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

ORDER PO-1860

Appeal PA-990329-2

Ministry of Training, Colleges & Universities

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

NATURE OF THE APPEAL:

The Ministry of Training, Colleges and Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a program for the training of painters and decorators operated by a private training delivery agency (the affected party). The Ministry located a number of records which were responsive to the request and, pursuant to section 28(1) of the *Act*, notified the affected party seeking its views on the disclosure of this information.

Following receipt of the submissions of the affected party, the Ministry disclosed the requested records, with the exception of an attachment to a document entitled "Proposal to Establish a Training Delivery Agency to Service the Trade of Painter and Decorator". The attachment, which is the sole record at issue in this appeal, consists of 35 pages of test questions and is entitled "Skills Tests". The Ministry applied the mandatory exemption in section 17(1) of the *Act* (third party information) to exempt this document from disclosure.

The appellant appealed the Ministry's decision.

I decided to seek the submissions of the Ministry and the affected party, initially. Both parties provided me with representations. The Ministry agree to share its submissions with the appellant, in their entirety. The affected party expressed some reservations about sharing its submissions, however. After reviewing the representations of the affected party, I decided not to share these submissions with the appellant as I had concerns about the confidentiality of the information contained in them.

The appellant also submitted representations in response to the Notice which I provided to him. He objected to the fact that I decided not to share the affected party's representations with him, claiming that the reasons for this decision which were described in the Notice were insufficient and that his ability to respond to the position on disclosure of the record which has been put forward by the affected party was severely curtailed. I will address this issue as a preliminary matter.

PRELIMINARY ISSUE:

WITHHOLDING OF THE REPRESENTATIONS OF THE AFFECTED PARTY

The appellant submits that the rationale for not providing him with the submissions of the affected party which are expressed in the Notice of Inquiry does not adequately explain the basis for not disclosing the affected party's representations.

The appellant refers to IPC Practice Direction 7 dated August 2000, describing the procedure which governs the sharing of representations of parties to an appeal. Paragraphs 5 and 6 of the Practice Direction describe the criteria to be applied by Adjudicators when determining whether to share all, or part of, the representations of one party with another party who is adverse in interest.

In the Notice of Inquiry which I provided to the appellant, I simply stated that:

> [T]he affected party expressed some reservations about sharing its submissions, however. After reviewing the representations of the affected party, I have decided not to share these submissions with the appellant as I have some concerns about the confidentiality of them.

In the affected party's submissions to me regarding the sharing of his representations, the affected party's representative explained in some detail the history of how the records came to be created and his reasons for not wanting the information contained in its submissions to be made available to the appellant. The affected party's representative expressed to me certain concerns about the continued operation of this business should the contents of its submissions be disclosed to the appellant. For reasons of confidentiality, I am unable to describe them in any detail in this order. However, based on the submissions of the affected party with respect to this question, I was, and remain, satisfied that the criteria set out in sections 5(c) and 6 of the Practice Direction have been met.

In my view, the affected party communicated its views on the application of section 17(1) to this office in a confidence that it would not be shared with the appellant and that this confidentiality is essential to the maintenance of the relation between the IPC and the affected party. I further find that the relation between the affected party and the IPC is one which ought to be diligently fostered. Finally, I find that the injury which would result from the disclosure of the affected party's representations outweighs any benefit which the appellant may derive from their disclosure.

In addition, I find that the appellant was provided with sufficient information from the representations of the Ministry to know the case he had to meet and to make substantive submissions responding to the issues raised in the Notice.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) 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 Ministry 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.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

Part 1: Type of Information

Trade Secret

The term "trade secret" has been defined in previous orders 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.

[Order M-29]

The Ministry submits that:

> . . . it is clear from the information provided that the portion of the record at issue is a trade secret. As a battery of practical test examinations, it is a compilation of information that could be contained in a product, in this case a course or program, which (i) is or my be used in a trade or business, in this case the trade in which the principal of the third party is qualified, (ii) and (iii) has economic value from not being generally known since it has not yet been accredited, and (iv) is not the subject of efforts on the part of the Ministry that the Ministry considers reasonable under the circumstances to maintain the secrecy of the information in question.

The affected party's submissions do not directly address the question of whether the information qualifies as a "trade secret" as that term has been defined in previous orders of the Commissioner's office.

The appellant disputes the Ministry's assertion that the information contained in the record is not generally known, arguing that the affected party has been delivering its apprenticeship program since April 1998 and that a number of students have now passed through the program, using the evaluation material which constitute the records at issue. The appellant further submits that the testing material is Apresumably closely based upon the educational requirements for apprentice painters and decorators that are set out in detail in the *Trades Qualification and Apprenticeship Act, Painter and Decorator* R.R.O. 1990, Reg. 1071".

I agree with the position expressed by the Ministry and find that the record at issue contains information which qualifies as a "trade secret" within the meaning of section 17(1). The record contains information which is included in a training programme which is used to assist in the education of individuals entering the painting and decorating field. It clearly has economic value as the students taking the courses pay tuition. The Ministry recognizes the economic value of the information and the steps taken by the affected party to limit the use of the testing material. I find that the first part of the section 17(1) test has, accordingly, been satisfied.

Part Two: Supplied in Confidence

In order to satisfy the second requirement, the Ministry and/or the affected party must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence. In addition, information contained in a record will be said to have been "supplied" to an institution, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-179, P-203, PO-1802 and PO-1825).

Supplied

Based on my review of the record itself and the submissions of the parties, I am satisfied that the information which forms the record at issue was supplied by the affected party to the Ministry.

In Confidence

In order to establish that the records were supplied either explicitly or implicitly in confidence, the Ministry and/or the affected party must demonstrate that an expectation of confidentiality existed at the time the records were submitted, and that this expectation was reasonable and had an objective basis (Order M-169). All factors are considered in determining whether an expectation of confidentiality is reasonable including whether the information was:

(1) Communicated to the Ministry 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 party prior to being communicated to the Ministry.

(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)

The Ministry indicates that it was understood by the affected party and itself that the record was supplied in confidence. It also submits that the Ministry has consistently treated the information as confidential.

The affected party submits that the record was provided to the Ministry on the strict understanding that these tests would be "held privileged in trust by the ministry for future reference to the possibility for implementation of practical testing in Ontario."

The appellant disputes that the records were prepared for a purpose which would not entail disclosure. He points out that the tests have been made available to the students who have enrolled in the programme, therefore, "the very purpose for which the tests were prepared was one which would necessarily entail disclosure to students."

Based on the information provided to me by the Ministry and the affected party, I am satisfied that the information contained in the record was provided to the Ministry with a reasonably-held expectation that it would be treated in a confidential fashion. I do not agree with the position taken by the appellant that disclosure of the contents of the records to students enrolled in the course would negate the affected party's arguments about confidentiality. I find that disclosure to the enrolled students in an examination setting does not undermine the reasonably-held expectation on the part of the affected party that the Ministry would treat the record as confidential.

Accordingly, I find that the second part of the section 17(1) test has also been met.

Part Three: Reasonable Expectation of Harm

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of

these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party or parties with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In the present appeal, the Ministry and the affected party, as the parties resisting disclosure, must provide detailed and convincing evidence to establish a reasonable expectation of probable harm, in this case one or more of the harms outlined in sections 17(1)(a), (b) and/or (c) of the *Act*.

Section 17(1)(c) - Undue Loss or Gain

The Ministry is of the view that disclosure of the requested information could "possibly lead to misuse of this information and cause undue harm in terms of the third party goals and expectations." It adds that the affected party advised the Ministry that the record at issue was mistakenly included in a proposal made to the Ministry as it was incomplete.

The affected party indicates that the information at issue:

> not only provides the test objectives, it also defines the assessment mechanism and the workshop scheme of requirements. . . The intent of this scheme is that its use should be closely monitored, in the wrong hands it could severely jeopardize the integrity of the whole process and create irreparable damage to years of hard work and dedication by [the affected party's representative], not to mention harm to the trade itself.

He goes on to add that:

> The context of the document at issue is not a secret, it is a testing mechanism derived from the curriculum standards. It is the scheme and format that must be respected as the work of a private individual. . . This document is only one third of an incomplete program of tests. When completed it will be submitted (*and only then to a recognized educational authority*) in the hope of being adopted as the testing method of the Province and possibly the Nation. If it is made public now, the security and integrity of this scheme will have been breached.

The affected party also points out that, in his view, other organizations have vested interests in the maintenance of the "status quo" with respect to the training of individuals to work in the field of painting and decorating. The testing scheme proposed by the affected party operates as a "threat" to these established interests, according to the affected party.

The appellant indicates that the submissions made on behalf of the Ministry fall far short of the sort of "detailed and convincing evidence" required in order to make a finding that the information is subject to the section 17(1) exemption.

In Order PO-1688, Senior Adjudicator David Goodis examined the purposes of the exemption in section 17(1) in his discussion on the application of the public interest override (in section 23 of the *Act*). In my view, these comments are worthy of note in considering the degree of harm that could reasonably be expected to occur from disclosure of a record.

> The purposes of section 17(1) of the *Act* were articulated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):
>
> > . . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information *act* requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).
>
> Clearly, the purposes of the section 17(1) exemption are serious, and are intended to protect the public interest in the manner expressed by the Williams Commission.

In my view, the affected party has provided the kind of "detailed and convincing evidence" required to demonstrate that undue loss or gain to its business could reasonably be expected to result from the disclosure of the record at issue. I find that the affected party has made a substantial investment of time, energy and money in the development of the testing program outlined in the record. Should the record be disclosed, I am satisfied that others with an interest in similar training programs would be able to adversely make use of the fruits of the affected party's labour, thereby causing it to suffer an undue loss.

As all three parts of the section 17(1) test have been met, I find that the record at issue is exempt from disclosure under that section.

ORDER:

I uphold the Ministry's decision to deny access to the requested information.

Original signed by: January 26, 2001
Donald Hale
Adjudicator