

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3021

Appeal PA10-358

Ministry of the Attorney General

December 12, 2011

Summary: The appellant sought access to records relating to the temporary transfer of a liquor licence by the Alcohol and Gaming Commission of Ontario from the appellant tenant to the affected party landlord. The AGCO denied access on the basis that the information was exempt under sections 13(1), 17(1), 19 and 21(1). The appellant withdrew his appeal respecting the personal information in the records and other portions subject to exemption claims under section 13(1) and 19 were found to be not responsive. The remaining information was found not to qualify for exemption under section 17(1) as the parties resisting disclosure did not provide detailed and convincing evidence of the harms alleged.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Alcohol and Gaming Commission of Ontario (the AGCO) for access to a copy of:

- An application for temporary transfer of a specified liquor license submitted by or on behalf of [a numbered company] as landlord in possession; and
- Correspondence between the numbered company and the AGCO.

[2] The AGCO located 31 pages of responsive records and forwarded the request to the Ministry of the Attorney General (the ministry), as it is responsible for processing requests made to the AGCO under the *Act*. In its decision, the ministry issued a fee estimate of \$21.10 and granted partial access to the responsive records. Access to the remaining records, or parts of records, was denied under the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemptions in sections 13(1) (advice or recommendations) and 19(a) (solicitor-client privilege) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision.

[4] During mediation, the appellant indicated that he was not seeking access to the information which was withheld under section 21(1). That information is, accordingly, no longer at issue in this appeal. As a result of communications between the appellant and the ministry, a second decision letter was issued in which additional records, and parts of records were disclosed. A representative of the numbered company (the affected party) was notified by the mediator, but the affected party declined to consent to the disclosure of the information in the records relating to it.

[5] As further mediation was not possible, the appeal was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought the representations of the ministry and the affected party, initially. I received representations from the ministry, but not from the affected party. In its submissions, the ministry questions whether certain information at issue is in fact responsive to the request. The appellant was provided with a complete copy of the representations of the ministry in accordance with Practice Direction 7, but did not submit representations in response to the Notice.

[6] In the discussion that follows, I find that some of the records are not responsive to the request. In addition, I find that none of the records are exempt under section 17(1).

RECORDS:

[7] The records remaining at issue consist of the undisclosed portions of 14 pages of correspondence and emails.

ISSUES:

A. Is the information in Records 16, 17 and the top of Record 18 responsive to the request?

- B. If the answer to Issue A is yes, does the discretionary advice or recommendations exemption in section 13(1) apply to these records?
- C. If the answer to Issue A is yes, does the discretionary solicitor-client privilege exemption in section 19 apply to these records?
- D. Does the mandatory third party information exemption in section 17(1)(a), (b) and/or (c) apply to the records?

DISCUSSION:

A. Is the information in Records 16, 17 and the top of Record 18 responsive to the request?

[8] The request as originally framed by the appellant was clear and unequivocal about the information sought. It stated specifically that it was limited to:

- An application for temporary transfer of a specified liquor license submitted by or on behalf of [a numbered company] as landlord in possession; and
- Correspondence between the numbered company and the AGCO.

[9] Records 16, 17 and the top half of Record 18 represent internal email communications passing between staff of the AGCO following a communication received from counsel for the affected party. While the emails that comprise Records 16, 17 and the top half of 18 relate directly to the communication received from the affected party, they are not “correspondence between the numbered company and the AGCO;” nor are they the actual application for a temporary transfer of the licence.

[10] The ministry’s representations on this issue were shared with the appellant and he was invited to make submissions on whether the scope of the request encompassed these records. The appellant did not provide representations on this or any other issue, however.

[11] Based on my reading of the request as originally framed, I find that Records 16, 17 and the top half of Record 18 are not responsive. As a result, it is not necessary for me to consider the application of section 13(1) [Issue B] or section 19 [Issue C] to them.

D. Does the mandatory third party information exemption in section 17(1)(a), (b) and/or (c) apply to the records?

[12] The AGCO and the affected party claim that Records 2, 6, the bottom half of Record 18, 19, 20, 21, 22, 23, 27, 28, 29 and 31 are exempt from disclosure under the third party information exemption in section 17(1)(a), (b) and (c). Neither the

appellant nor the affected party provided me with representations in this appeal. The ministry relies on the application of sections 17(1)(a), (b) and (c), which state:

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;
- (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; or

[13] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

[14] For section 17(1) to apply, the institution and/or the third 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 or financial 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 paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: type of information

[15] The ministry argues that the records contain commercial information within the meaning of that term in section 17(1). The enumerated types of information, including commercial information that are listed in section 17(1) have been discussed in prior orders:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

[16] The records describe in detail the nature of a commercial landlord and tenant relationship involving the affected party and the appellant, respectively. The records describe details of the termination of the lease agreement and certain allegations made by the affected party about the appellant's default under the terms of the lease. In my view, these references to the terms of the lease agreement contained in the records qualifies as "commercial information" for the purposes of the first part of the test under section 17(1).

Part 2: supplied in confidence

Supplied

[17] 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 [Order MO-1706].

[18] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

[19] Based on my review of the contents of the records, I find that the commercial information which they contain was supplied by the affected party to the AGCO. This was done in the context of an application for the temporary transfer of a liquor license and in reporting to the AGCO the nature of the breach of the lease agreement between the affected party and the appellant.

In confidence

[20] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

[21] 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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497].

[22] Neither the ministry nor the affected party have provided any evidence with respect to the circumstances surrounding the provision of the information in the records to the AGCO. In its representations, the ministry includes an assertion that the information in the records was provided by the affected party “in confidence, either explicitly or implicitly.” I note that Page 20 of the records, which is the final portion of a three-page email from the affected party to the AGCO, includes certain “boilerplate” wording indicating that “[T]his email is confidential. Rights to privilege are not waived.”

[23] Based on this evidence, I find that the commercial information contained in the records was provided to the AGCO with an expectation on the part of the affected party that it would be treated confidentially.

Part 3: harms

[24] To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[25] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

[26] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

[27] The sole evidence tendered in favour of a finding that the harms element of the test under section 17(1) has been met is a nearly verbatim recitation of the language of the section 17(1) exemption by the ministry. I have not been provided with any evidence from the affected party which would assist in establishing this part of the test under section 17(1). I have also carefully examined the contents of the records themselves in order to determine whether they contain information whose disclosure could reasonably be expected to result in the harms outlined in section 17(1). Moreover, I find that the records themselves do not lead to such a conclusion.

[28] In the absence of detailed and convincing evidence to support a finding that the harms contemplated by section 17(1) could reasonably be expected to result from the disclosure of the information in the records, I find that part three of the test under section 17(1) has not been established. As all three parts of the test under section 17(1) must be met in order for the records to be exempt under that section, I find that they do not qualify for exemption under the third party information exemption in section 17(1) and I will order that they be disclosed to the appellant.

ORDER:

1. I order the AGCO to disclose those portions of the records which do not constitute personal information to the appellant by providing him with a copy by no earlier than **January 12, 2012** but not after **January 19, 2012**. I have provided the AGCO with a copy of the records indicating those portions which should **not** be disclosed.
2. In order to verify compliance with Order Provision 1, I reserve the right to require the AGCO to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

December 12, 2011