



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-777

Appeal P-9400152

Ministry of Citizenship



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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 requester asked the Ministry of Citizenship (the Ministry) to receive access to background materials relating to a decision to make a monetary grant to a named organization (the organization). This grant was made under the Ministry's Anti-Racism Operational Funding Program (AROFP).

The Ministry identified a total of 27 records that were responsive to the request and disclosed 14 of these documents to the requester in their entirety. The Ministry denied access to the remaining 13 records, either in whole or in part, based on the following exemptions contained in the Act:

- third party information - section 17(1)
- invasion of privacy - section 21(1)

The requester appealed this decision to the Commissioner's office.

The appellant subsequently indicated that she would be prepared to restrict her appeal to nine of the records that were originally at issue. In addition, the appellant indicated that she had no interest in obtaining access to the personal information of other individuals contained in the records.

A Notice of Inquiry was provided to the parties to the appeal including the organization which obtained the grant. Representations were received from all parties. In its submissions, the organization consented to the release of Record 20 in its entirety and to page 1 of Record 1. The Ministry should, therefore, disclose these materials to the appellant.

A general description of the eight records which remain at issue in this appeal is contained in Appendix "A" which is attached to this order.

DISCUSSION:

THE RAISING OF A DISCRETIONARY EXEMPTION BY A THIRD PARTY

In its representations, the organization submits that Record 12 should be exempt from disclosure under the discretionary exemption contained in section 18(1)(d) of the Act (damage to the financial interests of the Government of Ontario).

As a general rule, the responsibility rests with a Ministry to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by a Ministry during the course of an appeal. This result would occur, for example, where the release of a record would seriously jeopardize the rights of a third party.

In my view, however, this appeal does not represent a situation where a discretionary exemption not originally raised by a Ministry should be considered. Accordingly, I am not prepared to apply section 18(1)(d) in the circumstances of this appeal.

INVASION OF PRIVACY

As indicated previously, the appellant has indicated that she does not wish to receive any personal information contained in the records which relates to other individuals. This information (which I have highlighted in yellow on the copy of the records to be provided to the Ministry's Freedom of Information and Privacy Co-ordinator) appears on pages 5, 6, 7 and 11 of Record 3(e). The passages in question must not be released to the appellant.

THIRD PARTY INFORMATION

The Ministry and the organization claim that sections 17(1)(a), (b) and (c) of the Act apply to each of the eight records at issue. For a document to qualify for exemption under this provision, the Ministry and/or the organization 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 sections 17(1)(a), (b) or (c) will occur.

I will first consider the third part of the test and then go on to consider the first and the second components.

Part Three of the Test

To satisfy this component of the test, the Ministry and/or the organization must describe a set of facts or circumstances that would lead to a reasonable expectation that one of the harms described in section 17(1) will occur if the information contained in the records is released. The evidence which is presented to establish this connection must be clear and convincing.

In her representations, the appellant states that the information should be disclosed so that an average citizen can judge the basis on which the grant was made, whether the grant fits the goals of the AROFP program and finally whether the organization has applied the monies in accordance with the goals set out in the grant.

In its representations, the organization points out that the strategies outlined in its proposal were developed to combat a new and pernicious form of racism. It then argues that these approaches would be undermined if groups which promote racism are forewarned of them. In the context of section 17(1), the argument is that the release of this information would cause undue loss to the organization.

In general terms, this would be an argument with considerable persuasive value. I would note, however, that several weeks after the organization submitted its representations to the Commissioner's office, it made a public announcement regarding the parameters of the strategy. On this basis, I cannot conclude that the release of information in the records which essentially elaborates on these strategies would cause the organization undue loss or jeopardise the work that it is undertaking.

The organization also submits that the disclosure of its research methodology would confer an unfair advantage on other human rights groups which compete for scarce public funding. More particularly, the organization suggests that these groups could bring forward similar strategies without having to invest in the substantial research necessary to develop these products.

I have carefully reflected on this submission. My conclusion, however, is that the organization has not provided me with sufficient evidence to establish that this result will likely occur if the materials in question are released.

The organization also takes the position that the disclosure of its fund-raising strategies, which it considers to be unique, would significantly prejudice its competitive position under section 17(1)(a) of the Act and result in undue loss to the group under section 17(1)(c) of the Act.

In applying for this grant, the organization has been required to provide the Ministry with detailed information about its funding sources. This information is found on page 6 of Record 3(a), page 2 of Record 3(b) and pages 8 and 9 of Record 3(e). In my view, the release of this information is not necessary to public scrutinize the grants program. In addition, I am persuaded that such disclosure would significantly damage the organization's competitive position under section 17(1)(a) of the Act. I have highlighted the information which falls into this category in blue on the copy of the records which has been provided to the Ministry's Freedom of Information and Privacy Co-ordinator.

Finally, the organization advances an argument under section 17(1)(b) of the Act. It submits that the public disclosure of the information provided by anti-racist groups to the Ministry would result in similar information no longer being supplied to this institution. The organization emphasizes, in this respect, that informants universally require assurances that both their identities and the information which they supply will be held in strict confidence. The organization submits that, absent such assurances, these sources will be reluctant to share such information with the organization or with the Ministry.

I appreciate the organization's concern. I also wish to point out that there exist specific exemptions in the Act to address this issue (e.g. those dealing with confidential sources and the invasion of privacy). I have carefully reviewed the records at issue in this appeal and find that they do not contain any information which

may be attributable to an identifiable source. On the strength of the arguments presented, I find that the section 17(1)(b) exemption does not apply to the records in question.

To summarize, with the exception of the highlighted portions of Records 3(a), 3(b) and 3(e), the remaining parts of the records do not satisfy part three of the 17(1) test and must, therefore, be released to the appellant.

I must now determine whether the highlighted portions of these three records also qualify for exemption under the first and second parts of the section 17(1) test.

Parts One and Two of the Test

I have carefully reviewed the highlighted parts of the three records and find that they contain financial information for the purposes of part one of section 17(1).

To satisfy part two of the test, the Ministry and/or the organization must establish that the information contained in the records was **supplied** to the Ministry and secondly that such information was supplied **in confidence** either implicitly or explicitly.

Based on my review of Records 3(a), 3(b) and 3(e), I find that the information contained in each of these documents was supplied to the Ministry by the organization. I must now determine whether this information was supplied in confidence.

Neither the Ministry nor the organization has argued that the documents provided to the Ministry were supplied with an explicit understanding of confidentiality. In its representations, however, the organization states that it assumed, when applying for the grant, that the information would be held in confidence. The Ministry states that it supports the organization's position on this issue.

The status of the information supplied by the organization is dealt with on page 7 of Record 3(a) which is entitled "Application for Anti-Racism Operational Funding Program". In very small print, condition 11 of the application provides that:

The Applicant/Recipient consents to the release of information contained in its Application and in any reports submitted under these terms and conditions all pursuant to section 17(3) of the Freedom of Information and Protection of Privacy Act 1987.

Section 17(3) of the Act provides that an institution **may** disclose a record described in section 17(1) if the party to whom it relates consents to this disclosure.

While there is no doubt that the term in question is found in the application, I believe that the Ministry has not taken sufficient steps to bring the significance of this provision to the attention of the organization. Nor do I believe that the organization was aware of its implications at the time that the form was sent to the

Ministry. Finally, I find it significant that the Ministry accepts that the organization was justified in believing that the information which it provided would be held in confidence.

I have carefully reflected on the facts of this case, including the nature of the financial information which remains at issue and the circumstances surrounding its provision to the Ministry. Based on the evidence before me, I have concluded that this information was supplied to the Ministry with an implicit expectation of confidentiality. On this basis the second part of the section 17(1) test has been satisfied.

The result is that only the highlighted portions of Records 3(a), 3(b) and 3(e) are exempt from disclosure under section 17(1) of the Act.

ORDER:

1. I uphold the decision of the Ministry not to disclose those portions of Records 3(a), 3(b) and 3(e) which have been highlighted in various colours on the copy of the records which has been provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose to the appellant Records 1, 3(c), 12, 14, 20 and 21 and page 6 of Record 3(e) in their entirety and the non-highlighted portions of page 6 of Record 3(a), page 2 of Record 3(b) and pages 5, 7-9 and 11 of Record 3(e) within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
3. 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 2.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ October 13, 1994

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD AND PAGE NUMBER	DESCRIPTION	DISPOSITION
Record 1	Consultant's review of the funding proposal made by the organization	Disclosed
Record 3(a) (page 6 only)	"Budget" page of the "Application for the Anti-Racism Operational Funding Program"	Disclosed in part
Record 3(b)	Summary of the funding proposal	Disclosed in part
Record 3(c)	Budget for the organization	Disclosed
Record 3(e)	A description of the make-up and activities of the organization	Disclosed in part
Record 12	Covering letter sent with the proposal by the organization	Disclosed
Record 14	Proposed criteria for program effectiveness	Disclosed
Record 21	Letter from the organization to the Ministry	Disclosed