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

ORDER 36

Appeal 880030

Ministry of Industry, Trade and Technology

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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 to the Commissioner.

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

1. On January 1, 1988, the Ministry of Industry, Trade and Technology (the "institution") received a request for access to "a copy of the contract implementing Ontario's memorandum of understanding with General Motors and Suzuki for the establishment of an automotive assembly plant at Ingersoll, Ontario."

2. Upon receipt of the request, the head issued notice to an affected person in accordance with section 28 of the Act and received representations from that affected person. On March 4, 1988, the institution's Freedom of Information and Privacy Co_ordinator wrote to the requester advising that partial access to the record was allowed and that "...the contract is severed under section 10(2) and section 17(1)(a) (b) and (c) of the Act, as disclosure of commercial and/or financial information could reasonably be expected to:

   (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of an 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 or group."

   A copy of the severed record was sent to the requester.

3. By letter to me dated March 6, 1988, the requester appealed the head's decision. I gave notice of the appeal to the institution and the affected party (the "third party").

4. The record at issue in the appeal was obtained and reviewed by an Appeals Officer from my staff, and between March 6 and July 14, 1988 attempts were made to mediate a settlement among the parties. As a result of mediation, the institution disclosed some of the information originally severed from the record, and the appellant narrowed the scope of his appeal to the severed information contained in Schedule "G" of the record.

5. By letter dated July 14, 1988, I notified the institution, the appellant and the third party that I was conducting an inquiry into this matter and enclosed a copy of the Appeals Officer's Report.

6. On July 27, 1988, I wrote to the three parties inviting them to make written representations on the issues arising from the appeal. I received representations from all parties and have considered them in making my Order.

The information contained in the record at issue in this appeal relates to:

(a) the type of infrastructure support to be provided and the division of this support into government and non_government;

(b) the nature and specification of Ontario Government obligations in relation to the provision of infrastructure;

(c) the contribution, in dollar amounts, of the Ontario Government and local municipalities towards the payment of costs of the government_supported infrastructure, and

(d) the nature and description of non_government infrastructure support.

It should be noted at the outset that the purposes of the Act as defined in subsections 1(a) and (b) are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and,
>
> ...
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions...

The sole issue arising in this appeal is:

Whether any of the severed portions of Schedule "G" (the record) are properly subject to exemption from release pursuant to subsection 17(1) of the Freedom of Information and Protection of Privacy Act, 1987.

Subsection 17(1) reads 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; or

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

In order for the subsection 17(1) exemption to apply, the information at issue must meet a three_part test:

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 any part of this test will render the subsection 17(1) exemption claim invalid.

After considering the representations from all parties and examining the record at issue in this appeal, I find that the requirements of all three parts of the section 17 test have not been met. I will address each of the three parts separately, with particular emphasis on part three which I have relied on most strongly in reaching my decision.

Test _ Part 1

In determining whether the first part of the test has been satisfied, I must consider whether disclosure of information contained in the record would reveal a "trade secret, or scientific, technical, commercial, financial or labour relations information."

The institution and the third party both argue that the severed portions of Schedule "G" contain information which is "technical, commercial or financial" in nature. In support of this position, the third party submits the following arguments:

technical _ "...the numerical information contained in Schedule "G" is arguably of a technical nature since specifications and requirements for sewage, hydro, natural gas and water represent some of the technical specifications for the successful operation of the plant by indicating the capacity of those systems to meet the operating requirements of the plant...";

commercial _ specifics relating to natural gas, sewage, water and hydro consumption requirements should be considered commercial information because their release would give competitors the ability to determine the "potential production capability and line speed capacity" of the plant;

financial _ the release of information pertaining to government and non_government infrastructure support would provide competitors with knowledge of specific levels of financial assistance provided to the third party by the Ontario government.

I have reviewed the record and I do not accept the arguments presented by the institution and the third party. In my view, even given the third party's broad interpretation of what constitutes technical, commercial or financial information, most, if not all of the severed information falls outside the scope of this interpretation.

Test _ Part 2

In order to satisfy the second part of the test, the information must have been supplied by the third party to the institution in confidence.

The severed information in Schedule "G" is a statement, in general terms, of the type of assistance the government is willing to provide to the third party to upgrade roads and provide services such as water supply and sewer pipeline.

The institution and the third party both submit that this information was "supplied" to the institution by the third party. In its submissions the third party states that "...we outlined our transportation needs and traffic requirements to accommodate the projected increase traffic flow in the plant vicinity and surrounding areas including Highway 401, as well as the projected utility requirements for the plant such as the natural gas supply, hydro, sewage and water usage."

In my view, the information at issue in this appeal was not "supplied" by the third party, within the meaning of subsection 17(1). Schedule "G" was included in the contract as a result of negotiations between the institution and the third party, and these negotiations were presumably based in part on information supplied by the third party. However, this "supplied" information and the information severed by the institution in this appeal are not one and the same, and the requirements of the Part 2 test have not been satisfied.

Test _ Part 3

Although I have found that the first two parts of the section 17 test have not been satisfied, my decision in this appeal is based primarily on the application of the third part of the test.

To meet the requirements of the third part of the test, the institution or the third party must successfully demonstrate that the prospect of disclosure could reasonably be expected to give rise to one of the types of harm specified in subparagraphs (a), (b) or (c) of subsection 17(1).

While the burden of proving the applicability of a particular exemption rests with the head under section 53 of the Act, in the case of section 17 exemptions, the head will normally rely on information and argument supplied by a third party. As the head in this case points out, he does not have the direct evidence, facts or details necessary to conclusively determine that disclosure of the record could reasonably be expected to cause the injuries, harm or damage set out in subparagraphs (a), (b) and (c). The head is, in effect, bound to rely upon and act on the representations and arguments put forward by the third party, and I feel this is appropriate, since

the third party is in the best position to present relevant and detailed evidence to support the arguments against disclosure.

In my view, 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.

In attempting to meet these requirements in this appeal, the third party made the following submissions.

Dealing with the harm identified in subparagraph (a), the third party submits that release of the information would result in a reasonable expectation of significant prejudice to its competitive position or significant interference with contractual or other negotiations in that: "[t]he amount of assistance that the Ontario Government is contributing to the [the third party's] plant infrastructure... would enable [the third party's] competitors to determine [the third party's] cost burdens and ultimately project the pricing of vehicles and [the third party's] vulnerability in terms of debt load. Any information about the financial assistance given to [the third party] would give [the third party's] competitors an advantage which would significantly prejudice [the third party's] competitive position."

In arguing that release of the information in question could give rise to a reasonable expectation of undue loss or gain, (subsection 17(1)(c)), the third party contends that "...all of the severances made under this schedule are justifiable since any and all of this information could be used by [the third party's] competitors to achieve undue gain by claiming similar assistance with a resulting financial loss, and a potential market loss to [the third party] if production capacity of the plant is determined".

The third party further argues that "...due to the fact that production at [the third party's] plant does not begin until April 1989, it is extremely difficult, if not impossible, to compile detailed statistics and financial data to prove unequivocally that any of the information in Schedule "G"

would significantly prejudice the competitive position of [the third party] under section 17(1)(a) or result in undue loss to [the third party] or undue gain to [the third party's] competitors under section 17(1)(c) of the Act. The highly competitive nature of the automobile industry, however, makes it extremely difficult for a start_up operation such as [the third party] to

risk the disclosure of any information which may be used to our detriment. It is the way in which this severed information may be interpreted by [the third party's] competitors which causes us a great deal of concern."

The appellant, on the other hand, submits that: "...it is my contention that the Ministry has over_stepped the meaning of the section. I do not believe the material contained in Schedule G, particularly Ontario's commitment to the plant's infrastructure could in any way result in undue loss or gain to any group, person, committee, financial institution or agency".

In my view the requirements of the Part 3 test have not been satisfied in the circumstances of this appeal. Neither the head nor the third party has adduced any objectively reliable evidence as to how these competitors could interpret the severed information contained in Schedule "G" in a way which could project the third party's production capacity, pricing of vehicles, and other related information. In any event, even if the competitors were able to project or somehow determine this information, in my view neither the head nor the third party has adequately demonstrated how this knowledge could result in a "significant prejudice to its competitive position", "undue loss" to itself or "undue gain" to its competitors.

In my view, the representations submitted by the head and the third party do not contain evidence sufficient to establish a reasonable expectation of harm resulting from the release of the severed information. I find the third party's statements to be generalized assertions of fact in support of what amounts, at most, to speculations of possible harm.

Furthermore, I find it significant that a great deal of the information at issue in this appeal, including the Ontario Government's direct financial assistance to the third party;

the plant's estimated production capacity; the dollar amounts of total investment; the estimated amount to be spent by the third party in the purchase of Canadian components; and the number of hours of employee training to be provided before the plant starts production, was revealed to the public by the institution in its News Release of August 27, 1986, announcing the joint venture.

In summary, I find that both the institution and the third party have failed to meet any of the three parts of the test for an exemption under section 17, and I therefore order that the entire record be released to the appellant within 20 days of the date of this Order. The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure of the record, of the date on which disclosure was made.

Original signed by: December 28, 1988
Sidney B. Linden
Commissioner