



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

ORDER P-1063

Appeal P-9500320

Ministry of the Solicitor General and Correctional Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the implementation of the Province's photo radar operations. Following clarification by the requester, the Ministry located a number of responsive records and granted access to the majority of them in whole or in part. Access to some responsive information was withheld by the Ministry pursuant to the following exemptions contained in the Act:

- relations with other Governments - section 15
- third party information - section 17(1)
- solicitor-client privilege - section 19

The requester appealed the decision to deny access to the records. A Notice of Inquiry was provided to the appellant, the Ministry and to three corporations (the affected parties) whose interests may be affected by the disclosure of the information contained in the records. Representations were received from the Ministry and one of the affected parties.

The records which remain at issue consist of the undisclosed portions of Records 1 and 3 and Record 2 in its entirety.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

In its decision letter, the Ministry has claimed the application of section 15(b) of the Act to Record 2. In its representations, however, it indicates that it does not intend to make any further submissions regarding the application of section 15(b) to Record 2. I have not been provided with any evidence to demonstrate that the disclosure of Record 2 could reasonably be expected to reveal information which had been received in confidence from another government or its agencies by the Ministry. Nor is there any indication on the face of the record itself to indicate that it was received by the Ministry in confidence. Accordingly, I find that this exemption does not apply to Record 2.

THIRD PARTY INFORMATION

Again, the Ministry has declined to make representations regarding the application of section 17(1) of the Act to the undisclosed information. One of the affected parties has addressed this exemption in its representations however.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the Ministry and/or 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 Ministry 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

I have reviewed each of the three records and find that the undisclosed portion of Record 1 does not contain information which qualifies as a trade secret or which is scientific, technical, commercial, financial or labour relations information within the meaning of section 17(1). The undisclosed portion of Record 1 is identical to Pages 134 and 135 in Record 3. Accordingly, part one of the test has not been met for these portions of Record 3 as well.

I find that Record 2 in its entirety and Pages 137-141, 146-149, 160 and 162 of Record 3 contain scientific, technical, commercial or financial information within the meaning of section 17(1). The first part of the test has, accordingly, been met with regard to these portions of the records.

Part Two of the Test

In order to satisfy part two of the test, the information at issue must have been supplied to the Ministry, either explicitly or implicitly in confidence.

Record 2 is a 43 page document entitled "Evaluation of the Gatso mobile radar speed detection device" which was provided to the Ministry by a Police Service located in the United Kingdom. Accordingly, it can be said that this record was "supplied" to the Ministry within the meaning of section 17(1). I have not, however, been provided with any evidence as to the circumstances under which the Ministry received a copy of Record 2 from the U.K. police force. In addition, there is nothing on the face of the record which indicates that it is to be treated confidentially by the Ministry. I find, therefore, that the Ministry has not satisfied the "in confidence" component of part 2 of the section 17(1) test and that Record 2 does not qualify for exemption under this section.

The information which remains at issue in Record 3 consists of various financial data and comparison tables prepared by Ministry officials in evaluating the responses from the affected parties to the Ministry's Request for Proposal for the supply of photo radar technology. I find that the information which remains at issue on pages 137-141, 146-149, 160 and 162 of Record 3 was supplied by the affected parties to the Ministry.

I must now determine whether the information remaining at issue in Record 3 was supplied to the Ministry with an expectation of confidentiality, either implicitly or explicitly. In its representations, one of the affected parties submits that it explicitly stated in its response to the Ministry's Request for Proposal that its submission was to be treated as confidential. On this basis and following my review of the record, I am satisfied that the information contained in these portions of Record 3 was supplied to the Ministry by the affected parties with an explicit expectation of confidentiality and that this expectation

was reasonably held. I find, therefore, that the requirements of Part two of the section 17(1) test have been satisfied.

Part Three of the Test

The affected party submits that the disclosure of the requested information will prejudice significantly its competitive position. It argues that details regarding its technology have gained it a significant competitive advantage in the market and that the disclosure of this information will have a significant financial impact on its operations in Canada.

I am satisfied that, based on the representations of the affected party and my independent review of the record, the disclosure of this information could reasonably be expected to result in harm to the competitive position of each of the affected parties. Accordingly, as all three parts of the section 17(1) test have been met with regard to the information contained in pages 137-141, 146-149, 160 and 162 of Record 3, it should not be disclosed.

SOLICITOR-CLIENT PRIVILEGE

The Ministry has denied access to portions of Pages 123 and 124 of Record 3 on the basis that it is exempt from disclosure under section 19 of the Act.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1)
and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry submits that the undisclosed information contained in Pages 123 and 124 of Record 3 is exempt under both Branch 1 and 2.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
 - (b) the communication must be of a confidential nature, **and**
 - (c) the communication must be between a client (or his agent) and a legal advisor, **and**

- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

- 2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

Record 3 is a document prepared by the Integrated Safety Project working group, a multi-Ministry joint project empowered to prepare an evaluation of each of the bids submitted in response to the Request for Proposal relating to the supply of photo radar equipment to the Province. The undisclosed information contained in Pages 123 and 124 of Record 3 consists of a written summary of two oral legal opinions relating to the validity of two of the bids which was provided by counsel from the Ministry's Legal Services Branch to the working group.

The Ministry submits that the undisclosed information represents a confidential communication between counsel for the Ministry and the working group in which legal advice was provided.

I have reviewed the undisclosed information contained in Pages 123 and 124 and conclude that it may be properly characterized as confidential legal advice which was provided by counsel to the working group. Accordingly, I find that this information is properly exempt under the first part of Branch 1 of the section 19 exemption.

ORDER:

- 1. I order the Ministry to disclose to the appellant the information contained in Pages 71 and 72 of Record 1, Record 2 in its entirety and Pages 134 and 135 of Record 3 within thirty-five (35) days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order.
- 2. I uphold the Ministry's decision to deny access to the undisclosed information contained in Pages 123, 124, 137-141, 146-149, 160 and 162 of Record 3.
- 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 1.

Original signed by: _____ November 24, 1995
Donald Hale
Inquiry Officer