



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2000

Appeal PA-010213-1

Ministry of Northern Development and Mines



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NATURE OF THE APPEAL:

The Ministry of Northern Development and Mines (the Ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

Please provide all invoices and receipts submitted and payments made connected to the attached grant of \$500,000 made to [a named company]. Also include [the named company's] application, the approval authorizations for this grant, and the assessment/audit records. I will want to know who ultimately received money from this \$500,000 grant, how much they received and when they received it.

The Ministry identified a number of responsive records and, pursuant to section 28 of the *Act*, gave notice to the named company, seeking submissions with respect to disclosure of these records. The named company responded by objecting to disclosure. The Ministry then issued its decision to the named company, advising that it intended to provide the requester with access to the records.

The named company (now the appellant) appealed the Ministry's decision on the basis that disclosure would cause competitive harm to the company, as described in section 17(1) of the *Act*.

During the mediation stage of the appeal, the Ministry notified the appellant of one additional responsive record (Record 10) it intended to disclose. In turn, the appellant objected to the disclosure of this record, so it was added to the scope of this appeal.

Mediation was not successful in resolving the issues, so the appeal moved to the inquiry stage. This office sent a Notice of Inquiry initially to the appellant, asking for representations on the application of the section 17(1) exemption claim. The appellant provided brief representations in response.

After receiving the appellant's representations, it was determined that some records contained information that might affect the interests of other organizations, and that some records could contain "personal information", as defined in the *Act*, thereby raising the possible application of the mandatory section 21(1) exemption claim (invasion of privacy). The original requester confirmed that he was interested in obtaining access to this information. Therefore, a revised Notice was sent to the Ministry as well as the organizations and individuals identified in the records (the "individual affected parties" and "corporate affected parties"). The Ministry and a law firm acting for a number of the individual affected parties and one of the corporate affected parties responded with representations.

I then sent a copy of the Notice, along with the representations of the Ministry and a severed copy of the representations of the law firm, to the original requester. He did not provide representations.

RECORDS:

The following are the records at issue in this appeal:

- Record 1 – August 10, 1999 application for funding submitted by the appellant;
- Record 4 – March 29, 2001 summary of 4 invoices (Records 5 through 8);
- Record 5 – December 6, 1999 invoice to the appellant from a corporate affected party;
- Record 6 – January 17, 2000 invoice to the appellant from a corporate affected party;
- Record 7 – November 30, 1999 invoice to the appellant from a corporate affected party;
- Record 8 – February 25, 2000 invoice to the appellant from a corporate affected party;
- Record 10 – August 11, 2000 status report from an appellant to the Ministry;
- Record 11 – August 17, 2000 letter from the Ministry to the appellant with attached quarterly statement;
- Record 12 – August 17, 2000 facsimile transmittal from the appellant to the Ministry with attached quarterly statement;
- Record 13 – August 23, 2000 letter from the Ministry to the appellant with attached quarterly statement;
- Record 14 – September 22, 2000 letter from the appellant to the Ministry with attached quarterly statement.

The Ministry severed certain information contained in Records 10 through 14 before disclosing them to the requester, on the basis that the severed portions were not responsive to the request. The requester did not appeal this decision, and these severances are not at issue in this appeal.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Introduction

The section 21(1) personal privacy exemption applies only to information that qualifies as personal information. Section 2(1) of the *Act* defined “personal information”, in part, to mean recorded information about an identifiable individual, including information relating to the employment history of an individual [paragraph (b)] or the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Ministry submits that the individuals’ names listed in Records 5 and 6 in conjunction with the payment amounts charged for the work performed by these individuals, qualify as their “personal information” under paragraph (h) of the definition. The law firm representing the individual affected parties makes similar representations, pointing out that this information reflects income paid by one of the corporate affected parties to these individuals.

I concur with the Ministry’s position. Information contained in invoices specifying payment rates and individuals who were paid these amounts have been found in previous orders to

constitute those individuals' personal information for the purpose of section 2(1) of the *Act* (See Orders M-498 and PO-1705)]. Similarly in this case, I find that the portions of Records 5 and 6 that identify individual employees of the corporate affected party and the amount charged by that affected party for their services qualifies as the personal information of these individuals under paragraph (h) of the definition. However, if the names are severed, I find that the information that remains is not identifiable to any specific individual and no longer qualifies as "personal information".

The Ministry also submits that the description of the work history of three individual affected parties that appears on pages 9 and 10 of Record 1 constitutes their "employment history" and therefore qualifies as the personal information of these individuals under paragraph (a) of the definition. Relying on Orders 80 and R-980015, the Ministry takes the position that the names, job titles and job descriptions of these two individual affected parties also contained in Record 1 "relates to their employment or association with the organizations whose interests they are representing" and therefore falls outside the scope of the definition of personal information.

Again, I concur with the Ministry. Past orders have determined that a record containing information relating to the prior work experience of an identified employee qualifies as the personal information of the identified employee under paragraph (b) of the definition (See, for example, Order P-655). For the same reasons, I find that the portions of pages 9 and 10 of Record 1 that describe the past work experience of the three individual affected parties qualifies as their "employment history" and falls within the scope of paragraph (b) of the definition of "personal information". The remaining information concerning these individuals in Record 1 is not "about" them in a personal sense, for the reasons identified by the Ministry, and therefore does not contain "personal information".

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. The only exception with potential application in the circumstances of this appeal is section 21(1)(f) that reads:

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.

The original requester in this case has not provided any representations on this issue.

In the absence of evidence to establish that disclosure of the personal information in the three records would not constitute an unjustified invasion of the three identifiable individuals, I find that requirements of the section 21(1)(f) exception have not been established in the circumstances of this appeal. Therefore the mandatory section 21(1) exemption applies, and the personal information of the three individual affected parties must not be disclosed.

THIRD PARTY INFORMATION

General

For a record to qualify for exemption under section 17(1), the parties resisting disclosure, in this case the appellant and the one corporate affected party that provided representations, 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 subsection 17(1) will occur.

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

The Court of Appeal for Ontario, in upholding my 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**” does 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.)]

The appellant's representations consist of the following statements:

... Since our initial appeal our position has not changed in that we believe the records ... are exempt because this financial information was supplied to us in implicit confidence by our supplier so that we may conform to the Ministries (sic) accountability guideline.

Additionally, the disclosure of this information would undermine our ability to conduct competitive bidding processes in the future.

Type of information

The corporate affected party submits that the records contain financial and commercial information.

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

The term "financial information" refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

Record 1 is titled "Funding Submission" and contains a detailed proposal submitted by the appellant for the provision of marketing and promotional activities, which was apparently approved for implementation and formed the basis of a contract for services between the appellant and the Ministry. The rest of the records are either invoices submitted by two corporate affected parties to the appellant for work performed under the terms of the appellant's contract with the Ministry, or correspondence exchanged between the Ministry and the appellant concerning the payment or release of funds. I find that all of these records relate to what appears to be a contract between the Ministry and the appellant for the purchase and sale of marketing and promotional services, and the arrangements put in place by the appellant with its sub-contracted suppliers in order to deliver these services. As such, I find that the information in the records falls within the definition of "commercial information" for the purposes of section 17(1). The records also contain information describing payments and/or budget figures associated with the contract, thereby qualifying as "financial information" under section 17(1).

Supplied in confidence

Records 1, 12 and 14 are signed by the president of the appellant organization and addressed to staff of either the Ministry or the Ministry of Tourism. Record 10 is headed "Submission from [the appellant] to [the Ministry]" and is described as a status report. I find that these records were clearly "supplied" by the appellant to the Ministry for the purpose of section 17(1).

Records 11 and 13 are authored by staff of the Ministry and addressed to the appellant. Both of them attach a quarterly statement that makes reference to information that was provided by the appellant in the context of submitting accounts for payment under the terms of its contract with the Ministry. Past orders of this office have determined that information contained in a record would satisfy the “supplied” requirement of the section 17(1) test if it would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. [See, for example, Orders P-36, P-204, P-251 and P-1105]. On this basis, I find that the information in Records 11 and 13 was also “supplied” to the Ministry for the purposes of section 17(1).

Records 5-8 are all invoices submitted by two corporate affected parties to the appellant for sub-contracted services stemming from the appellant’s contract with the Ministry. Record 4 is a summary of these four records that appears to have been created by the Ministry in the context of responding to this or some other similar access request under the *Act*. Given the relationship between the Ministry and the appellant, and the apparent recognition that certain services provided by the appellant under the terms of its contract with the Ministry would be sub-contracted to various other suppliers, it is reasonable to conclude in the circumstances that Records 5-8 were supplied by the appellant to the Ministry in order to provide the required documentation for payment under the terms of the contract. Record 4 contains information apparently derived from Records 5-8 and, for the same reasons outlined in my discussion of Records 11 and 13, I find that its disclosure would reveal information supplied by the appellant, thereby satisfying the “supplied” requirement of section 17(1).

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly (Order M-169).

In this regard, the corporate affected party that provided representations submits:

All invoice information is, obviously, supplied in confidence. [The affected party] would not (nor would any of its competitors, or indeed, typically, any business or organization) provide copies of its invoices to the public. They are always supplied in confidence to the client. Further, the invoices list, precisely, the manner in which [the affected party] bills for matters, the items it includes in its invoices and the precise amounts charged for certain services.

Although I accept that invoices submitted by a supplier to a client would normally be treated confidentially as between the parties, what the corporate affected party does not appear to take into account is the fact that its services were provided as part of a contract between the appellant and the Ministry, with the corresponding public accountability expectations associated with contracts of this nature. In my view, it is not reasonable for the corporate affected party to have assumed that invoice information, which it realized or should have realized would be passed on by the appellant to the Ministry in order to substantiate payment under the terms of the

appellant's contract, would necessarily be treated confidentially. No explicit references to confidentiality are evident on the face of any of the records, nor has the Ministry provided any indication that it received any of the records on an implicitly confidential basis. In addition, although the appellant states that the invoices "were supplied **to us** in implicit confidence by our supplier", it does not indicate that, in providing these records to the Ministry, the appellant had any corresponding expectation that they would be treated confidentially [my emphasis].

For these reasons, I am not persuaded that any of the records were supplied to the Ministry in confidence. Accordingly, the second requirement for exemption under section 17(1) has not been established. Because all three requirements must be established in order for records to qualify for this exemption, none of the records so qualify.

Although it is not necessary to do so, I have decided to address the third requirement of section 17(1) as well.

Harms

To discharge the burden of proof under the third part of the test, the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

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, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party 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.)]. [Orders PO-1745 and PO-1747]

The representations provided by the appellant in this case are neither detailed nor convincing. They simply state that disclosure "would undermine our ability to conduct competitive bidding processes in the future", but offer no details or explanations as to how or why this would occur. The same can be said of the corporate affected party identified on Record 4 that did not provide representations in response to the Notice of Inquiry. Accordingly, I find that the third requirement of the test for exemption under section 17(1) has not been established for any information concerning the appellant contained in the various records at issue in this appeal or the corporate affected party referred to in Record 4.

As far as the corporate affected party that submitted representations is concerned, it submits:

[The affected party] is an advertising agency. It is in a very competitive industry where competitive bidding on projects between a limited group of agencies is the

norm. The disclosure of the manner and allocation of fees and costs, the disclosure of underlying suppliers etc., should this information become public, would provide a competitor of [the affected party] with a strong advantage in future competitive project tenders.

[The affected party] does not object to it being disclosed that it provided invoices to [the appellant] in respect of the provision of advertising agency services. However, the nature and extent to which matters are billed by [the affected party] to its clients is a proprietary matter and the specific detailed allocations between fees and disbursements is confidential and competitively sensitive. Therefore, none of the details as to recipients of monies nor amounts billed should be disclosed. In our submission, these are clearly matters which fall within the exemption recognized by section 17 of the *Act* and these particulars should not be disclosed.

In the alternative, given the obligation to release whatever information can be released under the *Act*, [the affected party] would be prepared to consent to the release of the **total** amount paid to [the affected party] pursuant to its contract without any breakdown whatsoever of the amount. In our view, this would completely satisfy the request in issue as it would provide the information sought – ie. the amounts spent and the recipient of such amounts [emphasis in original].

None of the type of information described by the corporate affected party is contained in Records 1, 6, 8 or 10. Record 4 and the undisclosed responsive portions of Records 11-14 refer to total payment provided to the corporate affected party during a particular quarter, which would appear to be the type of information referred to in the final paragraph of this affected party's representations quoted above, which it has consented to disclose.

As far as Records 5-7 are concerned, I accept the corporate affected party's submission that disclosure of specific and detailed information concerning the manner in which it conducts its business could reasonably be expected to prejudice significantly its competitive position in the closely knit advertising industry in which this affected party conducts business. However, I do not accept that the contents of Records 5-7 fit within this description. They are invoices that contain various numeric codes and general categories of charges, with no descriptions; vendors names; and bottom line net and total amounts charged by each vendor, which are the same figures in all instances. I find that disclosure of the remaining information in these records could not reasonably be expected to result in any of the harms identified in section 17(1).

In summary, I find that none of the records qualify for exemption under section 17(1) of the *Act*.

ORDER:

1. I do not uphold the Ministry's decision to disclose the records in their entirety.
2. I order the Ministry to disclose to the original requester Records 4, 7 and 8 in their entirety, the responsive portions of Records 10, 11, 12, 13 and 14 in their entirety, and all

portions of Records 1, 5 and 6 that do not contain personal information. I have attached a highlighted version of Records 5 and 6 as well as pages 9 and 10 of Record 1 to the copy of this order provided to the Ministry, which identify those portions that should **not** be disclosed. The disclosures covered by this provision must be made by **April 19, 2002** but not before **April 14, 2002**.

2. 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 original requester pursuant to Provisions 1, only upon request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

March 15, 2002