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

ORDER P-222

Appeal 890170

Ministry of Culture and Communications

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

O R D E R

INTRODUCTION:

On March 7, 1989, a request was submitted to the Ministry of Culture and Communications (the "institution") under the Freedom of Information and Privacy Act, 1987, as amended, the ("Act"). The requester sought access to:

> Terms of Reference and proposals submitted and list of consultants asked to bid on all contracts awarded by the Ontario Heritage Foundation from 1986 to present.

Subsequently the requester narrowed his request to include only proposals relating to archaeology programs.

Pursuant to subsection 28(1) of the Act the institution notified seven consultants whose interests might be affected by disclosure of the requested records. Two of the seven consultants wrote to the institution objecting to disclosure.

On May 16, 1989, the institution informed the requester and the seven consultants of its decision to disclose the requested records, with the exception of any personal resumes which formed part of the proposals.

On June 6, 1989, one consultant (the "appellant") appealed the decision of the institution pursuant to subsection 50(1) of the Act. This subsection gives a person who is given notice of a

request under subsection 28(1) of the Act the right to appeal any decision of a head to the Commissioner. Notice of the appeal was sent to the institution and the original requester.

The records at issue in this appeal were obtained and reviewed by the Appeals Officer assigned to the case. The records consist of:

1. A ten page proposal dated May 25, 1987. Appendix contains resumes of staff to be involved in the project ("Record 1"); and,

2. a fourteen page proposal dated March 9, 1989. Appendix contains resumes of staff to be involved in the project ("Record 2").

During mediation of the appeal the original requester confirmed that he was not interested in obtaining the individual resumes appended to Records 1 and 2. However, the original requester does want access to approximately one and a quarter pages of material contained within the body of the records which summarizes the staff experience of the individuals who would be involved in the archaeological projects. This information is found on pages 1 and 3 of Record 1 and pages 5 and 6 of Record 2.

As a mediated settlement could not be achieved, notice that an inquiry was being conducted was sent to the appellant, the original requester, the institution and the seven employees of the appellant whose interests might be affected by disclosure of the records. Enclosed with the notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the 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. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

Representations were received from the institution, the appellant and from three of the appellant's employees (the "affected parties"). The original requester did not provide any representations. I have considered all the representations in making my Order.

In response to a question in the Appeals Officer's Report regarding the severability of the records at issue the appellant consented to disclosure of parts of the records. On May 14, 1990, the institution disclosed a copy of the severed records to the original requester.

The appellant and the affected parties' objections to disclosure are based upon the application of sections 17 and 21 of the Act.

PURPOSES OF THE ACT/BURDEN OF PROOF:

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of

individuals with respect to information about themselves held by institutions, and should provide individuals with a right of access to their own information.

Section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in this Act lies with the head of the institution. In this case, the head's decision was to grant access to the requested records. Accordingly, in the circumstances of this appeal the burden of proof that sections 17 and 21 apply lies with the appellant and the affected parties as they are the ones resisting disclosure.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

A. Whether the records at issue contain "personal information" as defined in subsection 2(1) of the Act.

B. If the answer to Issue A is in the affirmative, whether the exemption provided by section 21 of the Act applies.

C. Whether the exemption provided by section 17 of the Act applies.

D. If either Issue B or C is answered in the affirmative, whether the records could be severed under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

ISSUE A: Whether the records at issue contain "personal information" as defined in subsection 2(1) of the Act.

In all cases where the request involves access to personal information it is my responsibility, before deciding whether the

exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" contained in subsection 2(1) of the Act. "Personal information" is defined as follows:

> In this Act,
>
> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The records contain information regarding staff and corporate experience. They outline the educational and work history of the staff members. They outline the expertise of individual staff members in certain areas. I have considered the records at issue and in my view only parts of Records 1 and 2 contain information that falls within the definition of personal information under subsection 2(1) of the Act. I find that the information on pages 1 and 3 of Record 1 and pages 4 and 5 of Record 2 is properly considered personal information about the appellant and the affected parties.

ISSUE B: If answer to Issue A is in the affirmative, whether the exemption provided by section 21 of the Act applies.

Once it has been determined that a record or part of a record contains personal information, subsection 21(1) of the Act prohibits disclosure of this information except in certain circumstances. One such circumstance is contained in subsection 21(1)(f) of the Act, which reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Guidance is provided in subsections 21(2) and (3) of the Act with respect to the determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

Subsection 21(3) of the Act sets out a list of the types of personal information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Subsection 21(3)(d) provides:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;

The appellant and the affected parties do not consent to the release of the personal information about them contained in the records. One affected party submits:

> I do not consent to the disclosure of the personal information contained in the proposal. While this information is necessary for the selection of firms by potential clients, in the hands of unauthorized individuals it could adversely affect my professional career. The release of this information to either a competitor or unauthorized government administrator threatens my right to privacy ...

Another affected party notes:

> Like other professionals in the field of archaeology, I have distributed information about myself throughout this and other provinces by means of resume and personal communication. I have not done so indiscriminately. If the unidentified Third Party does not already have information about me in his or her files, it may be that I have not proffered such information to this party for a reason. Odd as it may sound, there exist in this province persons who are in a position to pass judgement on research proposals, who take into consideration the nationality of the person submitting the proposal, and who are biased against certain institutions of higher learning....

To reiterate, the educational or employment history of the appellant and the affected parties are summarized in the records. The representations of the three affected parties support the application of the presumption noted above.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under subsection 21(3) have been satisfied, I must then consider whether any other provisions of the Act come into play to rebut this presumption.

Subsection 21(4) outlines a number of circumstances which could operate to rebut a presumption under subsection 21(3). In my view, none of these circumstances apply to the personal information at issue in this appeal. Further, I find no combination of the circumstances set out in subsection 21(2) operates to outweigh the presumed unjustified invasion of personal privacy.

ISSUE C: Whether the exemption provided by section 17 of the Act applies.

Subsections 17(1)(a),(b), and (c) of the Act read as follows:

> 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.

In Order 36 (Appeal Number 880030), dated December 28, 1988, Commissioner Linden outlined the three part test which must be satisfied in order for a record to be exempt under the mandatory provisions of subsection 17(1) of the Act:

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 types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of each part of this test will render the subsection 17(1) of the Act exemption claim invalid.

I concur with the subsection 17(1) test defined by Commissioner Linden and adopt it for the purposes of this appeal.

The appellant takes the position that the disclosure of the records will "prejudice significantly our competitive position and could result in undue loss to our company".

I will first determine whether the first part of the test has been satisfied. I must consider whether disclosure of the records would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information".

In his representations, the appellant states the following:

> ...that work plans, costings and overall proposal structures constitute trade secrets. In no other business environments are proposals released to the competitors. The Ontario Heritage Foundation, like other clients, overtly consider work plans as expressions of a company's distinct approach and expertise. We have successfully tendered every Ontario Heritage Foundation project which we have submitted recently. We believe that these contracts and others have been awarded to us, in part, because of the strategy we employed in preparing our proposal and the final structure of the forwarded document. These plans are one of the most important factors in

> the selection of the consultant and are seen as distinct competing approaches.... Indeed, one of the OHF selection criteria is "understanding of the scope of the project" as is reflected in the written proposal. How it is structured is very important. It must show that we understand what the client wants. We bid on the basis of what is sent and we are selected on the basis of what we submit. Those elements that are considered privileged include the structure of the proposal, the
>
> selected research design, our phasing, our study process and our costing structure. These are all elements that are assessed by the client in choosing a consultant and are considered to be distinctive expressions of their approach to work of a particular nature.

I am of the view that the information contained in the records at issue in this appeal is most appropriately categorized as technical and commercial information. In reaching this conclusion, I am not unmindful of the fact that the appellant views this information as a "trade secret". However, in my view, the "structure of the proposal, the selected research design, our phasing, our study process and our costing structure" more clearly fall within the categories of technical and commercial information.

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

The appellant in his representations submits:

> ...that our work plan, costing and overall proposal structure was supplied in confidence. Nowhere did the terms of reference indicate that our proposal could be made public.

I am satisfied that the records were supplied implicitly in confidence to the institution, and therefore the second part of the test has been met.

To meet the requirements of the third part of the test, the appellant must successfully demonstrate that the disclosure could reasonably be expected to give rise to one of the types of harm specified in subsection 17(1).

The appellant has made representations that his consulting company and staff will suffer harm if disclosure of the records is made. He submits:

> ...should access be granted, the requester will obtain information, otherwise unavailable to him, which will allow him to submit proposals more in line with our own, thus compromising our competitive position in a variety of proposal situations. Clearly, ... our ability to submit unique proposal structures will have been compromised. This decision could adversely affect the lives of our twenty full time employees.

Having reviewed the representations, I am satisfied that disclosure of the records could reasonably be expected to prejudice significantly the competitive position of the appellant or result in undue loss to the appellant. I am of the view that the third part of the test has been met and therefore section 17 applies.

ISSUE D: If either Issue B or C is answered in the affirmative, whether the records could be severed under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

Subsection 10(2) of the Act states:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Commissioner Linden addressed the issue of severance in Order 24 (Appeal Number 880006), dated October 21, 1988. At page 13 of the Order he stated:

> The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that "necessary exemptions from the right of access should be limited and specific" (subsection 1(a)(ii). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release.

The key question raised by subsection 10(2) is one of reasonableness. As Commissioner Linden found in Order 24 supra:

> ...it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2)

> severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

I have reviewed the records and keeping in mind that the appellant previously consented to disclosure of parts of the records, in my view, no additional information that is in any way responsive to the request could be severed from these records and provided to the requester without disclosing information that legitimately falls within the section 17 and section 21 exemptions.

ORDER:

I order the head not to disclose the severed portions of Records 1 and 2.

Original signed by: February 22, 1991
Tom A. Wright Date
Assistant Commissioner