



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

ORDER P-807

Appeal P-9400340

Ministry of Health



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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 Health (the Ministry) received a request for access to an agreement between a named laboratory (the Laboratory) and the Ministry, resulting from a specific Request For Proposal (the RFP) for the supply of vaccine and related products. The Ministry notified the Laboratory of the request pursuant to section 28 of the Act. The Laboratory objected to the disclosure of certain portions of the agreement.

The Ministry granted partial access to the agreement. The agreement refers to the RFP as the attached Schedule A. The RFP was previously disclosed to the requester. The Ministry denied access to the balance of the agreement (the record) on the basis of the following exemption:

- third party information - section 17(1)

The requester appealed the decision of the Ministry.

A Notice of Inquiry was provided to the appellant, the Ministry and the Laboratory. Representations were received from all parties.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry and the Laboratory claim that sections 17(1)(a) and (c) of the Act apply to the information in the record. For a record to qualify for exemption under these provisions, the Ministry and/or the Laboratory 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) or (c) of subsection 17(1) will occur.

Part One

I have carefully reviewed the information in the record. It relates to the sale and supply of products and services by the Laboratory to the Ministry and qualifies as commercial information. Some of this information is the actual cost of products and therefore, also qualifies as financial information. In my view, the information in the record is commercial and/or financial information for the purposes of the section 17(1) test. The first part of the test has been met.

Part Two

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

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 in an agreement is typically the product of a negotiation process between the institution and the third party, that information will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act.

In the present case, the Ministry has advised that the contract was a "single source" contract. The Ministry states that in such contracts, negotiation, if any, is minimal. The Ministry explains that the contract contains information that reflects the broad parameters of the RFP already disclosed to the appellant. The contract also contains the specific details of the terms and conditions offered by the Laboratory to the Ministry. In its representations, the Laboratory submits that disclosure of the information in the record would reveal unique proposals, terms and conditions that were developed solely for the Ministry and that are not standard in the industry. The Laboratory claims that the information in the record is not the result of a negotiating process but constitutes terms and conditions actually supplied by the Laboratory to the Ministry.

I have carefully reviewed the information in the record and the representations of the Ministry and the Laboratory. I accept that most of the information in the record is information that was supplied by the Laboratory to the Ministry. However, there is some information which, in my view, does not fall within this ambit. I have highlighted in blue, the part of the record that, in my view, was not supplied for the purposes of the section 17(1) test. I have highlighted in yellow the part of the record that was supplied.

I will now consider whether the portions I have highlighted in yellow were supplied to the Ministry in confidence, either explicitly or implicitly. This requires the Laboratory to demonstrate that there was a reasonable expectation of confidentiality at the time that it supplied the information and that the expectation must have an objective basis.

There is nothing on the face of the record to indicate that it was supplied explicitly in confidence. The Laboratory points out that because of the unique nature of the proposals and conditions contained in the record and because the terms and conditions were developed solely for the Ministry, there was an implicit expectation of confidentiality and that this expectation was reasonable. The Ministry supports the position of the Laboratory.

I am satisfied that the information in the record was supplied to the Ministry by the Laboratory implicitly in confidence. Part two of the section 17(1) test has been met.

Part Three

To satisfy this part of the test, the Ministry and/or the Laboratory must describe a set of facts and circumstances which would lead to a reasonable expectation that one or more of the harms described in section 17(1)(a) or (c) will occur if the information is disclosed (Order 36). The evidence which is presented to establish this connection must be clear and convincing.

The Laboratory has provided detailed representations relating to each portion of the record which has been withheld. In essence, it submits that the record contains unique terms and conditions developed for the Ministry in response to the RFP. The Laboratory states that disclosure of this information would provide its competitors with the precise detailed information necessary to match or better the terms offered by the Laboratory to the Ministry when bidding for the Ministry's business in the future. Disclosure of the information would also interfere with the Laboratory's negotiations with its other customers who will insist on receiving the same favourable terms.

Having carefully reviewed the information in the agreement and the representations, I am satisfied that I have been presented with sufficient evidence to conclude that disclosure of the yellow highlighted parts of the record could reasonably be expected to prejudice significantly the competitive position of or interfere significantly with the contractual negotiations of the Laboratory (section 17(1)(a)) and result in undue loss to the Laboratory or undue gain to its competitors (section 17(1)(c)).

I find that all three parts of the section 17(1) test have been met with respect to the information highlighted in yellow which is properly exempt from disclosure. The parts of the record highlighted in blue should be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

In his representations, the appellant has indirectly claimed that a public interest exists in the disclosure of the record (section 23 of the Act). The appellant states that information about government expenditures such as the purchase contract with the laboratory should be disclosed to ensure government accountability and the prudent use of public funds.

Previous orders have established that in order to satisfy the requirement of section 23, there must be a **compelling** public interest in disclosure and this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Orders P-512 and P-607). In my view, the purpose of the section 17(1) exemption is the protection of third party information supplied to the Ministry in confidence so that the third party interests will not be harmed by disclosure.

In the circumstances of this case, there is no evidence that a **compelling** public interest exists in the disclosure of the information sufficient to outweigh the **purpose** of the exemption under section 17(1) of the Act. I find that section 23 of the Act is not applicable to this appeal.

ORDER:

1. I order the Ministry to disclose to the appellant those parts of the record that I have highlighted in blue on the copy of the record which has been provided to the Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose the information referred to in Provision 1 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. I uphold the Ministry's decision to deny access to the remaining portions of the record, which are highlighted in yellow.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the portions of the record disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ December 1, 1994