

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4529

Appeals PA22-00499 and PA22-00500

Ministry of Labour, Immigration, Training and Skills Development

July 12, 2024

**Summary:** An individual made two requests to the ministry. One request was for access to a named company's application to receive funding from the ministry's Skills Development Fund (SDF) to operate a training program for Home Support Workers and the other request was for a related agreement between the named company and the ministry. The ministry issued a decision on each request granting access, in part, to the SDF application and the agreement, relying on section 17(1) (third party information) to withhold some information. The named company appealed the decision on the basis that section 17(1) applies to the information the ministry is prepared to disclose. In this order, the adjudicator finds that the information remaining at issue is not exempt under section 17(1). She orders the ministry to disclose the information in accordance with its revised decisions and dismisses the appeal.

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

**Orders Considered:** Order MO-2299.

### OVERVIEW:

[1] The Ministry of Labour, Immigration, Training and Skills Development (the ministry) received two access requests under *the Freedom of Information and Protection of Privacy Act* (the *Act*). The first request was for a Skills Development Fund (SDF) application submitted to the ministry by a named company to receive funds to operate a training program for Home Support Workers. The second request was for a related

agreement between the same company and the ministry.

[2] The ministry notified the named company of the requests, and subsequently issued separate decisions for each request. The ministry granted partial access to the SDF application and the agreement with severances pursuant to the mandatory exemption at section 17(1) (third party information) of the *Act*.

[3] The named company, now the appellant, appealed both of the ministry's decisions to the Office of the Information and Privacy Commissioner of Ontario (IPC) to grant partial access to the requested information.<sup>1</sup>

[4] During mediation, the appellant consented to the disclosure of all the remaining information at issue in the SDF application except for two sections, sections D and F. The appellant also consented to the disclosure of all the information remaining at issue in the agreement except for an identified schedule, Schedule I. The ministry disclosed this information to the requester.

[5] After reviewing the disclosed information, the requester advised that he is still pursuing access to Section F of the appellant's SDF application and Schedule I of the agreement. He no longer seeks access to Section D of the application.

[6] As further mediation was not possible, this appeal was transferred to the adjudication stage of the appeal process, where I decided to conduct an inquiry under the *Act*. I invited and received representations from the parties.<sup>2</sup>

[7] During the inquiry, the ministry issued a revised decision for access to the application<sup>3</sup> in which it states that it no longer relies on section 17(1) to withhold the any portions of the SDF application except for the named company's Canada Revenue Agency (CRA) number in the SDF application. The requester confirmed that he was not interested in accessing the CRA number. As such, the CRA number is not at issue in this appeal.

[8] The ministry also issued a revised decision for access to the agreement<sup>4</sup> in which it states that it no longer relies on section 17(1) to withhold any portions of the agreement.

[9] In this order, I find that Section F of the SDF application and Schedule I of the agreement are not exempt under section 17(1). I uphold the ministry's decision to disclose both the SDF application and the agreement to the requester.

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<sup>1</sup> Appeal PA22-00499 was opened to address the first request and Appeal PA22-00500 was opened to address the second request.

<sup>2</sup> The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Code of Procedure*.

<sup>3</sup> Dated September 13, 2023.

<sup>4</sup> Dated August 16, 2023.

## **RECORDS:**

[10] The information that remains at issue is contained in Section F of the 13-page SDF application (Section F) and in Schedule I of a 56-page agreement (Schedule I) (collectively known as "the records").<sup>5</sup>

## **DISCUSSION:**

[11] The sole issue in this appeal is whether the third party information exemption in section 17(1) applies to the information in Section F and Schedule I.

[12] The appellant claims that the mandatory exemptions at sections 17(1)(a), (b) or (c) of the *Act* applies to Section F and Schedule I and that therefore they should not be disclosed.

[13] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>6</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>7</sup>

[14] Section 17(1) states, 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; or

...

[15] For section 17(1) to apply, the appellant must satisfy each part of the following

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<sup>5</sup> From my review, the information in Schedule I is very similar to the information contained in Section F.

<sup>6</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>7</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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: type of information**

[16] The types of information listed in 17(1) have been discussed in prior IPC orders. Relevant to this appeal are the following:

***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>8</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>9</sup>

***Financial information*** is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>10</sup>

***Technical information*** is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.<sup>11</sup>

***Labour relations*** means relations and conditions of work, including collective bargaining. It is not restricted to employer/employee relationships. The IPC has found that "labour relations information" includes:

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<sup>8</sup> Order PO-2010.

<sup>9</sup> Order P-1621.

<sup>10</sup> Order PO-2010.

<sup>11</sup> Order PO-2010.

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute;<sup>12</sup> and
- information compiled in the course of the negotiation of pay equity plans (for example, exchanges between a hospital and the bargaining agents representing its employees).<sup>13</sup>

**Trade secret** includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>14</sup>

[17] The appellant submits that Section F and Schedule I contain commercial information, financial information, technical information, labour relations information and trade secrets. It submits that both records reveal trade secrets, commercial and technical information because they set out operational details its training program for Home Support Workers. Specifically, it submits that the records reveal its:

- sustainability plan for the program;
- mitigation strategy for potential risks;
- project summary, description, and objectives;
- area of focus and target population for the program;
- plan for collecting performance measurement data;
- supports to be provided to participants to ensure success; and expected project outcome.

[18] The appellant submits that Section F contains commercial information because it sets out a detailed project work plan for its Home Support Worker training program, including key steps and milestones, with dates over the course of a full year.

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<sup>12</sup> Order P-1540.

<sup>13</sup> Order P-653.

<sup>14</sup> Order PO-2010.

[19] In addition, the appellant submits that Section F reveals financial information as it sets out the "Requested Amount" and the "Total Cost of the Project" for the training program.

[20] Further, the appellant submits that both Section F and Schedule I reveal labour relations information, or, alternatively, information so closely and directly related to labour relations information that it ought to be deemed to constitute labour relations information.

[21] Although the requester submitted representations, his representations did not address the types of information that might be contained in the portions that remain at issue.

[22] On my review of Section F and Schedule I, I accept that they contain commercial information as the information contained in these records relate to the selling of services, specifically a training program for home support workers. I also accept that Section F contains financial information as it contains information that relates to money, specifically the amount of funds requested by the appellant from the ministry and the total cost of the appellant's project.

[23] However, I do not accept that Section F and Schedule I contain technical information as the information in these records do not belong to an organized field of knowledge in the applied sciences or mechanical arts. I also do not accept that Section F and Schedule I contain labour relations information as the information does not relate to conditions of work or the management of employees. Although Section F and Schedule I describe a home support worker training program, the description is very general and does not relate to the conditions of work for the home support workers or the management of employees.

[24] Finally, I am not satisfied that Section F and Schedule I reveal trade secrets, as the appellant claims. Although the appellant makes a general statement that Section F and Schedule I reveal trade secrets, it has not provided any explanation to support this assertion. It is also not apparent to me from my review of these records themselves that either Section F or Schedule I contain formulas, patterns, compilations, programmes, methods or techniques that meet the four criteria listed in the definition of the term set out above. Accordingly, considering the appellant's representations and the records, there is no basis for me to conclude that Section F and Schedule I include trade secret information within the meaning of section 17(1).

[25] In sum, I find that the appellant has established that Section F and Schedule I contain commercial and financial information. As such, I find that part 1 of the test for section 17(1) has been met.

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

### ***Supplied***

[26] For section 17(1) to apply, part 2 provides that the information at issue must have been “supplied in confidence” to the institution, either implicitly or explicitly. Information may qualify as “supplied” for the purposes of section 17(1) 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 that is directly supplied by a third party.<sup>15</sup>

[27] Previous orders of the IPC have held that the contents of a contract between an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1).<sup>16</sup> The terms of a contract are generally treated as mutually generated rather than “supplied” by a third party.

[28] There are two exceptions to the general rule that contracts are not “supplied”: the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.<sup>17</sup> The “immutability” exception applies where the contract information is supplied by the third party, but the information is not susceptible to negotiation.<sup>18</sup>

[29] In Order MO-2299, the adjudicator considered whether a proposal, which was appended as a series of schedules to an agreement, was supplied. He stated:

... However, the parties subsequently chose to incorporate these records into the agreement entered into between them. The agreement clearly refers to these three schedules as forming part of the agreement, and as containing certain terms of the agreement.

In my view, by incorporating these documents into the agreement, and by having them form part of the agreement, these documents can no longer be considered to have been “supplied” by the third party. Rather, these documents constitute the agreed, negotiated terms of the agreement.

Again, I have also carefully reviewed these records to determine whether any portions of them fit within the situations in which the usual conclusion that the terms of a negotiated contract were not “supplied” would not apply (the “inferred disclosure” and “immutability” exceptions). On my careful

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<sup>15</sup> Orders PO-2020 and PO-2043.

<sup>16</sup> Orders MO-1706, PO-2371 and PO-2384.

<sup>17</sup> Order MO-1706.

<sup>18</sup> For example, financial statements. See Order PO-2384.

review of these records, I find that the exceptions do not apply to any of the information contained in them. These three schedules, which form part of the agreement, do contain some "background" information as to why these records were provided, and the basis upon which some of the information in them is provided. I consider this information to be in the nature of the type of information found in a "preamble" to a contract, which essentially sets the framework for why the clauses in the contract were negotiated. I do not consider these portions of the schedules to fit within the "inferred disclosure" and "immutability" exceptions.

[30] I agree and adopt the approach to contracts and agreements set out in the above-noted order and will apply it to this appeal.

[31] From my review of Schedule I, I find that it was not supplied by the appellant for the purposes of section 17(1). Schedule I is one of several schedules attached to the agreement between the ministry and the appellant in which the appellant agreed to operate a training program for Home Support Workers in return for receiving funds from the ministry. It describes the appellant's SDF project and plan.

[32] Similar to the circumstances in Order MO-2299, the agreement clearly refers to Schedule I as forming part of the agreement and as containing certain terms of the agreement. By incorporating Schedule I into the agreement, and by having it form part of the agreement, I find Schedule I can not be considered to have been "supplied" by the appellant.

[33] I also find that it has not been established that either the "inferred disclosure" or the "immutability" exceptions described above apply to the information in Schedule I. I have insufficient evidence before me to support a conclusion that the general rule by which records containing the terms of a contract are not "supplied" for the purposes of section 17(1) should not apply to Schedule I. Accordingly, I find that the general rule by which records containing the term of a contract are not "supplied" for the purposes of section 17(1) applies.

[34] As I find that Schedule I was not "supplied" by the appellant, it does not meet part 2 of the test. As all three parts of the section 17(1) test must be met for the exemption to apply, it is not necessary for me to consider whether Schedule I meets the "in confidence" requirement of part 2 of the test or the harms requirement in part 3.

[35] On my review of Section F, however, I find that it was directly supplied by the appellant. Section F is part of the appellant's SDF application to the ministry for funding for its Home Support Worker training program. The appellant's SDF application contains information including its address, contact person, capacity, grant payment, project work plan, budget, performance measures, and partnership/stakeholders information. In particular, Section F of the SDF application describes the project – the appellant's Home Support Worker training program.



[36] Accordingly, I find that the “supplied” requirement of part 2 of the test has been met for Section F

### ***In confidence***

[37] The appellant must demonstrate that the information that was supplied was done so with an objectively reasonable expectation of confidentiality. This finding may be based in part on the content of the information itself, and the context in which it was provided to the institution.

[38] The appellant submits that it reasonably understands and expected that the information contained in Section F would remain confidential between the ministry and itself, and that it would not be disclosed to third parties, including its competitors.

[39] The appellant asserts that it had a reasonable expectation of confidentiality but provides no evidence to support its position. The ministry did not submit representations on this issue. In any event, as a result of my findings on the harms requirement in part 3, it is not necessary for me to make a finding on whether the SDF application was supplied in confidence.

### **Part 3: harms**

[40] A party resisting disclosure of a record must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.<sup>19</sup>

[41] The party resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>20</sup> However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.<sup>21</sup>

### ***Representations***

[42] The appellant submits that disclosure of Section F would result in the harms described in sections 17(1)(a), (b) and (c).

[43] With respect to sections 17(1)(a) and (c), the appellant submits that disclosure could reasonably be expected to prejudice significantly its competitive position relative to

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<sup>19</sup> Orders MO-2363 and PO-2435.

<sup>20</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>21</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

other funding applications and to interfere significantly with its contractual negotiations with its program partner. The appellant also submits that disclosure of Section F could be used by its competitors to compete unfairly with it in establishing similar training programs in the future, with or without ministry's funding, which would result in it experiencing an undue loss and correlative undue gain to its competitors.

[44] With respect to section 17(1)(b), the appellant submits if Section F was disclosed then it would unlikely apply for similar future funding and other opportunities to work with the ministry. It submits that this would reduce competition for such opportunities, resulting in increased funding costs and/or fewer services being provided for similar funding, to the detriment of the public who benefit from such services. The appellant also submits that it could also result in the services that are the subject of the funding becoming less readily available, again to the detriment of the public.

[45] The requester explains that it supplied information about its community health worker training program to the appellant. It submits that it assisted the appellant with writing the SDF application. The requester also explains that it was listed as the training partner on the appellant's SDF application and it supplied a Letter of Support for the appellant's SDF application.

[46] The requester submits that it seeks access to the information in order to verify that its proprietary community health worker training program was not used by the appellant to secure funding. It believes that its proprietary training program is being used by the appellant for undue gain.

[47] In response to the requester's representations, the appellant submits that neither the SDF application nor the agreement contains any confidential or proprietary information supplied by the requester. It submits that Section F contains confidential and proprietary information that belongs to it regarding its plan to implement its home support worker program.

[48] The appellant also submits that, at minimum, the financial details set out under the headings "Requested Amount" and "Total Cost of the Project" should be severed before Section F is disclosed as these financial details are specific to it and were not provided by the requester.

### ***Analysis and findings***

[49] To find that any of the section 17(1) harms could reasonably be expected to result from disclosure of Section F, I must be satisfied that there is a reasonable expectation of the specified harm. I can reach this conclusion either based on the representations made by the parties and/or on my review of Section F.

[50] Based on the representations of the appellant and the requester and my review of Section F, I find that the appellant has not provided sufficient evidence to establish that disclosure of Section F could reasonably be expected to prejudice significantly the

competitive position or significantly interfere with the contractual or other negotiations of the appellant (section 17(1)(a)), result in similar information no longer being supplied to the ministry (section 17(1)(b)), or result in undue loss or gain to the appellant or any other entity (section 17(1)(c)).

[51] The appellant's arguments on the harms in section 17(1)(a) and (c), summarized above, largely repeat the wording of the claimed exemptions without providing detailed evidence to support these assertions. These arguments are insufficient to establish the harms contemplated by those sections. As noted above, parties should not assume that the harms under section 17(1) can be proven simply by repeating the description of harms in the *Act*. In any event, previous IPC orders have found that the fact that disclosure results in more competition is not considered to significantly prejudice a competitive position or result in any loss or gain to the appellant that can be considered undue.<sup>22</sup>

[52] Further, I do not accept the appellant's argument that disclosure would result in businesses not applying for funding from the ministry in the future which relates to the harm contemplated in section 17(1)(b). This argument flies in the face of commercial reality. There is a demand for funding from the government to support training programs similar to the appellant's training program. As such, while the appellant may choose not to apply for funding in the future due to disclosure there is no evidence before me to suggest that other providers of training programs would be deterred from applying. I find that the appellant has not established that the harm described in section 17(1)(b) could reasonably be expected to occur if the information in Section F were disclosed.

[53] The appellant argues that, at a minimum, the amount under "Requested Amount" and "Total Cost of the Project" in Section F should not be disclosed. Besides relying on the fact that financial details set out in its SDF application were previously severed by the ministry, which the ministry is now prepared to disclose, the appellant does not make any arguments for why disclosure of these amounts would result in any of the harms stated in sections 17(1)(a), (b) or (c).

[54] I note that the ministry has disclosed (with the appellant's consent) a significant amount of financial information from the agreement, including the maximum funds the ministry will provide to the appellant to support the appellant's Home Support Worker training program.<sup>23</sup> As a result, it is not clear how disclosure of the appellant's requested amount and the total cost of the appellant's project could reasonably be expected to result in any of the harms alleged or claimed by the appellant.

[55] Moreover, I find that the appellant's representations fall short of the sort of detailed evidence that is required to establish part 3 of the test for section 17(1) to apply. Instead, its representations amount to speculation of possible harms. As stated above, Section F describes the appellant's project, which is its home support worker training

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<sup>22</sup> See Orders PO-2435, MO-2833 and MO-4497.

<sup>23</sup> Schedule B states the maximum funds while Schedule D provides a breakdown of the budget for the maximum funds.

program. From my review of Section F and the appellant's representations, I am unable to conclude that disclosure of Section F could reasonably be expected to result in any of the stated harms in section 17(1). As a result, I find that the appellant has failed to establish that part 3 of the section 17(1) test has been met.

[56] All parts of the three-part test must be met for the mandatory exemption at section 17(1) to apply. Since the appellant has not established the "supplied" requirement of part 2 (for Schedule I) and part 3 (for Section F) of the section 17(1) test, I find that section 17(1) does not apply to exempt either Schedule I or Section F from disclosure. I uphold the ministry's decision to disclose the information at issue to the requester and dismiss the appeal.

**ORDER:**

1. I uphold the ministry's decisions to disclose Section F of the SDF application and Schedule I of the agreement to the requester, and order it to do so in accordance with its revised decisions, by **August 19, 2024** but not before **August 12, 2024**.
2. To be clear, the ministry is not to disclose Section D and the Canada Revenue Agency number in the SDF application.
3. To verify compliance with provision 1, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the requester upon request.

Original Signed By: \_\_\_\_\_

Lan An  
Adjudicator

July 12, 2024 \_\_\_\_\_