



Information and Privacy
Commissioner/Ontario

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

ORDER P-839

Appeal P-9400200

Ministry of Economic Development and Trade



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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 Ministry of Economic Development and Trade and the Ministry of Natural Resources each received the same seven-part request for access to records relating to two named companies. The first two parts of the request were directed to the Ministry of Natural Resources and are not included in the issues addressed in this order.

The Ministry of Economic Development and Trade (the Ministry) addressed the remaining portions of the request for records pertaining to security interests held by or on behalf of the Northern Ontario Development Corporation (the NODC) or the Ontario Development Corporation (the ODC) in two named companies. For ease of reference and because the two companies are related and the responsive records are the same, I will hereafter refer to the two named companies as the Company.

The requester is another lumber company operating in the same area. The request is for information about the financial assistance given in the form of loans and guarantees given by the ODC and the NODC to the Company. Due to the nature of the request, the records also include information relating to the financial security held by other financial institutions and span a period of almost twenty years from 1977 to 1993.

The Ministry identified numerous records responsive to the request and granted partial access to the records. The Ministry also indicated that disclosure of the remaining records may affect the interests of the Company and certain lending institutions (the affected parties). The Ministry notified the Company and the affected parties of the request and asked for representations regarding disclosure. Because the Company and the affected parties objected to the disclosure of the remaining records, the Ministry denied access to these records. The requester appealed the decision to deny access.

The records to which the Ministry has denied access are listed in Appendix "A" to this order. The records consist of loan and guarantee agreements and amendments thereto, legal opinions, guarantees, correspondence and internal memoranda related to the financing provided to the Company and to the subsequent realization of this security by the NODC and the ODC.

The Ministry relies on the following exemption in denying access to the records:

- third party information - section 17(1)

Notices of Inquiry were provided to the appellant, the Ministry, the Company and the affected parties. Representations were received from the appellant, the Ministry, the Company and one of the affected parties.

DISCUSSION:

THIRD PARTY INFORMATION

For ease of reference and for the purpose of analysis, I have separated the records into the following categories:

Category A includes documents such as Offers of Loan and Offers of Guarantees, Guarantee Agreements, Loan Agreements and amendments by way of Notice of Change:

Records 1, 2, 3, 6, 10, 11, 13, 15, 16, 24, 27, 29, 30, 31, 37, 46, 59, 60, 63, 65, 69, 71, 72, 78, 80, 86, 89, 90, 91 and 92.

Category B includes documents such as internal memoranda, correspondence from the ODC or the NODC and other correspondence:

Records 49, 55, 76, 77, 82, 88, 97, 100, 102, 104, 108, 109, 110, 111, 112, 119, 121, 123, 129, 131, 132, 133, 134, 139, 140 and 141.

Category C includes Assignments, Guarantees, legal opinions, corporate resolutions and correspondence:

Records 4, 5, 7, 8, 9, 12, 14, 28, 32, 33, 34, 35, 39, 41, 42, 43, 47, 48, 50, 51, 54, 56, 61, 62, 64, 66, 67, 68, 73, 74, 75, 79, 84, 87, 93, 94, 95, 96, 98, 99, 115, 118, 128, 130, 136, 137, 138, 142 and 143.

The Ministry, the Company and the affected parties claim that sections 17(1)(a), (b) and/or (c) of the Act apply to the records. For a document to qualify for exemption under this provision, the Ministry and/or the Company and the affected parties 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.

In its representations, the Ministry indicates that it supports and relies on the representations of the Company and the affected party regarding the application of section 17(1) of the Act to the records.

Part One of the Test

The Company and the affected party submit that the records contain commercial and financial information. I have reviewed the information in all the records. All the records relate to the financial assistance provided to the Company for its business undertaking and the security given by the Company. I am satisfied that it qualifies as financial and/or commercial information. I find that part one of the test has been satisfied with respect to all of the records.

Part Two of the Test

For the second part of the section 17(1) test to be satisfied, the records must have been supplied to the Ministry by the affected parties, either explicitly or implicitly in confidence.

I will first consider the "supplied" part of this test.

In their representations, both the Company and the affected party submit that the records were supplied to the Ministry.

Previous orders have addressed the question of whether the information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the third party. Since the information contained in an agreement is typically the product of an negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act.

Other orders have also determined that information contained in a record would reveal information "supplied" within the meaning of section 17(1), if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-472 and P-765). I adopt both of the principles enunciated in the above orders for the purposes of this appeal.

Neither the Company nor the affected party have provided me with any evidence to show which portions, if any, of these records contains information that was supplied **by** the company or the affected party **to** the Ministry or in the alternative, how disclosure of any part of the record would reveal information that was actually supplied to the Ministry. I have not been provided with any evidence to show that the figures and other data contained in the records are the same as those actually provided to the Ministry. Accordingly, I can only conclude that the information in the records listed in Category A is the product of terms and conditions negotiated between the parties. Accordingly, the information in these records is not "supplied" to the Ministry for the purposes of section 17(1).

I note that some of the records listed in Category B are internal memoranda of the ODC and the NODC, correspondence from its own legal counsel to the ODC and correspondence of the ODC and the NODC with respect to negotiations for the realization of its security and that of the affected party. Again, I have not been provided with any evidence to show why or how the particular information contained in these records was "supplied" by the Company or the affected party to the Ministry within the context of section 17(1) of the Act. In my view, the records in Category B are not supplied to the Ministry and do not meet this part of the section 17(1) test.

I have reviewed the records in Category C and, in my view, the nature of the records is such that they would have been prepared specifically for provision to the Ministry. I am satisfied that these records contain information that was "supplied" to the Ministry, by the Company and/or the affected parties, to enable the NODC and the ODC to properly assess the Company's request for financial assistance, to ensure proper security for its funding and subsequently to properly assess the best methods for realizing on its security. In my view, the "supplied" part of the test has been met with respect to those records listed in Category C.

As I have noted above, failure to satisfy the requirements of any part of the test will render the section 17(1)

claim invalid. I have found that the records listed in Categories A and B do not meet part two of the test and I will, therefore, not consider Categories A and B further.

I will now consider whether the records in Category C were supplied **in confidence, explicitly or implicitly**.

None of the Ministry, the companies or the affected companies argue that the records were supplied explicitly in confidence. There is nothing on the face of the records to indicate that this was the case.

The position of the Company and the affected party is that the records were supplied to the Ministry implicitly in confidence. The Company points out that in any dealing with the NODC and the ODC (as with other lending institutions), there was an expectation that the records would be held in confidence and that this expectation is reasonable. The affected party submits that the records concern information related to the settlement and realization of security and were supplied in confidence; that such records have always been treated as confidential in the past and there was a legitimate expectation that this practice would continue.

I have carefully considered the evidence before me and the representations of the Company and the affected party. I accept that there was an expectation that the information in the records would be held in confidence and that this expectation was reasonable, in a business setting. I find, therefore, that part two of the section 17(1) test has been met with respect to the records listed in Category C.

Part Three of the Test

To satisfy this component of the test, the Ministry and/or the Company and/or the affected parties 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 in the records is disclosed. The evidence which is presented to establish this connection must be clear and convincing.

As noted above, the Ministry states that it relies on the representations of the Company and the affected parties.

The Company states that it is a small company and disclosure of the information in the records could enable a larger competitor to benefit by creating negative publicity. While I recognize that this could be a valid concern in a competitive market, I have not been provided with clear and convincing evidence that disclosure of the information in the records would actually result in the harms contemplated under sections 17(1)(a), (b) and/or (c).

The affected party submits that the information in the records was supplied, in confidence, to the ODC, as between lending institutions. It states that disclosure of this information would make it necessary for it to reconsider this practice and may result in this type of information no longer being available to the ODC.

In my opinion, it is in the public interest that this type of information continue to be available to the ODC and the NODC to assist in making decisions about the financial status of businesses. However, I find that it is only the information contained in Records 28, 32, 62, 87, 99, 137 and 143 that falls within this ambit and,

therefore, satisfies the harms test set in section 17(1)(b) of the Act. In addition, I find that disclosure of the information in Record 12 would lead to a reasonable expectation of the harm described in section 17(1)(c) of the Act.

Accordingly, I find that Records 12, 28, 32, 62, 87, 99, 137 and 143 qualify for exemption under section 17(1) of the Act. I find that the remaining records should be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 12, 28, 32, 62, 87, 99, 137 and 143.
2. I order the Ministry to disclose the remaining records as listed in Appendix "A" (with the exception of Records 12, 28, 32, 62, 87, 99, 137 and 143) to the appellant 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: _____
Mumtaz Jiwan
Inquiry Officer

January 18, 1995

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD	DESCRIPTION	NO. OF PAGES
1	Letter from NODC dated May 10, 1977	2
2	Loan Agreement dated May 4, 1977	1
3	Notice of Change #1 dated June 9, 1977	2
4	Resolution of Directors dated June 23, 1977	1
5	Letter to ODC dated July 6, 1977	4
6	Notice of Change #2 dated July 11, 1977	2
7	Letter of opinion to ODC dated July 27, 1977	3
8	Letter to ODC dated August 11, 1977	1
9	Letter to ODC dated August 15, 1977	1
10	Notice of Change #3 dated August 24, 1977	2
11	Notice of Change #4 dated July 3, 1979	2
12	Guarantee dated November 30, 1980	3
13	Notice of Change #5 dated May 22, 1981	2
14	Letter to ODC dated September 24, 1982	1
15	Letter to ODC dated October 8, 1992	5
16	Notice of Change #6 dated October 22, 1982	2
24	Notice of Change #7 dated May 6, 1985	2
27	Letter from ODC dated October 22, 1987	4
28	Letter dated April 11, 1988	13
29	Notice of Change #1 dated June 2, 1988	4

RECORD	DESCRIPTION	NO. OF PAGES
30	Guarantee dated June 10, 1988	14
31	Financial Assistance Agreement dated June 10, 1988	9
32	Letter dated June 14, 1988	4
33	Resolution of Directors dated July 11, 1988	1
34	Resolution of Directors dated July 11, 1988	1
35	Guarantee dated July 11, 1988	2
37	Guarantee dated August 2, 1988	13
39	Letter to NODC dated August 24, 1988	1
41	Letter to ODC dated September 22, 1988	5
42	Letter to ODC dated September 22, 1988	2
43	Letter to ODC dated October 4, 1988	4
46	Notice of Change #2 dated November 23, 1988	3
47	Letter to NODC dated November 28, 1988	1
48	Letter to NODC dated November 30, 1988	2
49	Letter from NODC dated December 2, 1988	1
50	Letter to NODC dated December 2, 1988	2
51	Letter dated December 2, 1988	2
54	Letter to ODC dated December 13, 1988	5
55	Letter from NODC dated December 16, 1988	1
56	Letter to ODC dated December 20, 1988	1
59	Notice of Change #1 dated February 19, 1990	2
60	Notice of Change #9 dated February 19, 1990	2
61	Letter to ODC dated February 27, 1990	1
62	Letter to ODC dated February 27, 1990	14
63	Loan Agreement dated June 4, 1990	10

RECORD	DESCRIPTION	NO. OF PAGES
64	Guarantee dated June 12, 1990	3
65	Letter to ODC dated June 13, 1990	6
66	Resolution of Directors dated June 12, 1990	1
67	Resolution of Directors dated June 12, 1990	1
68	Letter to ODC dated August 1, 1990	13
69	Letter from ODC dated September 6, 1990	1
71	Letter from NODC dated December 19, 1990	6
72	Loan Agreement dated December 17, 1990	9
73	Resolution of Directors dated December 21, 1990	1
74	Resolution of Directors dated December 21, 1990	1
75	Guarantee dated December 21, 1990	2
76	Letter from NODC dated January 17, 1991	1
77	Letter from NODC dated January 17, 1991	1
78	Notice of Change #3 dated January 18, 1991	2
79	Letter to NODC dated February 14, 1991	13
80	Priority Agreement Draft dated February 27, 1991	9
82	NODC internal memorandum dated March 11, 1991	1
84	Letter to ODC dated March 19, 1991	2
86	Notice of Change #7 dated March 22, 1991	2
87	Letter to ODC dated March 26, 1991	2
88	Letter dated July 8, 1991	2
89	Notice of Change #1 dated August 27, 1991	2
90	Notice of Change #2 dated August 27, 1991	1
91	Letter from NODC dated July 22, 1991	5

RECORD	DESCRIPTION	NO. OF PAGES
92	Loan Agreement dated September 5, 1991	11
93	Resolution of Directors dated September 5, 1991	1
94	Assignment dated September 1991	1
95	Letter to NODC dated September 18, 1991	19
96	Letter to NODC dated September 20, 1991	9
97	ODC internal memorandum dated January 14, 1992	7
98	Letter to NODC dated January 20, 1992	2
99	Letter to NODC dated January 21, 1992	5
100	Letter dated February 18, 1992	8
102	Letter from ODC dated February 28, 1992	1
103	Letter from ODC dated April 13, 1992	1
104	Letter from ODC dated June 25, 1992	1
108	Letter from ODC dated September 21, 1992	1
109	Letter from ODC dated September 25, 1992	1
110	Letter from ODC dated September 25, 1992	1
111	Letter from ODC dated September 25, 1992	1
112	Letter from ODC dated September 25, 1992	1
115	Letter to ODC dated October 5, 1992	1
118	Letter to NODC dated December 1, 1992	1
119	Letter from ODC dated January 29, 1993	1
121	ODC internal memorandum dated February 9, 1993	1
123	Fax sheet from ODC dated February 19, 1993	1
128	Letter to ODC dated March 12, 1993	2
129	Letter from ODC dated March 18, 1993	1
130	Letter to ODC dated March 25, 1993	1

RECORD	DESCRIPTION	NO. OF PAGES
131	Notice of Sale dated April 23, 1993	2
132	Notice Pursuant to section 63(5) of the PPSA dated April 26, 1993	3
133	Assignment of Loan Agreement and Debentures dated May 1993	2
134	Assignment of Debenture dated May 6, 1993	1
136	Statutory Declaration dated May 7, 1993	1
137	Letter to NODC dated May 10, 1993	1
138	Letter to ODC dated May 12, 1993	1
139	Letter from ODC dated May 14, 1993	1
140	Letter to ODC dated May 19, 1993	2
141	Letter from ODC dated May 21, 1993	1
142	Letter to ODC dated June 1, 1993	1
143	Letter to NODC dated June 23, 1993	2