



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 101

Appeal 880288

Ministry of Natural Resources



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O R D E R

This appeal was received pursuant to subsection 50 of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On July 19, 1988, a request was made by an individual to the Ministry of Natural Resources (the "institution") for copies of "all contracts for Bark Reforestation Inc." and "KBM Forestry Consultants Inc. for the years 1986, 1987, and Spring and Summer 1988."
2. By letter dated August 18, 1988, the institution responded to the requester that access to all contracts was denied, citing section 17 and subsection 18(1)(d) of the Act.
3. By letter dated September 12, 1988, the requester appealed the decision of the head. I sent notice of the appeal to the institution and the appellant.
4. In view of the voluminous and repetitive nature of the record, representative samples of the standard form contracts that make up the record were obtained and examined by the Appeals Officer assigned to this case. Efforts to mediate a settlement were commenced, but no final settlement was obtained.
5. On March 7, 1989, I sent notice to the appellant, the institution and the two affected parties (Bark Reforestation Inc. and KBM Consultants Inc.), that I was conducting an inquiry to review the decision of the head. Enclosed with these letters were reports prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the

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subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the report.

6. Written representations were received from the appellant, the institution and one affected party. I have taken all representations into consideration in making this order. To date, representations have not been received from the other affected party.

It should be noted at the outset that one of the purposes of the Act as defined in subsection 1(a) is to provide a right of access to information under the control of institutions in accordance with the principle that necessary exemptions from the right of access should be limited and specific.

Further, section 53 of the Act provides that the burden of proof that the record or part of the record falls within one of the specified exemptions in the Act lies with the head. In this case, the burden of proving the applicability of the section 17 exemption lies with the head and the affected party who has submitted representations, as they are resisting disclosure.

The issues arising in this appeal are as follows:

- A. Whether the records or any part of the records fall within the section 17 mandatory exemption.
- B. Whether the records or any part of the records fall within the subsection 18(1) (d) discretionary exemption.
- C. If either issue A or issue B is answered in the affirmative, whether the severability requirements of subsection 10(2) apply to any of the records at issue.

Before addressing the issues set out above, I wish to point out that in my Order 70 (Appeal Number 880264), I dealt with similar issues in circumstances very closely resembling the circumstances of the present appeal. At issue in Appeal Number 880264 was the denial of access to two executed standard form contracts by the same institution, the Ministry of Natural Resources.

As in Appeal Number 880264, the records at issue in the present appeal consist not of the standard form contracts themselves but of the pieces of information inserted in the "blanks" in the standard form contracts, resulting in contracts in the form finally "executed".

ISSUE A: Whether the records or any part of the records fall within the section 17 mandatory exemption.

Subsection 17(1) of the Act reads as follows:

17.--(1) 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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to qualify for exemption under section 17, the parts of the contracts at issue must meet all three parts of the following test:

1. The records must contain 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 types of injuries specified in (a), (b) or (c) of subsection 17 will occur.

The institution submitted that disclosure of the executed contracts would reveal both commercial and labour relations information. The affected party who made representations did not refer specifically to the type of information contained in the records but did submit that the information, if disclosed, would "provide a competitor with a bidding advantage". My view is that the parts of the contracts at issue, when taken as a whole, constitute commercial information and therefore the first part of the section 17 test is met.

The second part of the section 17 test raises the question of whether the information was "supplied in confidence implicitly or explicitly". The institution submitted that:

Details of a bid for the contract(s) are contained in sealed tenders. Only the bidding company and the full bid price are disclosed at the tender opening. Bidders were not advised that the executed contract would become a public document...

There is also an expectation that in the tendering process, only minimal details of the successful bid are disclosed. Full disclosure of the contract has never been contemplated by the Ministry in the tendering process.

The representations of the affected party do not address the second part of the section 17 test.

I am unable to accept the institution's claim of confidentiality in the light of the tendering process as it has been put before me in the context of this appeal. Therefore, my view is that the institution and the affected party have failed to demonstrate that the records or any part of the records were supplied to the institution in confidence. Accordingly, the requirements of the second part of the section 17 test have not been met.

Having said this, I need not base my decision solely on the second part of the test because the "harms" portion of the three-part test has also not been met. At page 7 of Order 36 (Appeal Number 880030), I found that:

...in order to satisfy the Part 3 test, the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a)-(c) would occur if the information was disclosed. (Emphasis added)

The institution provided no evidence regarding the type of harm that section 17 contemplates, while the representations made by the affected party on this point are neither detailed nor convincing.

For the reasons outlined above, the section 17 three part test has not been met, and subject to my finding under Issue B, all of the records at issue must be released.

ISSUE B: Whether the records or any part of the records fall within the subsection 18(1)(d) discretionary exemption.

Subsection 18(1)(d) reads as follows:

18.--(1) A head may refuse to disclose a record that contains,

...

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

...

The institution has submitted that:

It is anticipated that the disclosure of the contracts significantly lessen the ability of the government of Ontario to attract bidders/contractors. Disclosure may also be reasonably expected to decrease competitiveness of bids in subsequent proposals. . . disclosure of the details of the contract would jeopardize the relationship of trust. Impairment of the relationship of trust between the government and a contractor, would seriously erode the government's ability to attract potential contactors (sic) in the future.

The institution has provided no evidence to support its claim that disclosure of the records at issue could reasonably be expected to result in the government being unable to attract bidders/contractors. Therefore, I find that the parts of the contracts at issue do not fall within the section 18 discretionary exemption.

Having found that the executed contracts do not fall within either the section 17 mandatory exemption or the section 18 discretionary exemption, it is not necessary for me to consider issue C.

In summary, I order the head to release all the records at issue in this appeal, in full, to the appellant. I also order that the institution not release these records until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give the third party sufficient opportunity to apply for a judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on the institution within this 30-day period, I order that the records be released within 35 days of the date of this order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

Original signed by: _____
Sidney B. Linden
Commissioner

October 5, 1989
Date