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

ORDER P-532

Appeal P-910632

Ministry of Consumer and Commercial Relations

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

In early 1991, the Ministry of Consumer and Commercial Relations (the Ministry) entered into an arrangement with a private company, Real/Data Ontario Inc. (RDO), to produce a "land related information system". Pursuant to a Strategic Alliance Master Agreement between RDO and the Ministry, a company called Teranet Land Information Services Inc. (Teranet) was incorporated with RDO and the Ministry as the only shareholders. A Shareholders' Agreement, an Implementation and Operation Agreement and a License Agreement were also completed.

Subsequently, a request was made to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act) for access to information about the Teranet arrangement and in particular, information about the owners and/or principals of RDO.

The Ministry identified the four agreements between the Ministry, RDO and Teranet as responsive records and notified RDO and Teranet of the request pursuant to section 28(1) of the Act. RDO and Teranet objected to release of the records. After considering RDO and Teranet's representations, the Ministry provided access to some records but denied access to others under sections 17, 18 and 21 of the Act. The requester appealed the Ministry's decision.

During mediation, the Ministry - with the consent of RDO and Teranet - disclosed additional information including the names of all but two of the shareholders and the contents of a large portion of the four agreements referred to above.

Further 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, RDO, Teranet and the two unidentified shareholders. Written representations were received from the appellant, the Ministry, RDO, and Teranet.

In its representations, the Ministry raised section 16 as an additional exemption claim. In addition, one of the two shareholders who had previously withheld consent to disclosure of his name provided written consent to disclosure. The other shareholder did not make representations.

The records which remain at issue are the name of one shareholder and parts of the four agreements as set out in Appendix A to this order.

ISSUES:

A. Whether the mandatory exemption provided by section 21 of the Act applies to the name of the one shareholder.

B. Whether the discretionary exemption provided by section 18 of the Act applies.

C. Whether the mandatory exemption provided by section 17 of the Act applies.

D. Whether the discretionary exemption provided by section 16 of the Act applies.

E. If the answer to Issue A, B or C is yes, whether a compelling public interest exists in the disclosure of the records that clearly outweighs the purpose of the exemption.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 21 of the Act applies to the name of one shareholder.

The Ministry's representations refer to two shareholders' names; however, since one of the two shareholders consented to disclosure of his name, only one shareholder's name remains in issue.

In order to qualify for exemption under section 21, the information must first qualify as "personal information" as defined in section 2(1) of the Act. The Ministry submits that the shareholder's name qualifies as personal information under subparagraph (b) of the definition which reads as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

The Ministry states:

> The information in question is about two identifiable individuals, the financial transaction is the ownership of shares in an Ontario limited company (Real/Data Ontario Ltd.).

I do not agree. The definition of personal information requires that the information be about an "identifiable individual". The remaining shareholder's name is that of a corporate entity, not an individual. The corporate name is accompanied by the name of an individual to contact. However, in absence of information to the contrary, I am of the view that this individual is acting in a corporate or business capacity, not an individual capacity.

[IPC Order P-532/September 9, 1993]

Therefore, in my view, the shareholder's name is not personal information for purposes of the Act; and accordingly, the exemption provided by section 21 of the Act is not available.

ISSUE B: Whether the discretionary exemption provided by section 18 of the Act applies.

Section 18(1) of the Act states, in part:

> 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;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

Generally speaking, section 18 is intended to protect certain interests, economic and otherwise, of the Government of Ontario and other government institutions. The evidence required to support a claim under this section must be detailed and convincing (Orders 141, 162 and 163).

In my view, the essence of the Ministry's position on the application of section 18 is captured in the following excerpts from its representations:

> The Institution submits that the undisclosed portions of the record at issue are exempt from disclosure pursuant to the provisions of Section 18 of the Freedom of Information and Protection of Privacy Act.
>
> ...
>
> The idea behind Teranet was to create a profitable business venture in the geographic information systems area. This industry is highly competitive.
>
> ...
>
> The province of Ontario as a principle shareholder in Teranet has an economic interest in Teranet's business success. The province has invested heavily in Teranet. A goal of Teranet is to establish a world-class information system.
>
> ...
>
> Teranet intends to actively pursue the implementation of its system in other jurisdictions. Disclosure of the terms beneficial to the Province of Ontario will result in other jurisdictions with whom Teranet wishes to negotiate demanding similar terms.
>
> ...
>
> Should the institution be required to disclose the terms of the Teranet arrangement which are advantageous to Ontario, it can reasonably be expected that other jurisdictions will hold out for similar terms.
>
> ...
>
> This would not be advantageous to the business interest of Teranet and consequently the economic interest of the Province of Ontario.
>
> ...
>
> The undisclosed portions of the record are clearly information which if disclosed could reasonably be expected to be injurious to the financial interests of the Government of Ontario.

I have carefully reviewed the portions of the records which remain at issue together with the representations of the parties and, in my view, the disclosure of these portions of the records could reasonably be expected to be injurious to the financial interests of the Government of Ontario. Therefore, I find that the portions of the records which remain at issue (with the exception of the name of one shareholder which I have considered under Issue A and clause 2.04(b) of the Strategic Alliance Master Agreement which I will consider under Issue C) qualify for exemption under section 18(1)(d) of the Act.

[IPC Order P-532/September 9, 1993]

Section 18(1) of the Act is a discretionary exemption. It is my responsibility to ensure that the Ministry has properly exercised its discretion in deciding not to grant access to the records. In reviewing the head's exercise of discretion, I have found nothing improper, and would not alter it on appeal.

ISSUE C: Whether the mandatory exemption provided by section 17 of the Act applies.

Under Issue B, I found that all of the portions of the records which remain at issue except for the name of one shareholder and clause 2.04(b) of the Strategic Alliance Master Agreement qualify for exemption under section 18. The shareholder's name was considered under Issue A. Since the Ministry did not rely on section 18 for clause 2.04(b) it was not considered under Issue B; however, RDO submits that section 17 applies to this clause.

Sections 17(1)(a), (b) and (c) 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 clause 2.04(b) to qualify for exemption under sections 17(1), each part of the following three-part test must be satisfied:

(1) the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

(2) the record must have been supplied to the Ministry 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 section 17(1) (a), (b) or (c) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17(1) claim invalid (Order 36). Since neither the Ministry or Teranet have claimed the section 17 exemption, the burden of establishing the requirements of the test for exemption rests with RDO.

Part One

Clause 2.04(b) describes the total amount payable to the Ministry for its development costs. I accept that this information is "financial" thereby satisfying the first part of the test.

Part Two

Because of my conclusion with respect to part three of the test, I will not make a specific finding with respect to whether part two of the test has been met.

Part Three

The evidence that must be presented to satisfy part three of the test must be detailed and convincing (Order 36).

In its representations, RDO makes several general statements about the type of harm that would arise if certain parts of the records were disclosed. These statements apply to all parts of the records that RDO objects to disclosing, most of which have already been found to be exempt under section 18. The following excerpts from RDO's representations are typical of the positions advanced:

17(1)(a)

> ... disclosure of any of the foregoing provisions will prejudice significantly RDO's competitive position insofar as RDO hopes to bid on similar LRIS projects in other jurisdictions (where Teranet itself does not bid). Knowledge by competitors of the intricate details of RDO's financial abilities and business strategies will provide those competitors with an unfair advantage in structuring their competitive bids to undercut RDO's bid.
>
> ...

17(1)(b)

> ... ordering disclosure of such information in the present case will send a clear message to the private sector that there can be no realistic expectation of maintaining confidentiality of sensitive information.

17(1)(c)

> ... disclosure of the foregoing information would prejudice significantly RDO's competitive position as well as its ability to negotiate similar agreements.
>
> As a result, if the provisions in issue were to be disclosed, RDO and its shareholders stand to suffer great financial loss, while its competitors and prospective joint ventures [sic] will reap the benefit of inside information at RDO's expense.

The only specific reference to clause 2.04(b) is as follows:

> ... aside from the prejudice to RDO's ability to competitively bid on projects in other jurisdictions, disclosure of any of the foregoing items would significantly interfere with RDO's negotiating position vis a vis the contracting parties in other jurisdictions. That is because the strategic alliance with Ontario was RDO's first venture of this sort and as a result RDO made certain bargaining concessions which it might not otherwise have made, and does not in future intend to make. For example:
>
> Article 2.04(b) of the Strategic Alliance Master Agreement describes the total amount payable to MCCR for its costs in developing the POLARIS System.
>
> ...

The Ministry makes no representations regarding this clause while Teranet states that it consents to the release of the entire Strategic Alliance Master Agreement.

I have carefully reviewed RDO's representations and the clause itself. In my view, RDO has failed to provide sufficient evidence to establish that the types of harm described in section 17(1) could reasonably be expected to occur if this clause was disclosed. Therefore, since all parts of the test for exemption have not been met, clause 2.04(b) of the Strategic Alliance Master Agreement does not qualify for exemption under section 17.

Because of the way I have disposed of Issues A, B and C I need not consider Issue D.

ISSUE E: If the answer to Issue A, B or C is yes, whether a compelling public interest exists in the disclosure of the records that clearly outweighs the purpose of the exemption.

In Issue B, I found that portions of the records (with the exception of the name of one shareholder) are exempt from disclosure under section 18 of the Act. I must now consider whether there is a compelling public interest in the disclosure of this information, which would clearly outweigh the purpose of the section 18 exemption.

Section 23 of the Act states:

> An exemption from disclosure of a record under sections 13 , 15, 17, **18**, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 has two requirements which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 163 and 183).

While the onus of proof as to whether an exemption applies is on the institution, the Act is silent as to who bears the onus in respect of section 23. Where the application of section 23 has been raised by an appellant, it is my view that the onus of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of the application of section 23. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

The appellant submits that there is a compelling public interest in disclosure of the records. He further submits that the Government of Ontario has not followed its normal practice with respect to partnership arrangements in this case. The appellant refers to the Skydome where "all the partners and the full agreement were made public."

The appellant states that the Ministry has selected "unknown partners, for unknown amounts of investment, lasting an unknown number of years and for an unknown risk." He further states that the public has a right to know the financial status of the government's business partner, the extent of capital investment, the extent of risk involved, and the financial terms negotiated between RDO and the Ministry with respect to the business workings of Teranet.

In its representations, RDO states that while it recognizes that there is a public interest in the activities of the government, it has demonstrated its commitment to the objectives of the Act by agreeing to the disclosure of most of the records at issue. RDO states that while it accepts that a public interest exists, the right of access to government-held information should not be absolute, particularly in the current case, where disclosure of the records could prejudice the financial interests of the government and the affected parties.

In its representations, Teranet states that it recognizes the need for public scrutiny but submits that:

> ...it has tried to balance these two competing interests, namely, its need as a business entity to preserve the confidentiality of certain information and its responsibility as a company with a large public sector investment to be sufficiently open and candid to permit an appropriate level of public oversight.

Teranet emphasizes that only that part of the information required to protect its legitimate business interest has been withheld from disclosure.

The Ministry submits there is no compelling public interest in disclosure of the records such as to outweigh the purpose of the exemption claimed. The Ministry claims that the public interest provision should only be claimed in extremely unusual circumstances and that the onus is on the appellant to prove that there is a compelling public interest in disclosure of the records at issue. In order to do that, the appellant would have to establish that there was a "cloud" over the Ministry's activities. The Ministry states that there has been no impropriety, that there is no "public outcry or demand for disclosure." The Ministry also points out that only those parts of the records that are necessary to ensure the success of Teranet have been withheld.

I have carefully reviewed the representations of all parties. I completely agree with the appellant that the activities of government should be open to public scrutiny. I also agree that there is a public interest in information about the Teranet business venture. However, in my view, this interest and the other concerns that have been raised by the appellant have been satisfied by the significant amount of disclosure which has already taken place.

In summary, I am not convinced that a compelling public interest exists in the disclosure of the remainder of the records, which would clearly outweigh the purpose of the section 18 exemption.

ORDER:

1. I uphold the Ministry's decision to withhold access to the records at issue, with the exception of the name of the one shareholder whose name has not already been disclosed and clause 2.04(b) of the Strategic Alliance Master Agreement.

2. I order the Ministry to disclose the portion of the records containing the name of the one shareholder whose name has not already been disclosed and clause 2.04(b) of the Strategic Alliance Master Agreement within 35 days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order.

3. In the particular circumstances of this appeal disclosure of information contained in the records took place at various points in time during the appeal process. Therefore, I feel that it would be of assistance to the appellant if the Ministry were to provide the appellant with a further copy of all information that has previously been disclosed to him and I so order. Specifically, I order the institution to provide the appellant with complete copies of the four agreements, severing only those clauses which I have found to be exempt from disclosure.

4. In order to verify compliance with the order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant, **only** upon request.

POSTSCRIPT:

It is apparent that we are entering into a new era where arrangements between the public and private sector will become more prevalent. The creation of Teranet is a good example of one such initiative.

These new public/private sector relationships have implications for the public's right to know about the activities of government. In my view, private sector organizations that enter into arrangements with government must do so with the expectation that a level of public scrutiny will be available and is to be expected. Indeed, I believe that such scrutiny will be essential to establishing public confidence in the value of these new relationships.

As indicated by this order I am of the view that, for purposes of the Act, ultimately, the appropriate amount of disclosure took place. However, I also believe that, in the future, there are ways that the rights of access contained in the Act can be enhanced.

[IPC Order P-532/September 9, 1993]

For example, I suggest that at the time a new arrangement such as Teranet is formed, a public document be prepared by the appropriate government ministry or agency outlining the nature of the arrangement. This document could identify those who are involved in the arrangement and the nature of their involvement. There are other elements of the arrangement that could be described in such a document and the type of information that was eventually disclosed in response to the appellant's request in this appeal may provide useful guidance.

Resort to the Act to obtain access to government-held information is only one way in which to meet the purposes and intent of the Act. I would describe the process that I have outlined in the preceding paragraph as active dissemination of government information. In my view, the purposes of the Act can be achieved by following such a process with the added benefit that some of the "administrative trappings" associated with the Act can be avoided. At the same time the Act remains available for the particular requester who is seeking more details about a particular venture.

Original signed by: September 9, 1993
Tom Wright
Commissioner

APPENDIX A

LIST OF CLAUSES STILL AT ISSUE

Strategic Alliance Master Agreement

Articles 2.04(b) and 2.05

Shareholders' Agreement

Articles 3.02, 3.03, 3.06, 4.07, 4.10, 6.03, 7.01, 7.02 and that portion of Appendix B containing the names of two shareholders who have withheld consent to disclosure of their names.

Implementation and Operation Agreement

Articles 7.02, 9.02, 13.01, 15.05, 15.07, 16.02, 16.03, 16.04 (last sentence), 17.04, 21.01, 21.02, 21.03, 21.04, 21.05, 22.02, 22.05,
22.06, 22.07 plus schedules A, D and G

License Agreement

Articles 3.04, 4.04, 4.05, 5.01, 8.01, 8.04, 13.01, 13.03, 15.02, 15.03, 15.06, 15.07 plus schedules A and B.