



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

ORDER 70

Appeal 880264

Ministry of Natural Resources



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O R D E R

This appeal was received pursuant to subsection 50(1) 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 Commissioner.

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

1. On July 8, 1988, a request was made to the Ministry of Natural Resources (the "institution") for copies of "the contract between the Queen (Ministry of Natural Resources) and [a named individual] for creel census on Lake St. Clair" and "the contract between the Queen (Ministry of Natural Resources) and [a named individual] for creel census on Lake Erie (Peelee Island)".
2. By letter dated August 8, 1988, the institution responded to the requester that access to both contracts was denied, citing section 17 and subsection 18(1)(a) of the Act.
3. By letter dated August 19, 1988, the requester appealed the decision of the head. I sent notice of the appeal to the institution and the appellant.

4. The records were obtained and examined by an Appeals Officer. The appeal was unable to be resolved in mediation and both parties requested resolution by inquiry.
5. On February 7, 1989, I sent notice to the appellant, the institution and two affected persons, 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 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. The report is sent to all persons affected by the subject matter of the appeal.
6. Written representations were received from the appellant, the institution and one affected person and I have taken them into consideration in making this Order. To date, representations have not been received from the second affected person.

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 principles 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 both the head and the affected persons as they are the ones resisting disclosure.

The issues arising in this appeal are as follows:

- A. Whether any part of the contracts fall within the section 17 mandatory exemption.
- B. Whether any part of the contracts fall within the subsection 18(1)(d) discretionary exemption.
- C. If either Issue A or Issue B is answered in the affirmative, whether there exists a compelling public interest in the disclosure of the records exempted under sections 17 or 18 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.
- D. 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, it is necessary to identify the records. At issue in this appeal are two executed

standard form contracts, to which the institution has denied access in their entirety. At the same time, the institution acknowledges that "a draft, blank copy of the contract to be entered into was available publicly for a fee of ten dollars to anyone who asked, prior to the tender closing" and further, that "those portions of the contract document[s] that are considered to be disclosable have been and continue to be available to the public". (emphasis added)

For those very reasons, in my view, the standard form contracts themselves do not fall within the purview of the section 17 and 18 exemptions and there is no need for me to subject them to further scrutiny. What I intend to examine, pursuant to these exemptions, are the following pieces of information (information which, when inserted in the "blanks" of the standard form contract, resulted in the "executed" contracts):

- (1) date of contract.
- (2) name of contractor.
- (3) start and completion dates.
- (4) dollar figures (per scheduled sampling) or "unit price".
- (5) name and address of designated representative of the contractor.
- (6) name and address of designated representative of the Crown.
- (7) signatures of the parties and witnesses thereto.

ISSUE A: Whether any part of the contracts 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 fall within the section 17 exemption, the parts of the contracts in 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 records must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of subsection 17(1) will occur.

The institution submitted that disclosure of the executed contracts would reveal both commercial and labour relations information.

Counsel for the affected person did not specifically address the type of information at issue, but rather spoke to the likelihood of the information "be[ing] used by his competitors to gain an economic advantage".

I considered the proper interpretation of the term "commercial" information in Order 47 (Appeal Number 880043). My view is that the parts of the contracts in issue, when taken as a whole, constitute commercial information and therefore the first part of the section 17 test is established.

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

The institution claimed that confidentiality is established by virtue of the following: (1) clause 26 of the contracts forbids the contractor from disclosing any information relating to the services under agreement; (2) bidders were not advised that the executed contracts would become public documents; and (3) the tendering process contains an expectation that only minimal details of a successful bid are disclosed.

The appellant submitted that "the contracts in question concern information that is already a matter of public record. The name

of the tenderor (sic) was read aloud as well as the amount tendered at the public tender opening".

Counsel for the affected person submitted that "[A]t the time he entered into the contract with the Queen (Ministry of Natural Resources) he was under the express understanding that the specific terms of the contract would remain confidential".

I am unable to accept the institution's claims as establishing confidentiality. While clause 26 of the contracts forbids the contractors from disclosing information relating to the services contracted for, this clause in no way binds the Crown. Furthermore, the institution has failed to explain the tender process in such a way as to demonstrate the confidentiality of the process.

The affected person claimed an "express understanding" of confidentiality but did not elaborate on the circumstances surrounding this express understanding. Even were I to posit that the affected person's "express understanding" of confidentiality was in some way linked to the institution's submission that bidders were not advised that the executed contracts would become public records, I would remain unconvinced. The fact that a record or part of a record was not publicly available prior to the Act coming into force does not, in my view, establish confidentiality. Having said this, I need not base my decision solely on the second part of the test because, as I will outline below, the "harms" portion of the three_part test has not been met. (The institution made its argument respecting "harm" under subsection 18(1) (d) rather than under section 17, and I refer to it again under Issue B.)

Counsel for the affected person submitted that the information at issue has been requested so as "to secure an economic advantage from him" and, further, that "disclosure will result in an undue loss to [the affected person]. At this point in time, the exact amount of the loss has not been determined. However, it is substantial and will have a devastating impact on the economic position of [the affected person]." By way of further explanation, counsel submitted that "...the organization requesting the information intends to use it in order to obtain compensation from [the affected person] which will result in an undue loss to him".

On the other hand, the appellant's position is that the contracts are reflective of "work performed on public resources and performed with public funds". The appellant further stated that, "as a taxpayer and as a person concerned with how the resources of Ontario are managed I feel this information should be available for review".

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)

What the affected person appears to allude to (and what the institution cited in its subsection 18(1)(d) argument discussed in Issue B) is the current and ongoing dispute before the

Ontario Labour Relations Board regarding these two contracts (among others) and the application of the Successor Rights (Crown Transfers) Act, R.S.O. 1980, c. 489.

The institution provided no evidence regarding the type of harm that section 17 contemplates, while the evidence of the affected person on this point is neither detailed nor convincing. In my view, any harm that might accrue to the affected person could not be claimed to be a result of the release of the parts of the contracts in issue, but rather it would be as a result of an adverse (to him) decision of the Ontario Labour Relations Board.

For the reasons outlined above, the section 17 three part test has not been met and, subject to my finding under Issue B, both executed contracts must be released.

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

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

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 submitted that:

...disclosure of the contracts, ...would significantly lessen the ability of the government of Ontario to

attract bidders/contractors... Disclosure of the contracts to [a named organization] prior to the ruling on these two contracts by the Labour Relations Board as to the applicability of the Successor Rights Act to the contracts would result in the withdrawal of bidders or non_bidding by potential contractors due to their uncertainty, and increased aggravation in bidding on a Government contract. **The existence of this issue is inflating the bidding substantially, and the Ministry's ability to contract is impaired until the issue is resolved at the Labour Relations Board.**" (emphasis added)

The institution has provided no evidence to support its claim that disclosure of the contracts could reasonably be expected to result in the loss of bidders and contractors. Again, as I found in Issue A, in my view, it is not the release of the executed contracts which might cause economic harm to the institution but, rather, an adverse decision by the Labour Relations Board on the issue of contracting out.

In my view, the parts of the contracts in 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 nor the section 18 discretionary exemption, it is not necessary for me to consider Issue C or D.

In summary, I order the head to release, in their entirety, the two executed contracts within thirty_five (35) days of the date of this Order, and to notify me as to their release within five (5) days of the date of release.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ June 29, 1989
Date