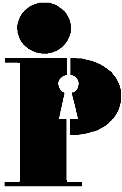

FINAL ORDER PO-2141-F

Appeal PA-010389-1

Ministry of Tourism, Culture and Recreation

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This is my final order dealing with two remaining records in Appeal PA-010389-1. These records were not addressed in Interim Order PO-2117-I.

NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Tourism, Culture and Recreation (now the Ministry of Culture) (the Ministry) made pursuant to the provisions of the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to information relating to a subdivision project in London, Ontario.

The Ministry notified an affected party of the request, and the affected party advised the Ministry that it objected to disclosure of records relating to it. The Ministry issued its decision letter to the appellant and granted full access to some records, partial access to others and denied access in full to other records. The Ministry relied upon sections 13 (advice to government), 17 (third party information), 19 (solicitor-client privilege), and 65(6) (application of the *Act*) in making its decision.

The appellant appealed the Ministry's decision.

During the mediation stage of the appeal process the number of records at issue was narrowed and the appellant clarified that he was not interested in the parts of some records that the Ministry had indicated were non-responsive.

Further mediation was not possible and the appeal was referred to adjudication.

I conducted an inquiry and received representations from the Ministry and an affected party (the first affected party). The appellant chose not to submit representations.

I issued Interim Order PO-2117-I. In it, I found the following:

- one record qualifies for exemption under section 17 (third party information)
- the *Act* does not apply to certain records under section 65(6)3
- certain records do not qualify for exemption in their entirety and one record does not qualify for exemption in part

I ordered the Ministry to disclose this latter category of records.

During the course of conducting the inquiry I determined that an additional party (the second affected party) might be affected by the disclosure of pages 2-4 of record 6 and pages 1-3 of record 11. Therefore, I decided to defer my decision on these portions of record 6 and record 11 until this party had an opportunity to make representations.

I note that pages 2-3 of record 6 are almost identical to pages 1-3 of record 11. Pages 2-3 of record 6 and pages 1-2 of record 11 comprise a letter from a Ministry employee to an affected party. The only differences are that the two letters have different dates and record 6 contains a signed version of the letter while record 11 contains an unsigned version. Page 3 of record 11

and page 4 of record 6 are identical copies of letters sent by the second affected party to the Ministry.

I also note that the Ministry raised the application of section 17 to pages 2-4 of record 6 and section 13 to pages 1-3 of record 11. But, the Ministry did not claim the application of section 13 to pages 2-4 of record 6 or section 17 to pages 1-3 of record 11. However, since the information at issue in record 6 is identical in substance to that found in record 11, it would appear that the Ministry's failure to raise section 13 for record 6 and section 17 for record 11 was an oversight. To ensure consistency in my analysis, and to avoid an absurd result, I have decided to consider the application of sections 13 and 17 to pages 2-4 of record 6 and pages 1-3 of record 11.

RECORDS:

Portions of two records remain at issue: pages 2-4 of record 6 and pages 1-3 of record 11.

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

The first issue for me to decide is whether pages 2-4 of record 6 and pages 1-3 of record 11 are exempt under section 17(1) of the *Act*. That section reads in part:

> 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, if 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[Section 17(1)(d), which relates to certain information in the labour relations context, clearly does not apply here.]

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the Ministry and/or the affected parties 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 [Orders 36, P-373, M-29 and M-37].

Part 1 – Type of Information

This office has defined the terms scientific, technical and financial information as follows:

> ***Scientific Information***
>
> Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act*. (Order P-454)
>
> ***Technical Information***
>
> Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*. (Order P-454)
>
> ***Commercial Information***
>
> Commercial information is information which 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)
>
> ***Financial Information***
>
> The term 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)

The Ministry states that "[t]he information in question is technical and scientific…" in nature and offers the following comments regarding this view:

> Order P-454 defined scientific information as belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. The Ministry continues to be of the view that […] archaeology is a recognized field of knowledge within one or more of these areas, and that fieldwork is a means by which the study of archaeology is accomplished. Alternatively, this information may be accurately characterized as being of a technical nature because assessments contain a significant amount of applied science components.

The first affected party makes a general statement that all of the records under consideration contain information of a potentially sensitive commercial nature.

The second affected party states that "the records contain financial information."

Based primarily on my review of the records, I find that pages 2-3 of record 6 and pages 1-2 of record 11 contain scientific and technical information. These pages contain scientific data (including investigation results and artifact analysis) and conclusions and recommendations presented by the first affected party to the Ministry, all of which fits within the definitions of the terms scientific and technical information. Accordingly, I find that part 1 of the test has been met with respect to pages 2-3 of record 6 and pages 1-2 of record 11.

As stated above, page 4 of record 6 and page 3 of record 11 are duplicate copies of a letter from the second affected party to the Ministry. The letter confirms the second affected party's commitment to pay outstanding fees for work completed by another party if certain conditions are met. Although the second affected party, which is the author of this letter, submits that the record contains financial information, in my view the information is commercial in nature since it relates to the exchange of services. I find that part 1 of the test under section 17(1) has been met with respect to page 4 of record 6 and page 3 of record 11.

Part 2 – Supplied in Confidence

Introduction

In order to satisfy part 2 of the test, an affected party and/or the Ministry must show that the information was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

The requirement that it be shown that the information was supplied to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties. As stated 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), which provided the foundation of this *Act*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
> (pp. 312-315) [emphasis added]

To meet part 2 of the test, it must first be established that the information in the record was actually supplied to the Ministry, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-203, P-388 and P-393).

With respect to whether the information was supplied "in confidence", part 2 of the test for exemption under section 17(1) also 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 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)

Representations

None of the parties make representations that specifically address pages 2-3 of record 6 and, by extension, pages 1-2 of record 11.

The Ministry submits:

> […T]here was an expectation of confidentiality surrounding the records at issue and that this expectation was reasonable and had an objective basis. Attached [is] a letter from the Manager of Heritage Operation of the Ministry, requesting consent from licensees to allow access and copying privileges to other licensees and researchers for any of their reports on file at the Ministry. The third party would have received such a request. The Ministry received no reply. As indicated in the letter, a non-response was considered to be a refusal to consent.

The first affected party submits: "We were assured that this information was provided under strict confidence[…]"

The second affected party states: "[T]he information contained in the documents was supplied in confidence to the Ministry[.]"

Findings

Although pages 2-3 of record 6 and pages 1-2 of record 11 comprise a letter from the Ministry *to* the first affected party, I find that portions of this letter contain information that was *supplied* by this affected party *to* the Ministry in respect of an assessment and report that it had submitted to the Ministry. In addition, I am satisfied that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry by the first affected party in it's report. With respect to the *in confidence* portion of the part 2 test, there is no evidence before me of an explicit expectation of confidentiality on the part of either the supplier of the information or the Ministry. However, I find an implicit expectation of confidentiality

since the information in pages 2-3 of record 6 and pages 1-2 of record 11 originates from a record (record 9) which I found was supplied in confidence by the affected party to the Ministry (see Interim Order PO-2117-I). Accordingly, I find that part 2 of the test has been met with respect to portions of pages 2-3 of record 6 and pages 1-2 of record 11.

However, I also find that portions of the information in these records comprise findings, data, recommendations and conclusions that were provided to the Ministry by the appellant. Under the circumstances, I find that the first affected party could not have supplied this latter information to the Ministry. Accordingly, I find that this latter information does not meet part 2 of the test under section 17(1) of the *Act*.

With respect to page 4 of record 6 and page 3 of record 11, it is clear on the face of this letter that the information contained in it was *supplied* by the second affected party to the Ministry. Regarding the *in confidence* portion of part 2 of the test, due to the nature of the letter and its contents, I am satisfied that there was an implicit expectation of confidentiality in the circumstances. Accordingly, I find that part 2 of the test has been met with respect to page 4 of record 6 and page 3 of record 11.

Part 3 - Harms

Introduction

To discharge the burden of proof under part 3 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.)].

Representations

The Ministry does not make any specific representations on the application of part 3 of the test to pages 2-4 of record 6 and pages 1-3 of record 11. It defers to the first affected party. In particular, the Ministry submits:

> In representations to the Ministry, the [first affected] party objected to the disclosure of the records. It is the Ministry's view that the [first affected] party is

in the best position to assess the harms that might reasonably be expected to result upon disclosure of all the records for which section 17 is claimed. The Ministry defers to the [first affected] party's view on this point with respect to all records for which section 17 is claimed.

. . . . .

Every licensee is required to furnish a report respecting fieldwork to the minister in accordance with s[ection] 65 of the *Ontario Heritage Act*. It is often the case that information contained in reports goes beyond the legal requirements for reporting. These requirements are set out in the *Ontario Heritage Act* and regulation 881, R.R.O. 1990 made under that Act. In the case of archaeological consultants, this will also include the higher reporting standards contained in guidelines produced by the Ministry (Archaeological Assessment and Technical Guidelines, 1993, […]). The [first affected] party is included in this group.

It can reasonably be expected that without any way to limit access to reports containing sensitive information, archaeologists would then react by submitting only the information which he or she is legally required to provide and nothing further. This would be an undesirable result, and certainly it would not be in the public interest. It continues to be the position of the Ministry that the information supplied to it in the form of reports contributes enormously to the wealth of knowledge concerning the heritage of Ontario. This is a resource of intrinsic value to all Ontarians. Additionally, reports play an important role in allowing the Ministry to fulfill its legislative mandate with respect to the conservation, protection and preservation of the heritage of Ontario. In order to make informed decisions it is essential for the Ministry to have the benefit of the best available information. For these reasons the Ministry takes the position that it is clearly in the public interest that similar information continue to be supplied to it.

We refer […] to the results in orders P-1347, P-1599 and PO-1702, which we believe provide ample support for the access decision.

The first affected party makes the following representations:

All of the documents under consideration contain information which we feel is of a potentially sensitive commercial nature. Therefore, we do not consider it appropriate to release this information to a competitor.

The second affected party made representations on the application of part 3 of the test to page 4 of record 6 and page 3 of record 11 only. The second affected party states:

> [A]s we are unaware of the nature of the inquiry and as the conditions set forth in the records of question were not met, it is reasonable to conclude that financial or other harm may occur as a result of the disclosure of these records.

Findings

With respect to pages 2-3 of record 6 and pages 1-2 of record 11, the Ministry and the first affected party have failed to provide me with detailed and convincing evidence that disclosure of this information would result in one of the enumerated harms in section 17(1) of the *Act*. However, I acknowledge that much of the information contained on these pages reveals findings, data, recommendations and conclusions that formed part of the first affected party's report to the Ministry. In Interim Order PO-2117-I I concluded that the information in this report (record 9) should be protected pursuant to section 17(1)(b). In that decision I stated:

> With respect to record 9, I have carefully considered the following: the Ministry's submissions under section 17(1)(b), the reporting requirements that archaeological consultants are required to meet under section 65 of the *Ontario Heritage Act* (*OHA*) and Regulation 881, the Ministry's Archaeological Assessment and Technical Guidelines (the Guidelines), relevant orders, and the record itself.
>
> The Ministry has compared record 9, an archaeological consultant report, to the records that were addressed in Orders P-1347, P-1599 and PO-1702. In those decisions archaeological consultant reports were also at issue and the adjudicators found in those cases, on the strength of the parties' representations, that the records exceeded the minimum standards under the *OHA* and Regulation 881. Form 5 under Regulation 881 stipulates that 14 points of information must be included in an archaeological consultant report to meet the minimum standards of reporting. The adjudicators found in each of these cases that the consultants had achieved the higher reporting standards set by the Ministry under the Guidelines by providing additional information. The adjudicators concluded that there is a public interest in receiving this additional information since it contributes enormously to the wealth of knowledge concerning the heritage of Ontario and is a resource of intrinsic value to all Ontarians. In the end, all three adjudicators found that the part 3 of the test had been established and that the records qualified for exemption under section 17(1)(b) of the *Act*.
>
> I acknowledge this office's previous decisions holding that archaeological consultant reports are exempt under section 17(1)(b). However, in this case the Ministry's representations fall short of persuading me that the requisite harm could reasonably be expected to occur from disclosure of record 9. The Ministry makes only a broad statement that "[i]t is often the case that information contained in reports goes beyond the legal requirements for reporting." The Ministry does not explain how, in this case, the affected party went beyond the minimum standards to provide additional information in its report to the Ministry.

> In addition, the affected party provides me with little, if any, assistance in this regard. Therefore, I am left to consider the record itself in conjunction with Form 5 of Regulation 881 and the Guidelines to determine whether the affected party did provide significantly more detailed information to the Ministry in discharging its reporting obligations, over and above the minimum requirements in the regulation.
>
> On my review, I am satisfied that the affected party did provide some additional information, beyond what is required under Form 5 of Regulation 881, in the following general areas: background information relating to the project, assessment methodology and details of archaeological findings. Consistent with past orders, I accept that information of this nature will more likely be provided to the Ministry when consultants, such as the affected party, are confident that materials will not be subject to disclosure outside the Ministry. I also agree that there is a public interest in ensuring that information related to these activities continues to be supplied to the Ministry.
>
> As a result, I am satisfied that the harm described in section 17(1)(b) could reasonably be expected to occur if record 9 is disclosed.

In order to ensure consistency in my analysis, I am prepared to accept that portions of pages 2-3 of record 6 and pages 1-2 of record 11 meet the "harms" test in section 17(1)(b). These portions form part of the first affected party's report to the Ministry. In Interim Order PO-2117-I I found that the harm described in section 17(1)(b) could reasonably be expected to occur if the report was disclosed. For the same reasons, I am satisfied that the harms described in section 17(1)(b) could reasonably be expected to occur if portions of pages 2-3 of record 6 and pages 1-2 of record 11 were to be disclosed to the appellant. Therefore, I find that some of the information contained on pages 2-3 of record 6 and pages 1-2 of record 11 qualifies for exemption under section 17(1) of the *Act*.

The remaining portions of pages 2-3 of record 6 and pages 1-2 of record 11 contain information that relates to

- procedural matters between the Ministry and the first affected party regarding the work it completed for the Ministry
- work that was completed by another party for the Ministry in regard to this matter

The Ministry and the first affected party have failed to provide any evidence that disclosing the contents of these records could reasonably be expected to result in the harm under paragraph (b) of section 17(1), or under paragraphs (a) or (c). In addition, I am not satisfied based on the face of the records themselves that these harms could reasonably be expected to occur as a result of disclosure.

I will now turn to page 4 of record 6 and page 3 of record 11, a duplicate copy of a letter from the second affected party to the Ministry setting out proposed terms of payment regarding a report prepared by the first affected party.

The Ministry's representations do not address this letter; they, therefore, do not assist me in my analysis. The second affected party has provided a general statement that it is reasonable to conclude that financial or other harm may occur as a result of this information being released. Unfortunately, the second affected party does not indicate, specifically, how disclosure of this information might result in the harms suggested.

The evidence before me consists of generalized conclusions regarding harm without any basis for reaching these conclusions. In addition, the information itself does not reveal anything that, on its face, demonstrates how disclosure of this information could reasonably be expected to result in one of the harms under section 17(1) of the *Act*. I find that part 3 of the test under section 17(1) has not been met for page 4 of record 6 and page 3 of record 11.

ADVICE OR RECOMMENDATIONS

The second issue for me to decide is whether the section 13(1) exemption applies to pages 1-3 of record 11 and pages 2-4 of record 6.

Section 13(1) reads:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 94, former Commissioner Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information in the records must contain or reveal a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process who is senior in status to the person delivering the information [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v.*

Ontario (Information and Privacy Commissioner) (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

As stated above, the remaining portions at issue of pages 2-4 of record 6 and pages 1-3 of record 11 contain information that relates to the following:

- procedural matters between the Ministry and the first affected party regarding the work it completed for the Ministry (pages 2-3 of record 6 and pages 1-3 of record 11)

- work that was completed by another party for the Ministry in regard to this matter (pages 2-3 of record 6 and pages 1-3 of record 11)

- terms of payment regarding a report prepared by the first affected party (page 4 of record 6 and page 3 of record 11)

The Ministry does not offer any representations regarding the application of section 13(1) to these portions of the records.

On my review, pages 2-3 of record 6 and pages 1-2 of record 11 do not contain information that would reveal the substance of a suggested course of action within the meaning of section 13(1). The information at issue reveals Ministry concerns about the first affected party's work on an identified project and proposes a meeting to discuss these concerns. The Ministry also discloses information relating to work performed by another party on the identified project. In my view, this letter does not reveal a suggested course of action that could ultimately be accepted or rejected by a Ministry employee in a deliberative process. Therefore, I find that section 13(1) does not apply to pages 2-3 of record 6 and pages 1-2 of record 11.

Turning to page 4 of record 6 and page 3 of record 11, this is a letter from the second affected party to the Ministry. In my view, none of the information contained in this letter could be said to reveal a suggested course of action within the meaning of section 13(1) of the *Act*. Therefore, I find that section 13(1) does not apply to page 4 of record 6 and page 3 of record 11.

ORDER:

1. I uphold the Ministry's decision that part of record 6 and part of record 11 are exempt from disclosure under the *Act*.

2. I order the Ministry to disclose part of record 6 and part of record 11 no later than **June 4, 2003**, but no earlier than **May 29, 2003**, in accordance with the highlighted version of these records included with the Ministry's copy of this order. To be clear, the Ministry should **not** disclose the highlighted portion of these records.

3. In order to verify compliance with provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the records they disclose to the appellant.

Original signed by: April 30, 2003
Bernard Morrow
Adjudicator