



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

ORDER P-472

Appeal P-9200815

Ministry of Culture, Tourism and Recreation



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ORDER

BACKGROUND:

Two requests were received by the Ministry of Tourism and Recreation (now the Ministry of Culture, Tourism and Recreation) (the Ministry) pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the proposed renovation of the "Forum" facility at Ontario Place. Specifically, the requester sought access to records:

... pertaining to the negotiation or implementation of contracts between Ontario Place Corporation (the Corporation) and [a number of companies or an affiliate of one of the companies].

The Ministry identified a number of records that were responsive to the request. The Ministry then notified a company which might have an interest in the disclosure of the records as a third party to the request. The company, represented by its solicitor, objected to the release of most of the responsive records. The Ministry then made the decision to grant access to some documentation but refused to disclose 10 records based on the exemptions contained in sections 17 and 18(1)(c) and (d) of the Act. The requester appealed the denial of access.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry, the appellant and the company (the affected person). Representations were received from all parties.

ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemptions provided by sections 18(1)(c) and (d) of the Act apply to Record 2.
- B. Whether the mandatory exemption provided by section 17 of the Act applies to Records 1, 3, 4, 5, 6, 7, 8, 9 and 10.

SUBMISSIONS\CONCLUSIONS:

ISSUE A: Whether the discretionary exemptions provided by sections 18(1)(c) and (d) of the Act apply to Record 2.

Record 2 is a one page excerpt from the minutes of the July 7, 1992 meeting of the Board of Directors of Ontario Place Corporation. The information contained in the record compares revenue, expenses and profits for the year 1992 with projected revenues, expenses and profits for

the year 1993. Similar comparative figures are provided concerning attendance, ticket sales, parking/concessions, sponsorship, venue rental fees, artist fees, production expenses and advertising.

Sections 18(1)(c) and (d) of the Act, state:

A head may refuse to disclose a record that contains,

- (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;

Representations on this issue were received from the appellant and the Ministry. The appellant takes the position that:

... disclosure of the requested records, far from prejudicing the economic interests of a government institution, would in fact result in potential economic benefit to government institutions resulting from greater public scrutiny of contracts involving the public purse including potentially a more competitive bidding process.

The Ministry, however, in refusing to disclose Record 2, states that:

By releasing this information it could be expected to be injurious to the economic and/or financial interests of the province as the pending contract with [the company] is still in the negotiation stage and any premature release of information may be reasonably expected to damage the ongoing negotiations.

In Order 48, former Commissioner Sidney B. Linden expressed the following test to be applied in situations where an institution or an affected person relies upon the exemptions provided by section 17 and 18 of the Act:

In all cases where a claim for exemption is made under sections 17 or 18 of the Act, an onus rests with the institutions and/or affected third parties to demonstrate that the harms envisioned by these sections are present or reasonably foreseeable. In the absence of evidence to support any such claims, in my view, the burden placed on the institution under section 53 has not been satisfied, and the information in question should be released to the appellant.

In its representations, the Ministry does not indicate, with any specificity, how the release of the information contained in Record 2 would harm the contractual negotiations with the company. On this basis, I find that the Ministry has not met the evidentiary burden necessary to support the section 18(1)(c) or (d) exemptions.

The Ministry then goes on to state that "... disclosure of this information would permit OPC's competitors to bargain with performing artists with an unfair advantage over OPC."

It should be pointed out that Record 2 reports revenues, expenses and profits for the entire 1992 season, as well as projections for the 1993 season, on a consolidated basis. The information presented, therefore, is not specific enough to provide a competitor with any useful insights on how the Corporation deals with individual artists.

For the reasons specified, therefore, the Ministry has failed to prove that the exemptions set out in sections 18(1)(c) and (d) of the Act apply to this record.

ISSUE B: Whether the mandatory exemption provided by section 17 of the Act applies to Records 1, 3, 4, 5, 6, 7, 8, 9 and 10.

Section 17(1) states, in part, 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, former Commissioner Sidney B. Linden enunciated a test for determining whether the section 17 exemption applies to a particular record. For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the institution and/or the affected person must satisfy each part 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), (b) or (c) of subsection 17(1) will occur.

I will deal with each part of the three part test in relation to the nine remaining records in this appeal.

Before beginning my analysis, it is important to note that several previous orders have determined that information contained in a record would reveal information "**supplied**" by an affected person, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228, P-241).

Record 1

Record 1 is a letter from the Corporation to the company, with the name and address of the company withheld. In its representations, the company has indicated that it has no objection to the release of the record in its entirety. On this basis, the record should be disclosed.

Record 8

Record 8 is the pivotal document in this appeal. The record, which is comprised of a four page covering letter and five appendices, sets out the proposal submitted by the company for the operation of the facility known as the Ontario Place Forum. Since the remaining records to be considered in this appeal either quote from or comment on Record 8, it would be useful to analyze this document first.

Insofar as the first part of the section 17 test is concerned, I am satisfied that all of Record 8 contains technical, financial or commercial information with the exception of the first and second paragraphs on page one and the first, second and third full paragraphs on page three of the

covering letter. Because these parts of the covering letter do not meet the first part of the section 17 test, they do not qualify for exemption and should be released to the appellant.

In its representations, the company takes the position that "It is clear and generally accepted that commercial proposals are submitted in confidence."

In support of this statement, the company refers to Article 6.7(a) of the Letter of Intent entered into between the Corporation and the company following the acceptance of its proposal. This Article states:

OPC (Ontario Place Corporation) and Proponent (and their respective agents) shall keep the terms of this letter, Development Agreement and Ground Lease in strictest confidence, except as may be mutually agreed upon in writing, unless disclosure is required as a result of OPC being a Crown Corporation.

I accept that the inclusion of this Article into the Letter of Intent indicates that the parties understood explicitly that the information contained in the proposal was being supplied in confidence. Accordingly, I find that the second part of the section 17 test has been satisfied for the remaining parts of Record 8.

In order to meet the third part of the section 17 test, the party resisting disclosure must demonstrate that the prospect of disclosure of the record will give rise to a reasonable expectation that one of the harms specified in sections 17(1)(a), (b) or (c) will occur. In its representations, the company points out that Record 8 contains revenue and expense projections that are very detailed. The company also submits that, should information contained in the record respecting overhead costs and talent fees be made available either to the company's competitors or to the artists whom it may book to perform at the facility, its competitive position would be adversely affected.

The company raises similar concerns about those portions of its proposal which deal with the construction costs and detailed plans for the renovation of the facility. In this respect, it states that:

What an operator can spend on construction of a venue of this sort and still expect to make a profit is a very important factor in deciding whether to proceed with a proposal. [The company] believes, however, that the economic limit on construction costs is not well understood by others. A more accurate assessment of that economic limit could be obtained, however, as a result of someone gaining access to this proposal which indicates what [the company], one of the leaders in this industry, is prepared to spend.

Both the Ministry and the company have raised the fact that negotiations between these parties are continuing on this subject. The company also submits that:

... disclosure of [the company's] proposal now could well result in a competitor ... having the benefit of [the] proposal, making a proposal to OPC to [the company's] detriment.

Based on the arguments presented, I accept that the prospect of the disclosure of Record 8 would reasonably be expected to result in the harm described in section 17(1)(a) of the Act. For these reasons, the remaining portions of Record 8, having met all three parts of the section 17 test, are properly exempt from disclosure.

Record 3

Record 3 comprises three separate documents which pertain to the scoring of the company's Amphitheatre Proposal (Record 8). These are a "pros and cons" page, a two page revenues/expenses document and a scoring page. The information found in each of the first two parts of Record 3 was extracted from Record 8 and, therefore, contains information from which accurate inferences can be drawn about the information which is found in Record 8. For the same reasons I discussed in dealing with Record 8, I find that these parts of Record 3 qualify for exemption under section 17(1)(a) of the Act.

In its representations, the company has indicated that it has no objection to the release of the third part of the record (the scoring page) and, accordingly, this document should be released.

Record 4

Record 4 consists of a three-page letter sent to the company by the Corporation which sets out a number of questions relating to the proposal described in Record 8. The company has indicated that it has no objection to the release of this record, with the exception of the section referred to as paragraph 1.3. I also find that disclosure of this paragraph would allow accurate inferences to be drawn about the financial provisions contained in Record 8, which I have previously found to be exempt from disclosure pursuant to section 17. Therefore, this information also qualifies for exemption under section 17(1)(a) of the Act.

As a result, all but paragraph 1.3 in Record 4 should be disclosed to the appellant.

Record 5

Record 5 consists of a six page letter from the company to the Corporation in response to the questions posed in Record 4. The company has indicated that it has no objection to the disclosure of paragraph 1.4 on pages four and five of this record. The other information contained in the document is similar to that found in Record 8 and serves to update and elaborate upon the information presented. Because disclosure of this information would allow accurate inferences to be drawn about the information contained in Record 8, I find that it is also exempt pursuant to section 17(1)(a).

As a result, only paragraph 1.4 of Record 5 should be disclosed to the appellant.

Record 6

Record 6 consists of a four page letter from the Corporation to the company which confirms certain questions posed and answers given at a previous meeting. The information would also allow accurate inferences to be drawn about the information contained in Record 8 and, for this reason, I find that the section 17(1)(a) exemption applies to the contents of this record.

Record 7

Record 7 is a two page letter from the company to the Corporation which further clarifies several of the answers provided in Record 6. For the same reasons I have stated above, I also find that this record is exempt from disclosure under section 17(1)(a) of the Act.

Record 9

Record 9 consists of three documents. These are: an 18 page set of scores prepared by the evaluators of the company's proposal (which includes sections on evaluation criteria and pre-screening results), the company's two page "presentation notes", which summarize the proposal contained in Record 8, and six pages of notes taken by the evaluators.

The company has indicated that it has no objection to the release of the actual scores contained in the first part of Record 9 and these should be disclosed. However, the score sheets in question also include the written comments of the evaluators. In my view, this information, if disclosed, would allow accurate inferences to be drawn about the contents of Record 8. The same analysis applies to the "presentation notes" and the six pages of formal evaluation notes. On this basis, these documents are also exempt under section 17(1)(a) of the Act.

Therefore, only the evaluator's actual scores should be disclosed to the appellant.

Record 10

Record 10 is the Letter of Intent executed between the company and the Corporation. It sets out:

... [the] general terms under which Ontario Place Corporation and [the company] will continue to negotiate an agreement and lease respecting the creation and operation of a new Amphitheatre at Ontario Place.

The Letter of Intent, in the words of the company, "... substantially replicates [the] original proposal."

Although the information contained in Record 10 was the product of a negotiation process and hence not "supplied" by the company, its disclosure would allow the drawing of accurate inferences with respect to information which was otherwise supplied to the Corporation by the

company and which I have already found to be exempt from disclosure. Therefore, I find that Record 10 is properly exempt under section 17(1)(a) of the Act.

ORDER:

1. I uphold the decision of the Ministry to withhold access to Records 3, 4, 5, 6, 7, 8, 9 and 10 with the exception of those items highlighted on the copy of the Record which will accompany this Order.
2. I order the Ministry to disclose Records 1 and 2, along with the highlighted portions of Records 3, 4, 5, 8 and 9 to the appellant within 35 days following 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 Ministry to provide me with a copy of the record which is disclosed to the requester pursuant to Provision 2, **only** upon request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ June 8, 1993