



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

ORDER P-728

Appeal P_9400062

Ministry of Culture, Tourism and Recreation



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records from the Ministry of Culture, Tourism and Recreation (the Ministry) relating to the arrangements to bring the Barnes Exhibition (the exhibition) to the Art Gallery of Ontario (the AGO) in September 1994.

The exhibition consists of paintings from a collection which were given to the Barnes Foundation (the Foundation) on an indenture of trust. In order for the exhibition to travel at all, the Foundation had to secure the approval of the Court of Common Pleas of Montgomery County, Orphans' Court Division (the Court), in Pennsylvania. In response to the Foundation's application, the Court agreed to allow the exhibition to be shown at the AGO. That decision is currently under appeal.

The records consist of:

- correspondence and enclosures regarding the exhibition exchanged among the following parties: the Foundation, the AGO, the Ministry, and other Ontario government officials, and
- draft agreements and proposed revisions relating to the exhibition.

The Ministry relies on the following exemption to deny access to some records in their entirety, and parts of other records:

- third party information - section 17(1).

The Ministry also relied on section 21(1) to deny access to some portions of Record 17b. During mediation, the appellant indicated that he did not wish access to the portions of Record 17b for which the Ministry had claimed section 21(1), and accordingly, those parts of Record 17b are not at issue in this appeal.

A Notice of Inquiry was provided to the parties to the appeal, namely the appellant, the Ministry, the AGO and the Foundation. Representations were received from the appellant, the Ministry and the AGO.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry and the AGO have claimed that section 17(1) applies to the records. The Ministry's representations indicate that it defers to the representations submitted by the AGO with respect to the applicability of this exemption.

The AGO states that, in the course of the Foundation's application to the Court for the necessary approval to permit the exhibition to travel to Toronto, opponents of the tour requested production of the contractual arrangements concerning the exhibition. The Court quashed the petition to subpoena these documents. The AGO appears to have provided this information to advance its case that the exemption in section 17(1) applies to the undisclosed information in the records.

However, the factors to be considered under the Act are not the same as those relating to a court order for production and, therefore, this evidence is irrelevant to the question of whether these records are exempt under section 17(1) of the Act.

For a record to qualify for exemption under section 17(1)(a), (b) or (c), the parties resisting disclosure (the Ministry, the AGO and the Foundation) must satisfy each part of the following three-part test:

1. the records 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.

Part One of the Test

The Ministry submits that the records contain financial or commercial information. I have reviewed the records and in my view, the undisclosed information in Records 4, 5, 8, 10, 11, 13, 14, 15, 16, 17a, 17b, 17c, 17d, 19, 21, 23 and 25, the second severance in Record 6 and the first severance in Record 12, relates specifically to the negotiations regarding the exhibition and qualifies as commercial and/or financial information. This information therefore meets part one of the test.

In my view, however, the undisclosed information in Records 2, 3, 7, the first severance in Record 6 and the second severance in Record 12, does not relate in any specific way to the negotiations and therefore it does not qualify as commercial or financial information.

The AGO submits that the information in the records consists of trade secrets and technical information. I have considered this with regard to the undisclosed parts of the records which I have found do not qualify as "commercial" or "financial" information. In my view, the information contained in the undisclosed portions of those records does not qualify as trade secrets or technical information.

Accordingly, the undisclosed information in Records 2, 3, 7, the first severance in Record 6 and the second severance in Record 12 does not meet part one of the test.

Part Two of the Test

The second part of the test has two elements. First, the parties resisting disclosure must establish that the information was **supplied** to the Ministry and second, that it was supplied **in confidence**, either explicitly or implicitly.

The appellant has advanced an argument based upon Order P-581 that the records and parts of records at issue are the products of a "negotiation process" and therefore were not "supplied" to the government organization as required to meet part two of the test.

The record at issue in Order P-581 was a Letter of Intent which contained the agreed-upon terms to be included in a contract. The basis of the decision in that order was that the Letter of Intent was the result of negotiations. For that reason, the information which had been "supplied" to the government organization was not the same as the information in the contract, which had been altered as a result of the negotiations. Accordingly, its disclosure could not reveal the information which had been supplied to the government organization and part two of the test was not met.

The situation here differs significantly from that in Order P-581. There, the institution was a party to the contract, and its contents, which were the result of negotiations, were therefore not "supplied" within the meaning of section 17. In this case, the draft agreements were between the AGO and the Foundation, and did not involve the Ministry directly. These draft agreements, and all of the other records at issue except for Record 14, were supplied to the Ministry in the form in which they now appear.

The AGO's representations indicate that the entire negotiation process regarding the exhibition, and the resulting draft agreements, were intended to be kept confidential, and that this is standard procedure in such circumstances. Based upon the evidence provided to me, I am of the view that, except for Record 14, these records were supplied to the Ministry **implicitly** in confidence.

Record 14 is a letter **from** the Ministry and therefore cannot be considered to have been supplied to the Ministry, as required by section 17.

Accordingly, except for Record 14, I find that the records at issue were supplied to the Ministry implicitly in confidence, and meet part two of the test.

Part Three of the Test

In order to meet part three of the test, the parties resisting disclosure (the Ministry, the AGO and the Foundation) must demonstrate that the prospect of disclosure gives rise to the reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

The mere possibility of harm is not sufficient. At a minimum, the parties resisting disclosure must establish a clear and direct linkage between the disclosure of the specific information and the harms which are alleged.

The AGO asserts in its representations that release of the undisclosed information in the records would impede its ability to secure similar exhibits in the future, since other museums would replicate its marketing strategies. This appears to relate to the harm contemplated by section 17(1)(a). In my view, this assertion, which is not substantiated by evidence of any kind, does not establish the reasonable expectation of the harm contemplated by section 17(1)(a).

Several of the matters raised by the AGO's representations appear to relate to both sections 17(1)(a) and (c). I will now consider these.

The AGO notes that the court ruling which awarded the Barnes Foundation the right to circulate the exhibition to the AGO is currently under appeal. In this regard, the AGO argues that the release of the information could jeopardize the Barnes tour, creating significant financial loss for the AGO, as well as destruction of public partnerships, loss of professional stature and undermining of public credibility. The representations do not provide any explanation of how disclosure of the records could affect the course of the appeal of the court ruling. In my view, I have not been provided with sufficient evidence in this regard to establish the reasonable expectation of the harms contemplated by section 17(1)(a) or (c).

In addition, the AGO submits that release of AGO staffing and projected visitor flows could endanger the security of the Barnes collection and negatively affect the AGO's credibility. However, the evidence provided to substantiate this view is nothing more than a reference to similar assertions made to the Court by the Foundation, regarding the production of documents. In my view, this is not sufficient to establish the reasonable expectation of the harms contemplated by section 17(1)(a) or (c).

The AGO's representations also referred to "similar information no longer being supplied", which appears to raise the possible application of section 17(1)(b). However, I have not been provided with any specific information in this regard and in my view the applicability of section 17(1)(b) has not been established.

Accordingly, part three of the test has not been met for any of the records and parts of records which have been withheld from disclosure, and none of them qualifies for exemption under section 17(1).

ORDER:

1. I order the Ministry to disclose all the withheld parts of the records (except those parts of Record 17b for which the Ministry relied on section 21(1) to deny access), in their entirety, to the appellant within thirty-five (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 reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
John Higgins
Inquiry Officer

July 20, 1994