

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-4371

Appeal PA21-00562

Ministry of Economic Development, Job Creation and Trade

March 28, 2023

**Summary:** The Ministry of Economic Development, Job Creation and Trade (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a specified agreement between the Government of Ontario and a named company. The requester appealed the ministry's decision granting partial access to the agreement pursuant to section 17(1) of the *Act*. In this order, the adjudicator finds that the withheld information is not exempt under section 17(1), and orders the ministry to disclose it.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

**Order Considered:** Orders PO-3158 and PO-3392.

### OVERVIEW:

[1] The Ministry of Economic Development, Job Creation and Trade (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a specified agreement between the Government of Ontario and a named company.

[2] After notifying a third party, a manufacturing company, the ministry issued a decision granting partial access to the agreement, withholding certain information under section 17(1) (third party information) of the *Act*. The third party appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

Appeal PA21- 00094 was opened and a mediator was assigned to explore resolution.

[3] During mediation, the ministry issued a revised decision denying additional portions of the agreement under section 17(1), which resolved Appeal PA21-00094. The ministry subsequently released the partially severed agreement to the requester, and included the third party's description of the redacted portions:

Redacted portions of the contract include information supplied by [the named company], i.e. high-level principal items to be included with the project and information regarding the potential site of the project.

[4] The requester, now the appellant, appealed the ministry's revised decision to the IPC and Appeal PA21-00562 was opened.

[5] During mediation, the appellant advised that he is seeking access to the withheld information in the agreement. The appellant also advised that there is a compelling public interest in the disclosure of the withheld information that outweighs the purpose of the section 17(1) exemption. Consequently, the public interest override at section 23 of the *Act* was added as an issue in this appeal.

[6] The third party, now the affected party in this appeal, confirmed that it does not consent to the disclosure of the withheld information. As a mediated resolution was not possible, the appeal was transferred to the adjudication stage.

[7] The adjudicator originally assigned to this appeal decided to conduct an inquiry. She sought and received representations from the affected party and the ministry, both of whom raised confidentiality concerns with regards to sharing. The adjudicator accepted that both sets of representations met criteria under *Practice Direction Number 7* of the IPC's *Code of Procedure*. As a result, she shared a non-confidential summary of the affected party's representations with the appellant, as well as the ministry's non-confidential representations. The appellant provided representations in response, and the affected party and ministry provided their replies.

[8] The file was then assigned to me to continue the adjudication of the appeal. In reviewing the parties' representations, I decided to invite further representations from the ministry, in response to specific questions. The ministry submitted these additional representations, which were shared with the other parties in accordance with *Practice Direction Number 7*.

[9] I have considered all of the parties' representations and supporting documents, however, I will not refer to representations deemed confidential below.

[10] For the reasons that follow, I find that the information at issue was not supplied for the purposes of section 17(1). I do not uphold the ministry's decision and order it to disclose the withheld information to the appellant.

## **RECORDS:**

[11] The information remaining at issue is portions of one page in a three-page agreement in principle between the Government of Ontario and the affected party regarding the development of a manufacturing facility.

## **BACKGROUND**

[12] According to the ministry, the Government of Ontario met with the affected party several years ago to discuss its commitment to investing in Ontario. The affected party had selected Ontario as the location for a manufacturing facility and, according to a provincial news release cited by the ministry, it planned an investment of hundreds of millions of dollars, projected to create hundreds of jobs in Ontario. A non-binding agreement in principle (the agreement) was executed to facilitate further discussions and continue preliminary negotiations for potential funding under Ontario's Jobs and Prosperity Fund. The first page, which was disclosed to the appellant, indicates that the agreement is between the affected party and the "Government of Ontario – Ontario Investment Office." As explained in further detail below, the Ontario Investment Office was a part of the ministry at the time and one of its branches was involved in negotiating the agreement at issue.

## **DISCUSSION:**

[13] The sole issue in this appeal is whether the section 17(1) mandatory exemption for third party information applies to the information in the agreement withheld by the ministry. The ministry and affected party argue that this information is commercial in nature, was supplied in confidence, and that its disclosure would give rise to a reasonable expectation of harms.

[14] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>1</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>2</sup>

[15] Section 17(1) states:

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,

---

<sup>1</sup> *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.) (*Boeing Co.*).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(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

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[16] For section 17(1) to apply, the party arguing against disclosure 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;
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), (c) and/or (d) of section 17(1) will occur.

### **Part 1 of the section 17(1) test: type of information**

#### ***Representations, analysis and finding***

[17] The affected party submits that the information withheld under section 17(1) contains commercially sensitive trade secret and technical information. Based on my reading of the affected party's representations, it argues that the information is commercial and technical in nature, and also qualifies as trade secret.

[18] The affected party explains that the information at issue covers five technical items related to: the scale and type of manufacturing facility; the innovative design and configuration of the facility; the types of product to be produced; and the integration of technological innovations into the manufacturing facilities.

[19] In the ministry's view, the information at issue qualifies as commercial information. It notes that the IPC has found information relating to a business or to proposed business activities, plans and strategies of an affected party to be

“commercial information” for the purposes of section 17(1) of the *Act*.<sup>3</sup> The ministry submits that the information at issue in this appeal relates to the affected party’s proposed project plans and strategies and the site selection plan relating to its establishment of a manufacturing plant in Ontario. The ministry notes that after receiving the withheld information, it decided to invite the affected party to submit a more fulsome business plan for its consideration under Ontario’s Jobs and Prosperity Fund, a funding program that furthers economic development and job creation in Ontario.

[20] The appellant does not address part one of the test in his representations.

[21] Based on my review of the record and the parties’ representations, I find that the information at issue is commercial in nature. Previous IPC orders have defined commercial information as follows:

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.<sup>4</sup> The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.<sup>5</sup>

[22] The withheld information describes a proposed manufacturing facility, in the context of an agreement between the affected party and the province. As the affected party and the ministry note, the withheld portions of the agreement include information about the type of product to be manufactured, the scale of production, specific features of the proposed facility, and information relating to the proposed site.

[23] I find that this information was shared in the context of an agreement relating to the buying, selling or exchange of merchandise or services – in this case, the development of a manufacturing facility in Ontario. As explained above, this agreement lays the groundwork for a final agreement for provincial funding in exchange for the affected party’s investment in Ontario.

[24] Accordingly, I conclude that the information at issue meets the definition of commercial information.

[25] As part one of the test has been met, it is not necessary for me to determine whether this information also qualifies as technical information or trade secrets.

## **Part 2: supplied in confidence**

[26] For the reasons that follow, I determine that the information at issue was not

---

<sup>3</sup> The ministry cites Order P-1629.

<sup>4</sup> Order PO-2010.

<sup>5</sup> Order P-1621.

supplied to the ministry, and it is therefore not exempt under section 17(1).

### ***Supplied***

[27] The requirement that the information have been “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>6</sup>

[28] 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.<sup>7</sup>

### ***Representations***

[29] The affected party and ministry submit that the information at issue was supplied by the affected party. In its initial representations, the ministry describes the information as the affected party’s proposed project plans, including the potential site of the manufacturing facility. The ministry argues that this information is fixed, non-negotiable and immutable.

[30] As mentioned above, the agreement was between the affected party and the “Government of Ontario – Ontario Investment Office” (OIO). The ministry explains in its additional representations that the OIO was part of the ministry and staffed by ministry employees at the time the agreement was signed.<sup>8</sup> The ministry notes that the OIO was established to “provide an integrated set of services to those looking to invest in our province”<sup>9</sup> and that one of its functions was to drive investment in Ontario.

[31] The ministry submits that the affected party proposed signing the agreement at issue, and generated a first draft of the terms which were provided to the ministry for its consideration. It notes that the redacted portions of the final version of the agreement – the information at issue – did not differ substantively from those in the first draft.

[32] The ministry explains that in its review of a funding applicant’s proposed business plans, it does not seek to alter the proposed project and site selection plans, as these capture commercial considerations and decisions made by the applicant. The ministry notes that its role in such situations is limited to considering the provision of financial support to eligible projects only, and distinguishes it from the type of negotiable input a potential business partner may have on a proposed business plan.

[33] The appellant submits that any information presented to the government in the

---

<sup>6</sup> Order MO-1706.

<sup>7</sup> Orders PO-2020 and PO-2043.

<sup>8</sup> The OIO’s former functions have since been assigned to other branches or divisions of the ministry and to the ministry’s relatively new agency, Invest Ontario.

<sup>9</sup> The ministry cites *Building Ontario Up For Everyone: 2016 Ontario Economic Outlooks and Fiscal Review*

hopes of securing an agreement, becomes publicly available once that agreement is reached. In the appellant's view, the government and affected party have successfully bargained, and the resulting contract is disclosable.

[34] In response to the appellant's argument, the ministry notes that the information at issue appears in an agreement, which it submits is a non-binding precursor, entered into to facilitate further discussions concerning the affected party's commitment to investing in Ontario. The ministry notes that the agreement is not a final funding agreement and that when it was concluded, the affected party had yet to submit its full business plan. According to the ministry, the "essential bargain" reflected in the agreement was for the province and affected party to continue preliminary negotiations for potential funding under Ontario's Jobs and Prosperity Fund.

[35] In the ministry's view, the information at issue qualifies as supplied for the purposes of section 17(1) as it was solely proposed by the affected party.<sup>10</sup> It submits that this is because the agreement is not binding on the parties, nor is it the final funding agreement between the parties.

[36] In the alternative, the ministry submits that the immutability exception to the general rule that contractual information is negotiated rather than supplied applies in this instance. It argues that the IPC has found that detailed information about an affected party's business plans revealing its current and projected activities falls under the immutability exception.<sup>11</sup>

*Analysis and finding:*

[37] Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.<sup>12</sup> I have considered all of the parties' representations and supporting documentation and reviewed the agreement, and find that the general rule for contracts applies in this case. The ministry submits that the withheld information originated with the affected party and that no substantive changes were made to it. While the ministry may not have had any input with regard to this information, it is still treated as mutually generated.

[38] The ministry submits it had a limited role in the lead up to the agreement, distinguishing it from the negotiable input of a potential business partner. Though the relationship between the ministry and the affect party may be different from that of

---

<sup>10</sup> The ministry cites Order PO-3392, para 55, which it notes was upheld on judicial review in *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

<sup>11</sup> The ministry cites Order PO-3158, para 58.

<sup>12</sup> This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

business partners, it remains that the two were parties to an agreement that was preceded by little or no negotiation. The ministry relies on Order PO-3158, in which former Assistant Commissioner Sherry Liang considered the application of section 17(1) to portions of a funding agreement between the ministry and a company under the Strategic Jobs and Investments Fund, a program created to provide strategic investments to businesses. She found that the funding agreement and the other records at issue were largely based on the company's business plan submission, parts of which she found were exempt under section 17(1). In that appeal, the ministry made similar arguments, which were addressed as follows:

The ministry has submitted that in its review of the business plan, it does not seek to alter the business fundamentals. I accept that the ministry's role as funder does not encompass the type of input that, for example, a potential business partner may have. But it is indisputable that the ministry's funding was subject to the affected party's commitment to meet the key elements of its business plan. Once these elements became incorporated into the conditional grant agreement, it would be incorrect to characterize those terms as "belonging" to the affected party in the sense protected by section 17(1). This information "belongs" as much to the ministry as to the affected party.

[39] I agree with and adopt this reasoning, which reflects the IPC's established approach that the contents of a contract between an institution and a third party will not normally qualify as having been "supplied." In this case, the agreement was signed by the affected party and the OIO, a part of the ministry at the time. Its terms originated from the affected party, which the ministry submits it accepted without negotiating. Accordingly, in keeping with the IPC's approach, I find that the withheld information in the agreement at issue was mutually generated, despite the ministry's limited role in determining the terms of the agreement.

[40] In addition to its submission that it made no changes to the withheld information, the ministry argues that the agreement was non-binding, and that it was not the final funding agreement between the parties. It relies on Order PO-3392,<sup>13</sup> in which a winning proposal was found to be supplied for the purposes of section 17(1). The ministry cites paragraph 55, which states in part:

In this case, the proposal is not a final agreement between the third party appellant and the Ministry of Transportation [Transportation]; rather, it is the proposal containing the contractual terms proposed solely by the third party appellant. The proposal was not the product of negotiation and, consequently, was not mutually generated by the Ministry of Transportation and the third party appellant. Therefore, I am satisfied that

---

<sup>13</sup> The ministry cites Order PO-3392, para 55, which it notes was upheld on judicial review in *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.



the third party appellant supplied the information at issue contained in the proposal.

[41] I do not agree with the ministry that this order is applicable in the present circumstances. The adjudicator in Order PO-3392 considered that the IPC has previously found the terms of a winning proposal to be mutually generated where those terms are incorporated into a contract, upon acceptance, but not where there is a separate final agreement. In this case, the parties ultimately did conclude a final funding agreement,<sup>14</sup> and according to the ministry, the terms in the agreement at issue were solely proposed by the affected party. However, this is not the case of a proposal in response to an RFP. This is a case about a contract, even if it is a preliminary one.

[42] The ministry submits that the agreement was meant to facilitate subsequent discussions about the affected party's commitment to investing in the province and provincial funding. Whether further negotiations, a full business plan and a final agreement were to follow, does not make the information at issue supplied and does not change the fact that the ministry and the affected party signed the agreement which is the subject of this appeal.

[43] There are two exceptions to the general rule that contracts are negotiated, as opposed to supplied. The ministry raises the "immutability" exception, which applies where the contract contains non-negotiable information supplied by the third party.

[44] I am not persuaded that this exception applies in the circumstances. The ministry submits that the affected party's proposed project plans and site selection are fixed and non-negotiable, and as the affected party's commercial considerations and decisions, it does not seek to alter them. The IPC has found non-negotiable information to include financial statements, underlying fixed costs and product samples or designs.<sup>15</sup> I am not convinced that terms describing the affected party's proposed manufacturing facility are analogous to these examples. Information relating to the potential site or proposed features of the facility is neither fixed or non-negotiable in the sense that, for example, financial statements or product samples are.

[45] The ministry relies on Order MO-3158 in support of its argument that the information at issue falls under the immutability exception, arguing that it similarly reveals the affected party's current and projected activities. The ministry cites paragraph 58, in which former Assistant Commissioner Liang found that certain parts of the funding agreement at issue in that order were exempt under section 17(1):

...The detailed information about the affected party's year-to-year business plan, revealing its current and projected activities, hiring patterns, timetable for the various stages of the project, budget and

---

<sup>14</sup> A copy of the conditional grant agreement that the parties signed a few months after the agreement at issue was included in the appellant's supporting documentation.

<sup>15</sup> *Miller Transit*, cited above at para. 34.

sources of financing, is immutable in the sense that it is fixed and non-negotiable.

[46] I find Order MO-3158 is distinguishable. The information at issue in the present appeal is, in the affected party's words, "high-level principal items to be included with the project and information regarding [its] potential site." As noted above, it is a description of a proposed manufacturing facility, including its features, the type of product to be manufactured, the scale of production, and information relating to the proposed site. The agreement is made up of three pages, the first page being a cover page. The information at issue makes up most of the second page. The remaining information in the agreement includes the affected party's proposed investment and job creation target, the provincial government's assistance, or intended assistance, to the affected party, next steps and a description of the agreement's non-binding nature. The information at issue describes the proposed facility, which forms the basis for how the affected party plans to invest large sums of money and create jobs in Ontario. In my view, this information represents the substance of the parties' agreement, which was later discussed and developed in further detail.

[47] At issue in Order MO-3158 were portions of 20 pages of a funding agreement based on, or taken directly from, the company's business plan submission. In my view, the information at issue in Order MO-3158 differs in breadth, depth, and substance. The ministry submits that the information at issue in this appeal reveals the affected party's current and projected activities, as was the case in Order MO-3158. In my view, it only reveals the affected party's plan to establish the specified manufacturing facility, which, as noted above, is the substance of the agreement. This is distinguishable from a year-to-year business plan including details like hiring patterns and a project timetable. Accordingly, I am not persuaded by the ministry's argument that Order MO-3158 is relevant to my determination.

[48] As I have found that the information at issue was not supplied by the affected party to the ministry, the second part of the test has not been established and I need not consider part three of the test. In order to qualify for exemption under section 17(1), all three parts of the test must be met. As a result, I order the ministry to disclose the information at issue in this appeal.

## **ORDER:**

1. I order the ministry to disclose the information at issue to the appellant by **May 2, 2023** but not before **April 27, 2023**.
2. In order to verify compliance with order provision 1, I reserve the right to require the ministry to provide me with a copy of its access decision as well as any records disclosed with it.

Original signed by \_\_\_\_\_  
Hannah Wizman-Cartier  
Adjudicator

\_\_\_\_\_ March 28, 2023