



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

ORDER P-582

Appeal P-9300144

Ministry of Culture, Tourism and Recreation



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ORDER

BACKGROUND:

The Ministry of Culture, Tourism and Recreation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of, or access to a document entitled "A Proposal for a Reservation System for the Ministry of Tourism and Recreation" (the Proposal). The requester indicated that the Proposal was submitted to the Ministry by a named company (the affected party).

The Ministry located the record responsive to this request and denied access to the Proposal pursuant to sections 17(1)(a), (b) and (c) of the Act. The requester appealed the decision.

The Ministry subsequently issued a supplementary decision letter in which it raised the application of the exemptions provided by sections 18(1)(a), (c), (d) and (g) of the Act.

Mediation was not possible and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, and the affected party. Representations were received from the Ministry and the affected party only.

The record at issue may be generally described as containing an Executive Summary, the details of contractual compliance, an outline of the required goods and services, an overview of the proposed reservation service, system design and function, network requirements and some pricing information.

ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemptions provided by sections 17(1)(a), (b) and/or (c) of the Act apply to the record.
- B. Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d) and/or (g) of the Act apply to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemptions provided by sections 17(1)(a), (b) and/or (c) of the Act apply to the record.

Sections 17(1)(a), (b) 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;
- (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;

For a record to qualify for exemption under sections 17(1)(a), (b) and/or (c), the Ministry 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.

Failure to satisfy the requirements of any part of the test will render the section 17(1) claim invalid.

[Order 36]

The burden of proving the applicability of the section 17 exemption lies on the party resisting disclosure of the record (Orders 42, 101, P-228, M-10 and M-29). In the circumstances of this appeal, the Ministry and the affected party are the parties resisting disclosure; therefore, the responsibility to establish that the information is exempt under section 17 of the Act rests with them.

Part One

The information contained in the Proposal relates to the screen layouts, data base design, and overall system flow charts representing the development of the Central Reservation System product information (C-RES). The Proposal also contains the call rates, booking and conversion rates, product, pricing and ongoing maintenance information of a named franchise operation.

Both the Ministry and the affected party submit that the Proposal contains commercial information. In addition, the Ministry claims that it contains technical information.

Commercial information is information which relates to the buying, selling or exchange of merchandise or services (Orders 47, 179 and P-318).

In Order P-454, Assistant Commissioner Irwin Glasberg defined "technical information" as follows:

In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1) of the Act.

I adopt this definition for the purposes of this appeal.

I am satisfied that the Proposal contains both technical and commercial information. Part one of the test has been met.

Part Two

With respect to part two of the test, it must be established that the information was **supplied** to the Ministry and that it was supplied **in confidence**, either implicitly or explicitly. I am satisfied that the Proposal was supplied by the affected party to the Ministry as a tendering bid in response to a Request For Proposal.

With regard to the issue of whether the Proposal was supplied in confidence, the Ministry makes the following submissions:

We think that [the affected party] would reasonably expect that its proposal, in which it invested significant amounts of time and money in research and development, would be held in confidence by the Ministry.

...

It is the tendering practice within the Ministry to provide for sealed bids, the contents of which are not released to other bidders without third party approval, as these proposals constitute third party concepts which could fall under the categories of trade secrets or technical commercial or financial information.

The affected party states:

The information provided by the document "A Proposal for a Reservation System for the Ministry of Tourism and Recreation" is confidential [and] is intended only for the Ministry of Tourism and Recreation. As this information is sensitive in a number of areas, it was supplied to The Ministry in confidence.

Having reviewed these representations, the nature of the information at issue and the circumstances under which it was provided to the Ministry, I am satisfied that the Proposal was supplied to the Ministry implicitly in confidence. Therefore, I find that both requirements for part two of the test have been met.

Part Three

In order to satisfy part three of the test, the affected 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 one or more of the harms described in section 17(1) would occur if the information was disclosed (Order 36).

As far as sections 17(1)(a) and (c) are concerned, the affected party states that the Proposal contains confidential commercial information specific to at least two of its customers that, if disclosed to the appellant, speaks to the business strategy of those customers and would prejudice significantly their competitive position, thereby resulting in undue loss. In addition, it submits that disclosure would interfere significantly with other negotiations between the affected party and its customers.

The affected party then argues that if its competitors obtained access to the information contained in the Proposal, they would gain an unfair competitive advantage because:

- (a) Competitors could use the information to develop a strategy against the affected party in future competitive bidding situations.
- (b) Competitors could use the Proposal to enhance or design their own system bypassing the considerable expense of research and development.
- (c) Competitors could utilize any customer information contained within the Proposal for their own sales activities.

I have carefully reviewed the Proposal and the representations of the affected party and in my opinion, the affected party has provided sufficient evidence linking a reasonable expectation of harm to the disclosure of the information contained in the Proposal. Accordingly, I find that part three of the test for exemption under section 17(1) has been met.

All three parts of the test having been satisfied, I find that the mandatory exemptions in sections 17(1)(a) and (c) apply to the Proposal. As a result, it is not necessary for me to consider the applicability of section 17(1)(b) or to address Issue B.

ORDER:

I uphold the decision of the Ministry.

Original signed by:
Anita Fineberg
Inquiry Officer

November 22, 1993