



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

# ORDER P-419

Appeal P-9200707

Management Board of Cabinet



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# ORDER

## BACKGROUND:

The Advertising Review Board (ARB) of Management Board of Cabinet (MBC) conducted a competition to select an advertising agency to promote the Ontario Government's "jobsOntario" program. As part of the competition, the ARB sent questionnaires to a number of advertising agencies and subsequently short-listed five agencies for detailed consideration. The requester made a request to MBC under the Freedom of Information and Protection of Privacy Act (the Act) for access to the information submitted by the five short-listed agencies in response to questions 1, 2, 3, 4, 6, 7 and 10.

MBC notified the five short-listed agencies pursuant to section 28(1) of the Act. One of them consented to disclose its responses, and MBC released this information to the requester. The four other agencies provided representations to MBC objecting to disclosure of their responses.

After reviewing the representations, MBC decided to provide the requester with access to the responses to questions 1, 4, 6, 7 and 10, but denied the requester access to the responses to questions 2 and 3, pursuant to sections 21 and 17 of the Act.

The requester did not appeal MBC's decision to deny access to the responses to questions 2 and 3. However, three of the agencies appealed the decision to provide the requester with access to the responses to questions 1, 4, 6, 7 and 10, claiming sections 17 and/or 21 of the Act. This order deals with one of those appeals.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review MBC's decision was sent to MBC, the original requester and the agency (the appellant). Representations were received from the appellant only.

The record at issue in this appeal consists of the appellant's responses to questions 1, 4, 6, 7 and 10 of the questionnaire. These questions read as follows:

1. What is your understanding of the jobsOntario initiative and its relationship to the Ontario Government's economic and social policy?
4. Please provide detailed information (problem, solution, results) and background about the account(s) you have at present, or have handled in the past, that would translate into relevant experience for the jobsOntario initiative public information requirements.
6. Is your agency in a position to service the Government's jobsOntario account with senior key personnel from among your present staff?
7. Please identify the members of your team (all areas of service) who would be assigned to this account. What other account

assignments would the members of this team have? Please outline their qualifications and experience as it relates to this account.

10. Please provide a list and brief description of your accounts using French language media, and describe your agency's experience with ethnocultural community communications programs.

## **ISSUES:**

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by sections 17(1)(a) and/or (c) of the Act applies to the record.
- B. Whether the mandatory exemption provided by section 21 of the Act applies to the record.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the mandatory exemption provided by sections 17(1)(a) and/or (c) of the Act applies to the record.**

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

In order for a record to qualify for exemption under sections 17(1)(a) and/or (c), the parties resisting disclosure must establish all of the requirements of the following 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 harms specified in (a) or (c) of subsection 17(1) will occur.

[Order 36]

### **Part One of the Test**

The appellant submits:

Certainly our submission and the sections requested deals with (1) commercial information - i.e. staffing, billings,

Having reviewed the record, I find that only the response to question 4 contains "commercial" information. This part of the record includes a description of several communications strategies developed for former clients. In my view, this information relates to the "buying, selling or exchange of merchandise or services", and therefore qualifies as "commercial information" under section 17(1) of the Act [Order P-394.

The appellant's responses to questions 1, 6, 7 and 10 set out its understanding of the "jobsOntario" program, a brief biographical profile of the individuals who would have worked on the "jobs Ontario" campaign, and a list of clients to whom it provides French language service. In my view, none of this information is "commercial information" in the requisite sense; nor does it qualify as a trade secret or scientific, technical, financial and/or labour relations information.

In summary, I find that only the information contained in the response to question 4 satisfies the first part of the section 17(1) exemption test.

### **Part Two of the Test**

The appellant submits:

Submissions to the Advertising Review Board are made by us with an implicit understanding that they are for the use of the panel. Requests for submissions indicate the number of copies to be supplied. This clearly indicates to us limited or restricted access to the information.

I am prepared to accept that there is a certain degree of confidence implicit in the process of selecting an advertising agency, and, accordingly, I find that the second part of the section 17(1) test has been met in the circumstances of this appeal.

### **Part Three of the Test**

Because I have found that the responses to questions 1, 6, 7 and 10 do not satisfy the requirements of the first part of the test, it is technically not necessary for me to consider these parts of the record under part three of the test. However, because the appellant's representations regarding part three do not differentiate between the various questions, I will consider the responses to all five questions under this part of the test.

To satisfy the third part of the test, the appellant must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that raises a reasonable expectation that the harm described in sections 17(1)(a) 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 [Order P-294].

In its representations, the appellant raises the harms set out in sections 17(1)(a) and (c), but not section 17(1)(b).

#### **section 17(1)(a)**

The appellant submits that:

There can be no doubt that releasing our presentation would provide information to a competitor (the requester agency) that could be used to their advantage.

...

It is not conjecture to assume that by reviewing our submission that a competitor could improve the quality of their efforts. In doing so they would improve their chances of making subsequent competitions. Given that there is a finite number of agencies selected for a "short list" any advantage gained by another agency by definition prejudices our position.

...

... the requesting agency may wish to use the information we supplied, specifically about staffing the jobsOntario account, to approach our existing clients with a story about us changing existing staff relationships with these other clients.

...

Any attempt to use our staffing information with existing clients would be significantly prejudicial and could significantly interfere with existing contractual relationships.

In my view, these claims are speculative statements about possible future harm which have not been supported by detailed and convincing evidence. Accordingly, I find that the appellant has

failed to establish that the type of harm set out in section 17(1)(a) could reasonably be expected to arise if the record is released.

**section 17(1)(c)**

The appellant claims that:

Given the competitive nature of advertising, given the heavy investment in resources to prepare a submission, given the experience leading to successful submissions, given our unique style of presentation, there can be a reasonable expectation that the requester would gain (and we would lose) some advantage.

This submission is similar to the argument raised under section 17(1)(a); the appellant asserts that its competitors would gain "some advantage" by getting access to its submission to MBC.

Consistent with my finding under section 17(1)(a), in my view, the appellant's submission is a speculative statement about possible future harm that has not been supported by detailed and convincing evidence. Accordingly, I find that the appellant has failed to provide the detailed and convincing evidence necessary to establish that the type of harm described in section 17(1)(c) could reasonably be expected to arise if the record is released.

In summary, I find that the appellant has failed to establish the requirements of part three of the section 17(1) exemption test and, because all three parts of the test must be satisfied in order for a record to qualify for exemption, I find that the record at issue in this appeal does not qualify for exemption under sections 17(1)(a) or (c) of the Act.

**ISSUE B: Whether the mandatory exemption provided by section 21 of the Act applies to the record.**

The appellant did not raise section 21 in its representations, but did refer to its employees' "privacy" when making its initial representations to MBC on September 9, 1992. Because section 21 is a mandatory exemption, I will consider whether section 21 applies to any part of the record.

In order to qualify for exemption under section 21, the information must first qualify as "personal information" under section 2(1) of the Act.

In response to question 7, the appellant provided a brief summary of past account assignments undertaken by the various individuals who would have been assigned to work on the "jobsOntario" project if the appellant's bid had been successful. Having reviewed this part of the record, I find that the information provided by the appellant cannot accurately be described as the personal information of these individuals. Rather, in my view, the information is a description of certain past accounts worked on by the named individuals, which was submitted by the appellant because the information was felt to be supportive of its bid for the "jobsOntario" project. The individuals are named in their professional not their personal capacities and, in my view, the

information provided by the appellant in response to question 7 does not qualify as the personal information of the named individuals. Accordingly, the exemption provided by section 21 of the Act is not available in the circumstances of this appeal.

**ORDER:**

1. I uphold MBC's decision to release the appellant's responses to questions 1, 4, 6, 7 and 10, and order MBC to release this information to the original requester within 35 days of the date of this Order and **not** earlier than the thirtieth (30th) day following the date of this Order.
2. In order to verify compliance with the provisions of this Order, I order MBC to provide me with a copy of the record which is disclosed to the original requester pursuant to Provision 1, **only** upon my request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ February 24, 1993