on reason.

Further, I do not agree that in order for section 17(1)(a) to be met, the degree of harm must be as substantial as the appellant suggests. In my view, it is sufficient that the Ministry and/or affected party demonstrate that the harm which would result from disclosure be of some consequence to the affected party.

I have considered the representations of all the parties. In my view, Records 1 - 6 set out considerable information which reflects the results of a significant amount of research and development on the part of the affected party. In my view, disclosure of this information to the appellant, or any other party, could reasonably be expected to result in undue loss to the affected party. Accordingly, I find that the harm in section 17(1)(c) applies to the disclosure of this information. With respect to the financial statements and statements of account, I find that they contain a great deal of information regarding the internal structure of the affected party and its financial activities, the disclosure of which could reasonably be expected to prejudice significantly its competitive position. Therefore, I am satisfied that the harm in section 17(1)(a) applies to these records.

Because all three parts of the test have been satisfied, the records at issue are exempt under section 17(1).

ORDER:

I uphold the Ministry's decision.

Original signed by: December 2, 1997
Laurel Cropley
Inquiry Officer