



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

ORDER P-1074

Appeal P-9500402

Ministry of Education and Training



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NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Education and Training (the Ministry) for access to information from the Ministry's jobsOntario file. The file related to a Local of an identified union (the Union). In his request, the appellant indicated that he sought access to the contract that delegates the Union special broker status for jobsOntario, the funding provided to the Union to date, how the balance of the disbursements would be paid and the identity of the signing individuals at the Ministry and the Union.

The Ministry responded to the request by providing the appellant with the funding information, and the name of the Union contact. This information was not located in a record, but provided to the appellant in the Ministry's decision letter.

The Ministry also identified one document, a contract signed on March 31, 1995, between the Ministry and the Union as being the only record responsive to the request. The Ministry released most of this document to the appellant. Certain portions were withheld on the basis of the exemption contained in section 17(1) of the Act, third party information.

The appellant objected to the denial of access and also maintained that more responsive records existed. He appealed the Ministry's decision on these two grounds.

During mediation, the appellant raised a number of points related to his assertion that more responsive records exist. The Ministry was requested to perform another search for records responsive to the request. The Ministry located ten categories of additional records in its jobsOntario Union file. However, the Ministry maintained that it had initially provided the appellant with all of the information he had sought, as it had clarified the request and was of the view that the appellant only sought access to the contract, the funding information and the identity of the signatories to the contract. Thus, the Ministry advised that if the appellant wished to access any of the additional records it had located, he should submit a new request under the Act. The appellant maintained that these additional records were responsive to his original request.

Thus, the issues which arise in this appeal are as follows:

- (1) Whether the appellant and the Ministry fulfilled their respective obligations regarding the nature of the request and clarification thereof under sections 24(1) and (2) of the Act; and
- (2) Whether the Ministry properly applied the exemption in section 17(1) of the Act to withhold certain portions of the contract.

A Notice of Inquiry was sent to the Ministry, the appellant and the Union. Representations were received from the Ministry and the Union.

DISCUSSION:

OBLIGATIONS OF THE MINISTRY AND THE APPELLANT

Both a requester and an institution have certain obligations with respect to access requests under the Act. These obligations are set out in section 24 with respect to general access requests, such as the one at issue. Section 24 states:

- (1) A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

It is the position of the Ministry that some of the questions now being posed by the appellant are being used to broaden the scope of the original request and that some are, in fact, beyond the scope of the Act. Therefore, it states that the appellant failed to fulfill his obligations under section 24(1) in that he did not provide the Ministry with sufficient detail regarding his request to enable the Ministry to identify records in addition to those it has already disclosed to him. Conversely, the Ministry maintains that it has fulfilled its obligations under section 24(2) to clarify the request with the appellant.

In order to resolve this issue, I will review the communications between the appellant and the Ministry as related to the nature of the request. I note that it would have been extremely helpful to have representations from the appellant on this issue.

The Ministry states that the appellant initially called its Freedom of Information and Privacy Co-ordinator to inquire about receiving a copy of the contract. He was told that he could request this document under the Act, which he subsequently did in writing. The Ministry states that, as a result of this initial contact, it understood that the appellant was seeking access to the contract. The Ministry further submits that, when it received the written request, with its emphasis on the contract and the funding, it confirmed that the requested record was the contract and the funding figure.

As the wording of the request is germane to my determination of the issues under section 24, I will reproduce the relevant parts:

....

I request information from the Jobs Ontario file, representing Local Union [named union and old and new addresses]

My request regards **mainly the contract that exists**, that delegates this Union Organization a special Broker status, for Jobs Ontario.

My concerns at this time regard the **Ministry's requirements** and or demands to establish this relationship, and the response from [the Union] that resulted in this organization being acceptable as a **Special Broker**. What responsibilities are expected from a Special Broker status.

Funding that has been forwarded to date, or funds that are expected to be forwarded, to complete the present contract, if the Contract is closed, or open, and on going.

Contact person at the Ministry, Contact person or persons at the [Union] office. I consider contact person to be signing person, or persons. [all original emphasis and punctuation]

The Ministry's position is that because the portions of the request related to the "contract", "funding" and "contact person" were bolded and underlined, these three pieces of information defined the scope of the request. As I have previously indicated, the Ministry made a decision on these items when it initially responded to the request.

Although there are two other portions of the request that have the same emphasis, "Ministry's requirements" and "Special Broker", the Ministry takes the position that:

The statement that the appellant made about his concerns were never considered or thought of as requests for records. Therefore, the Ministry was under no obligation to lead or suggest documents to the appellant. The contract document was the record that addressed the responsibilities between the parties.

This is a difficult case in which it appears that both parties, the Ministry and the appellant, believed they had fulfilled their obligations under the Act. The appellant believed that his request was sufficiently clear to enable the Ministry to identify the responsive records. It is his view that the additional documents located in the Union jobsOntario file are responsive to his request.

Conversely, the Ministry believes that it was under no obligation to assist the appellant in clarifying the request as it sufficiently described the record sought, the contract, and the funding and contact person information.

Based on the information before me, I conclude that the Ministry satisfied its obligations under section 24(2) of the Act. The appellant's request did not indicate that he was seeking access to the entire Union jobsOntario file. It did not state that the specific information requested (that which was bolded and underlined) constituted examples of the information or records included in the file to which he sought access. In these circumstances, and based on the information provided by the Ministry concerning the Co-ordinator's telephone conversation with the appellant, I find that the Ministry was under no obligation to seek clarification of the request from the appellant. I would again emphasize, however, that in deciding this issue I would have been greatly assisted by submissions from the appellant on this point.

However, it appears that the appellant now seeks access to the ten categories of records located in the Union file described in the Ministry's letter of August 25, 1995. This letter was subsequently forwarded to the appellant. In these circumstances, I believe that the most expeditious resolution of this matter is for the appellant to contact the Ministry to confirm which category or categories of records described in the Ministry's August 25th letter are of interest to him. I will order the Ministry to make an access decision with respect to the documents identified by the appellant. The details of this process are set out in the order provisions at the end of this order.

THIRD PARTY INFORMATION

The Ministry has withheld the following portions of the contract under section 17(1) of the Act:

- (1) The numerical entries in Schedule A, the Sectoral Broker's Budget; and
- (2) Schedule B, the Workplan, in its entirety.

Section 17(1) of the Act states:

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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the Ministry and/or the Union 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), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Part One

The Ministry maintains that the budget estimates as well as the Workplan constitute financial and commercial information. Having reviewed the information, I find that it constitutes commercial information in that it relates to the costs and details of providing the services outlined in the project proposed by the Union as part of the jobsOntario program.

Part Two

In order to satisfy part two of the test, the Ministry and/or the Union must demonstrate that the information has been provided to the Ministry, either explicitly or implicitly in confidence.

The Ministry states that the Union provided it with the figures contained in the budget, as well as the details of the Workplan. There is nothing on the face of the contract, or any part of it, to indicate that it was provided explicitly in confidence. However, the Ministry states that it has consistently treated such information as confidential. In these circumstances, I believe that the Union held a reasonable expectation that the confidentiality of its budget estimates and Workplan would be maintained. I find, therefore, that the information was provided to the Ministry by the Union implicitly in confidence. Thus, part two of the section 17(1) test has been met.

Part Three

Section 17(1)(a)

The Ministry submits that disclosure of the information could interfere significantly with the contractual negotiations of the Union, the harms described in section 17(1)(a) of the Act. To support this assertion, the Ministry maintains that this would result in injury to the Union, which is in the middle of a funding contract. However, the Ministry has provided no evidence to explain how, and in what manner, such interference could occur.

The Ministry also claims that this interference would result in injury to the Ministry as it would not be able to continue the program. However, the exemption claimed by the Ministry to withhold this information, section 17(1), is designed to protect the interests of third parties, such as the Union, not the Ministry itself. The Ministry appears to recognize this distinction in that it states in its submissions:

The Ministry also submits that although it has not invoked section 18 (ECONOMIC AND OTHER INTERESTS OF ONTARIO) of the ACT, this exemption should be considered in reviewing this submission.

As the Ministry indicates, it has never claimed that section 18(1) applies to the information at issue. As this is a discretionary exemption, I am of the view that I have no jurisdiction to consider its application.

Moreover, even if I were to consider it, the Ministry has provided no evidence of its application to the facts of this case.

Thus, I find that the Ministry has not provided sufficient evidence to allow me to conclude that disclosure of the information could reasonably be expected to interfere significantly with the contractual or other negotiations of the Union.

Section 17(1)(b)

The Ministry also submits that disclosure of the information would result in “impeding the supply of similar information” and thus claims that section 17(1)(b) applies. In order to substantiate the harms mentioned in this section, two requirements must be met. First, it must be established that disclosure could reasonably be expected to “result in similar information no longer being supplied to the Ministry”. In addition, it must be in the public interest that such information continue to be supplied to the Ministry.

In its representations, the Ministry sets out the objectives of the jobsOntario program and indicates that in order for the program to continue, the groups which carry out the program, such as the Union, need to be assured that their information will not be disclosed. Finally, the Ministry submits that it is in the public interest that this information continue to be supplied and the program maintained.

Firstly, I note that the Ministry has provided no evidence to indicate that the brokers, such as the Union, have a concern about the confidentiality of the information at issue in this appeal. The Union has provided no submissions on this issue.

Although I have previously found that the Union provided the information to the Ministry implicitly in confidence, there is a clause in the contract, entitled “Confidentiality” which states:

Subject to the Freedom of Information and Protection of Privacy Act. (Called FOI Act in this section), information pertaining to this agreement may be public information and may be released by **jobsOntario** Training to third parties upon request to **jobsOntario** Training.

Thus, although it may be reasonable for the Union to expect that such information will be held in confidence, the clause in the contract clearly provides for disclosure in certain circumstances, such as in response to requests made under the Act. Thus brokers who provide the information know that it may be disclosed. Therefore, in the absence of any demonstrated concerns about disclosure or, for example, about a program which was discontinued because of such concerns, I do not find that, in this case, it could reasonably be expected that brokers would no longer supply similar information to the Ministry. Thus, the first requirement under section 17(1)(b) has not been met and I need not consider the second.

Section 17(1)(c)

The harms described in this section require that disclosure of the information could reasonably be expected to “result in undue loss or gain to any person, group, committee or financial institution or agency”.

The Union’s submissions apparently relate to this concern. It is clear from these submissions that the Union is aware of the identity of the appellant. The Union has included, as part of its representations, copies of correspondence exchanged between the appellant and various officers of its organization. The Union states that it is its opinion that the appellant will use the information to discredit its officers or to allege some impropriety to bring a case before the Labour Board. The Union submits that this will be costly financially to the Union as well as potentially damaging the credibility of both the Union and its officers and staff.

These representations emphasize the **possible use** which the Union suggests the appellant will make of the information if it is disclosed. However, as the author of the Union representations states, this is only his “opinion”. Moreover, the Union has provided no evidence or argument to explain how disclosure of this particular information could reasonably be expected to result in the alleged harms **even if** the appellant were to use the information in the manner suggested in the submissions. In these circumstances, I find that a reasonable expectation of the harms referred to in section 17(1)(c) has not been established.

To summarize, I find that neither the Ministry nor the Union has provided sufficient evidence to establish that the harms outlined in any of section 17(1)(a), (b) or (c) could reasonably be expected to result from disclosure of the budget estimates or Workplan. Accordingly, the third part of the section 17(1) test has not been established and this information does not qualify for exemption under section 17(1) of the Act.

I would also note that the Union has submitted that it has extensive personal information on all its trainees which it has always held in strictest confidence. No personal information of any kind is at issue in this appeal.

ORDER:

1. I order the Ministry to disclose the entire contract 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. Should the appellant wish to seek access to any or all of the ten categories of records described in the Ministry’s letter dated August 25, 1995, I order him to so advise the Ministry no later than **December 18, 1995** and identify the requested categories of information.
3. In the event that the appellant contacts the Ministry pursuant to Provision 2, I order the Ministry to make an access decision on the requested records within twenty (20) days of the date of the contact, in accordance with sections 26 and 29 of the Act.

4. In the event that the appellant does not contact the Ministry pursuant to Provision 2, this matter will be deemed to have been abandoned by the appellant. This does not, however, preclude him from submitting another access request to the Ministry with respect to these categories of records.
5. I order the Ministry to provide me with a copy of the access decision referred to in Provision 3, within twenty-five (25) days of the date of the decision. It should be sent to my attention c/o Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
6. In order to verify compliance with the provisions of this order, I reserve the right to require that the Ministry provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ December 4, 1995