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

# ORDER P-394

Appeals P-9200290 and P-9200353

Ontario Northland Transportation Commission

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# ORDER

## BACKGROUND:

The Ontario Northland Transportation Commission (the ONTC) received two requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of:

(1) the contract between the ONTC and Bearskin Airways (Bearskin), and the "deal" between the ONTC and Air Ontario; and

(2) the ONTC's study of Dash-8 service into Kenora.

The ONTC denied access to records responsive to the first request pursuant to sections 17 and 18 of the Act, and to records responsive to the second request pursuant to sections 13 and 18 of the Act. The requester appealed both decisions to this office.

During mediation, Bearskin consented to the disclosure of its contract with the ONTC provided that Schedules "E" and "F" were removed, and the ONTC disclosed the agreement, with the exception of Schedules "E" and "F", to the appellant. In addition, the ONTC indicated that it had no record of a "deal" between the ONTC and Air Ontario, and the appellant discontinued this part of his appeal.

The ONTC informed the appellant that it did not have a study dealing specifically with Dash-8 service into Kenora, but that it did have market analysis data regarding the entire northern region. The appellant confirmed he was interested in receiving access to this data.

Further mediation was not possible, and notice that an inquiry was being conducted to review the ONTC's decision was sent to the ONTC, the appellant, and Bearskin. Written representations were received from the ONTC and Bearskin.

The records remaining at issue are: Schedules "E" and "F" of the agreement between the ONTC and Bearskin and four related change notices to the agreement (Record 1); and the market analysis data (Record 2), which consist of a financial analysis of costs, a passenger load analysis and a financial comparison.

## PRELIMINARY MATTERS:

In its representations, Bearskin states that the Act is designed to protect the privacy of the individual, and submits that the definition of an individual in the Act does not only refer to a single person, but to a private business as well. Bearskin submits that Record 1 must not be disclosed in keeping with the privacy protection purpose of the Act.

In order for the disclosure of Record 1 to constitute an unjustified invasion of privacy, the Act requires that the information contained in Record 1 qualify as personal information. Section 2(1) of the Act defines personal information, in part, as "... recorded information about an identifiable individual ...". In Order 16, the issue of whether information respecting a business entity can qualify as personal information was considered by former Commissioner Sidney B. Linden:

> The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear.

I agree with this interpretation and, in my view, the privacy protection provisions of the Act do not extend to the information contained in Record 1.

## ISSUES:

The issues arising in this appeal are:

A. Whether the discretionary exemption provided by section 18 applies to the records.

B. Whether the mandatory exemption provided by section 17 applies to Record 1.

C. Whether the discretionary exemption provided by section 13 applies to Record 2.

## SUBMISSIONS/CONCLUSIONS:

### ISSUE A: Whether the discretionary exemption provided by section 18 applies to the records.

The ONTC submits that sections 18(1)(a), (c) and (d) apply to Records 1 and 2. These sections read:

> A head may refuse to disclose a record that contains,

> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (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;

**Section 18(1)(a)**

In order to qualify for exemption under section 18(1)(a), the ONTC must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value.

[Order 87]

The ONTC submits that Records 1 and 2 contain financial data, and that the passenger load factor data contained in Record 2 qualify as "commercial" information. The ONTC submits that the information belongs to the ONTC and has monetary value because its disclosure would identify lucrative markets to other air carriers where they could enter and compete with the ONTC's carrier, with a resultant loss of revenue.

I have reviewed Records 1 and 2, and I am satisfied that they do contain financial and commercial information; however, it is not entirely clear to me to which party the information belongs, or whether it belongs to both. In any event, the purpose of section 18(1)(a) is to permit the ONTC to refuse to disclose a record where circumstances are such that disclosure would deprive the ONTC of the monetary value of the information and, therefore, to satisfy the third part of the section 18(1)(a) test the information itself must have an intrinsic monetary value (Order P-219). In the circumstances of this appeal, I am not satisfied that the information itself has monetary value or potential monetary value. In my view, the ONTC's argument centres on the effect that disclosure would have on the ONTC's ability to competitively negotiate with other parties, which is the subject of section 18(1)(c).

**Section 18(1)(c)**

To establish a valid exemption under section 18(1)(c), the ONTC must successfully demonstrate a reasonable expectation of prejudice to the economic interests or competitive position of a government institution arising from disclosure of the information. The test under section 18(1)(c) is one of a reasonable expectation of prejudice to economic or competitive interests; it is not necessary to prove that actual harm will result from the disclosure, but that the expectation of harm is based on reason and is not fanciful, imaginary or contrived (Order P-263).

The ONTC submits that disclosure of the passenger load and market analysis financial information comprising Record 2 would severely limit the ONTC's ability to operate in the competitive market place. The ONTC submits that disclosure of this information would attract competition on the more lucrative markets and dilute its revenues. Other than the submission made in support of section 18(1)(a), the ONTC has not provided any evidence in support of their application of section 18(1)(c) to Record 1.

In my view, only Record 2 contains information the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of the ONTC and therefore qualifies for exemption under section 18(1)(c) of the Act.

I have reviewed the ONTC's exercise of discretion to refuse to disclose Record 2, and find nothing improper in the circumstances of this appeal. Because I have found that Record 2 is properly exempt under section 18(1)(c) of the Act, it is not necessary for me to consider the application of section 18(1)(d) to Record 2.

**Section 18(1)(d)**

In support of the application of section 18(1)(d), the ONTC submits:

> The Government of Ontario is financially supporting the operation of norOntair to the extent of $3.8 million in 1992. The costs of providing this service will increase with competition; therefore the release of this information would be injurious to the financial interest of the Government of Ontario.

In my view, I have not been provided with detailed and convincing evidence from the ONTC that the harm contemplated by section 18(1)(d) could reasonably be expected to occur should the information in Record 1 be disclosed. The ONTC bears the onus of proving that the harms described in this section are present or reasonably foreseeable. In my view, this onus has not been satisfactorily discharged, and I find that section 18(1)(d) does not apply to Record 1.

**ISSUE B: Whether the mandatory exemption provided by section 17 applies to Record 1.**

The ONTC and Bearskin submit that sections 17(1)(a), (b) and (c) apply to Record 1. These sections read:

> 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; or

In Order 36, former Commissioner Sidney B. Linden established a three-part test, each part of which must be satisfied in order for a record to be exempt under section 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this appeal. The test for exemption under section 17(1)(a),(b) or (c) is as follows:

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.

**Part One**

The ONTC submits that Record 1 contains commercial and financial information relating to monthly payments to Bearskin for cost-based fees, and management fees based on specified criteria being met.

Bearskin submits that the schedules which comprise Record 1 are titled "Payments and Penalties" and "Management Fees", and these titles indicate clearly that the information is

financial. Bearskin also submits that the information itself pertains to, and is specific data relating to, the price paid for the operation, maintenance, and management of the air services, and therefore qualifies as financial information.

Bearskin submits that information regarding the financial operation, maintenance, and management of a commercial air service is commercial in nature. Bearskin also submits that, by definition, the information regarding a commercial air service is commercial information.

In my view, giving a financial or commercial title to a record is not sufficient to qualify the information contained in it as financial or commercial information; the information itself must be of a financial or commercial nature. Further, I do not accept that solely because Bearskin is a commercial air service, all information regarding it is commercial. Only information which relates to the buying, selling, or exchange of merchandise or services qualifies as commercial information under the Act.

Having reviewed the record, I find that the information contained in paragraphs "A" and "B" of Schedule "E" relates to timetable and distance attachments, and does not qualify as commercial or financial information for the purposes of section 17. The information contained in the remaining part of Record 1 relates to payments made to Bearskin based on operating costs and incentives for efficient management of the air service, and I am satisfied that this information qualifies as financial and/or commercial information.

**Part Two**

The ONTC submits that the fees are based on estimates supplied in confidence by Bearskin and subsequently negotiated in confidence with the ONTC. However, Bearskin submits:

> ... the information that Bearskin supplied to the ONTC, for the purposes of the Agreement, was Bearskin's costs associated with the operation, maintenance, and management of the commercial air service. That cost information is one and the same as the information contained in Schedules "E" and "F" [Record 1]. It is further submitted that this financial information was provided to the ONTC for the purpose of creating these Schedules in the Agreement, and AT NO TIME did any negotiations take place with regard to the information provided.

Bearskin also submits that the information was supplied in confidence to the ONTC, because Bearskin knew at all times that disclosure of the information would prejudice its competitive position with respect to other private carriers. Bearskin submits that it would not have supplied the information unless it was understood that the information was to be kept confidential.

I am satisfied that the information relating to the cost-based fees contained in paragraphs "C" and "D" of Schedule "E" and parts of the four change notices were supplied in confidence implicitly by Bearskin to the ONTC.

With respect to the information contained in Schedule "F" and the remaining parts of the four change notices which relate to payments made to Bearskin as incentives for efficient management of the air service, it is my view that this information was arrived at through negotiations between the ONTC and Bearskin. I adopt the analysis developed in previous orders with respect to information arrived at through negotiations between an institution and an affected party (Orders 87, 203, P-218, P-251 and P-263). In general, the conclusion in these orders has been that, in order to meet the test of "supplied", the information contained in the record at issue must be one and the same as that originally provided to the institution by an affected party for the purpose of creating the record. In my view, the information which was arrived at through negotiations between the ONTC and Bearskin was not "supplied" by Bearskin to the ONTC. In addition, I

conclude that the disclosure of this part of Record 1 would not permit the drawing of accurate inferences about information actually supplied to the ONTC by Bearskin and, therefore, Bearskin and the ONTC have failed to satisfy the second part of the section 17(1) test with respect to this part of Record 1.

**Part Three**

To satisfy the third part of the test, the ONTC and/or Bearskin 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 sections 17(1)(a), (b) or (c) would occur if the information was disclosed. Generalized assertions of fact in support of what amounts, at most, to speculations of possible harm do not satisfy the requirements of the third part of the test.

In its representations, the ONTC indicates that part three of the test will be dealt with in submissions by Bearskin.

Bearskin makes submissions regarding sections 17(1)(a), (b) and (c). With regard to the type of harm described in section 17(1)(a), Bearskin submits:

> The disclosure would prejudice significantly the competitive position of Bearskin, as confidential cost and revenue information is contained in those Schedules which competitors of Bearskin could use to take business away from Bearskin.
>
> The Agreement between Bearskin and ONTC is up for renewal in November 1992, and any disclosure of that information would interfere significantly with Bearskin's ability to negotiate a new Agreement with ONTC.
>
> ... if this information was disclosed, bidding competition would be less competitive for the bids would be simply tailored to undercut Bearskin's price, rather than the lowest possible price.

In my view, Bearskin has not met the requirements of the third part of the test in respect of section 17(1)(a). I have not been provided with detailed and convincing evidence of how these competitors could use the information contained in Record 1 in a way which could "take business away from Bearskin", or "interfere significantly with Bearskin's ability to negotiate a new Agreement with ONTC". In addition, November 1992 has passed.

With regard to the type of harm described in section 17(1)(b), Bearskin submits that air service is essential to the continued viability of the North, and submits:

> If the information is disclosed Bearskin would no longer supply this type of information to the ONTC as it would be used by competitors of Bearskin who could then use it against Bearskin in determining competitor quotes. It is further submitted that no other private business would provide this information to the ONTC, for the same reasons as Bearskin ...

I do not accept Bearskin's position. In my view, this type of information would continue to be supplied regardless of whether it is disclosed or not, because there would continue to be a financial motivation to contract with the ONTC with the provision of such information being a necessary part of the process.

With regard to section 17(1)(c), Bearskin submits:

> ... The ability for other businesses to access the financial information in [Record 1] would result in those businesses undercutting any future bids that Bearskin will provide in further negotiations for air carrier service with the ONTC. The disclosure of the information would further result in a windfall gain by other competitors, in that they will know Bearskin's cost-base and revenue sources. It is submitted further that the information given is actual costs and is not capable of being altered unless the entire operation of Bearskin were altered, which is extremely expensive and unlikely to occur.

Again, it is my view that Bearskin has not met the requirements of the third part of the test in respect of section 17(1)(a). I have not been provided with detailed and convincing evidence of how these competitors could use the information contained in Record 1 in a way which could result in undue loss to Bearskin, or undue gain to competitors.

In summary, I find that the ONTC and Bearskin have failed to satisfy the third part of the test for exemption under section 17 with respect to all of Record 1, and have failed to satisfy the second part of the test with respect to the part of Record 1 which relates to payments made to Bearskin

as incentives for efficient management of the air service. Because each part of the three-part test must be satisfied for a section 17 exemption claim to be valid, I find that section 17 does not apply to Record 1.

Because I have found that Record 2 is properly exempt under section 18(1)(c) of the Act, it is not necessary for me to consider Issue C.

## ORDER:

1. I uphold the ONTC's decision to deny access to Record 2.

2. I order the ONTC to disclose Record 1 to the appellant within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with the provisions of this order, I order the ONTC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, only upon my request.

Original signed by: January 6, 1993
Holly Big Canoe
Inquiry Officer