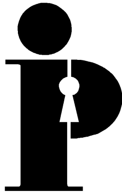
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1105

Appeal P-9500648

Ministry of Agriculture, Food and Rural Affairs

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NATURE OF THE APPEAL:

The Ministry of Agriculture, Food and Rural Affairs (the Ministry) received a request for access to information related to the formation of alliances or facilities-sharing arrangements between a named corporation (the Corporation) and the Ministry's Agricultural and Food Services Laboratory Branch (the Branch). The request was made under the Freedom of Information and Protection of Privacy Act (the Act).

The Ministry identified 25 documents as being responsive to the request. Pursuant to section 28(1) of the Act, the Ministry notified the Corporation of the request. After receiving submissions from the Corporation, the Ministry issued a decision to the requester. The decision granted access to 10 records in their entirety and portions of four others. The Ministry denied access to 11 documents in their entirety. The Ministry applied the following exemptions in denying access to these records, either in whole or in part:

- Cabinet records - section 12
- advice and recommendations - section 13(1)
- third party information - section 17(1)
- economic and other interests - section 18(1)(e)

The requester appealed this decision.

During mediation, the appellant eliminated certain records from the scope of his appeal. These included Record 4, a portion of which the Ministry had held to be exempt under section 12. The appellant also indicated that he was not interested in seeking access to the names of parties other than the Ministry and the Corporation which may be contained in the balance of the records.

In its submissions, the Ministry indicated that it was withdrawing its reliance on the application of sections 13(1) and 18(1)(e) to the handwritten notes on Records 17 and 18. The records remaining at issue are set out in Appendix A to this order. The record numbers used in Appendix A are those originally assigned by the Ministry in its decision letter. At this time, the sole remaining exemption is section 17(1).

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

DISCUSSION:

PRELIMINARY ISSUES

THE APPLICATION OF THE ACT TO THE CORPORATION

In its representations, the Corporation points out that it has not been designated as an "institution" for the purposes of the Act. On this basis, it submits that the Legislature has acknowledged the need to protect the Corporation's sensitive commercial information from disclosure.

The Corporation then refers to the legal principle that "a party cannot do indirectly that which it cannot do directly". Based on this principle, it believes that it would be wrong for the appellant to obtain information about the Corporation indirectly from the Ministry when the Corporation does not have a direct legislative obligation to disclose this information as an institution under the Act. The Corporation cites the case of Madden v. Nelson and Fort Sheppard Railway [1899] A.C. 626 (H.L.) in support of this proposition.

In Order P-1001, I considered a similar argument raised by the Corporation. After pointing out that the Madden case was decided in an entirely different statutory context, I approached the issue in the following fashion:

> One of the purposes set out in section 1(a)(i) of the Act is to provide a right of access to information under the custody or control of an institution in accordance with the principle that information should be available to the public. It is my opinion that the issue raised by the Corporation must be based on the wording and intent of the Act.
>
> Although the Corporation is not listed among those entities which are defined as "institutions" for the purposes of the Act, there is nothing in the Act which expressly excludes from its application records which originated from third parties such as the Corporation.
>
> Section 10(1) of the Act provides as follows:
>
>> Every person has a right of access to a record or a part of a record **in the custody or under the control of an institution** unless the record or the part of the record falls within one of the exemptions under sections 12 to 22. [emphasis added]
>
> In Order P-239, Commissioner Tom Wright addressed a similar argument made by the Office of the Ontario Ombudsman. In that case, the Ombudsman submitted that because the Ombudsman's office is not an institution listed in the Act, it would be inappropriate to construe the Act as applicable to records prepared by the Ombudsman which might be found in the possession of institutions. Commissioner Wright stated:
>
>> It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act.
>
> He concluded that the Act applied to information that originated in the Ombudsman's office which was in the custody or under the control of an institution. To state this proposition a bit differently, the Act will apply to information in the custody or control of an institution notwithstanding that it was

> created by a third party. I accept this approach and adopt it for the purposes of these appeals.
>
> There are innumerable individuals, organizations, agencies and businesses that interact with government institutions on a daily basis. During the course of these interactions, information about these entities often comes into the possession of these institutions. In drafting its freedom of information legislation, the government determined that such information should be subject to the provisions of the Act, unless the exemptions contained in the statute applied. These exemptions are designed to not only protect the interests of government institutions, but also those of third parties (such as individuals, agencies and organizations) whose information may come into the custody or control of an institution as well. Based on the scheme of the Act, therefore, a third party, such as the Corporation, will have the opportunity to fully argue that its interests will be harmed by the release of such information.
>
> In its representations, the Corporation has not provided any evidence to indicate that the Legislature intended that the Corporation should be treated differently from any other third party agency or business which provides information to an institution. Nor is there any dispute that the records at issue are in the custody of the Ministry.

In the result, I concluded that the records in question were subject to the provisions of the Act. This approach was subsequently followed by former Assistant Commissioner Irwin Glasberg in Order P-1019 and by Inquiry Officer Mumtaz Jiwan in Order P-1012.

In this appeal, the Corporation submits that this approach results in the Corporation being placed in the "peculiar position of being afforded a lesser degree of protection than if it had been designated an 'institution' under the Act". The Corporation argues that had it been so designated, it could have claimed that its information was protected by the application of some of the discretionary exemptions available to an institution. It states that:

> ... in making the specific decision that [the Corporation] should not be designated an institution under the Act, it was the government's intention that [the Corporation's] information be protected from disclosure, not to open it up to more disclosure. In our view, the Act should be interpreted so as to avoid such a perverse result.

In my view, these additional arguments on this issue do not negate the application of the principles I set out in Order P-1001. The records are in the custody of the Ministry, section 10(1) applies and there is nothing in the Act which excludes such records from the scope of the principles of the legislation as set out in section 1. Moreover, I do not consider this to be a perverse result in that the Legislature has obviously included the mandatory exemption in section 17(1) of the Act to address the issue of third party information.

The result is that the information contained in the records provided to the Ministry by the Corporation falls within the parameters of the Act. I must now determine whether the statutory exemption claimed by the Ministry and the Corporation apply to this information.

RESPONSIVENESS OF RECORD 6

In its representations, the Corporation submits that Record 6 is not responsive to the request. The part of Record 6 which is at issue is a schematic diagram of the Corporation's business plan prepared by consultants to the Corporation. The Corporation states that the record does not contain any references to the Branch of the Ministry and has nothing to do with this Branch.

In Order P-880, I canvassed in detail the issue of responsiveness of records. That order dealt with a re-determination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3d) 197.

In that case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In my discussion of this issue in Order P-880, I stated as follows:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by the head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions and adopt them for the purposes of this appeal.

The request is for any information concerning the **formation of alliances** or **facilities sharing arrangements** between the Corporation and the Branch. When the Ministry received the request, it notified the Corporation pursuant to section 28 of the Act. As part of this notification, the Ministry forwarded all the records which it considered to be responsive to the request to the Corporation for its comments. At that time, the Corporation indicated that Record 6 in its entirety (that is, both diagrams) should be exempt from disclosure under section 17(1) of the Act. The Corporation also noted that "... this record is not **directly** relevant to the FOI request" (emphasis added).

Nonetheless, when the Ministry issued its decision to the appellant, it granted access to page 1 of the diagram and denied access to page 2 under section 17(1). In my view, the Ministry's decision on this record indicates that, contrary to the comments made by the Corporation, it was of the view that the record was responsive to the request.

I have carefully considered the wording of the request, the submissions of the Corporation and Record 6. In my view, there is information contained in the record about the Corporation's relationships with other facilities which is "reasonably related" to the wording of the request and is, therefore, responsive to the request.
The Ministry and the Corporation have both made representations on the application of section 17(1) to Record 6 and I will consider their submissions in my discussion below.

THIRD PARTY INFORMATION

Section 17(1) of the Act states, in part:

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

The Ministry and/or the Corporation must provide evidence that each of these elements are present in the records for which the exemption is claimed.

Type of Information

The Ministry submits that the records contain commercial and financial information regarding the Corporation's business plans and strategies, business negotiations and proposed partnership arrangements. The Corporation also characterizes the information in the records as relating to its commercial initiatives and the proposed revenue-generating relationship between the Ministry and the Corporation.

I accept these submissions, and I find that the records contain commercial and financial information.

Supplied in Confidence

This aspect of the exemption requires that the information must have been supplied to the Ministry in confidence, either explicitly or implicitly. In addition, information will be

considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

"Supplied"

Records 3, 9, 10, 12 and the cover letter portion of Record 17 are correspondence from the Corporation to the Ministry related to the Corporation's business initiative with the Ministry. Record 6, as previously described, is the diagram prepared by the Corporation's consultants. It is clear that all of these documents contain information which was supplied by the Corporation to the Ministry.

The balance of Record 17 and Record 18 consist of various drafts of an agreement between the Ministry and the Corporation.

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.

The Corporation submits that it prepared the draft agreements, that the agreements contain the same commercial and financial information as is found in the other records and that disclosure of these agreements would permit the drawing of accurate inferences with respect to the Corporation's business strategies vis-a-vis the Ministry. In addition, the Corporation submits that the line of orders regarding information contained in negotiated agreements is not applicable to the facts of this case. The Corporation distinguishes these orders by stating that in those cases there were no longer ongoing negotiations of the documents at issue; the negotiations were complete and in their final form. The Corporation advises that the drafts of the agreements at issue in this appeal have not been finalized or signed and that the negotiations remain ongoing.

I will address each of these arguments. In my view, for the purposes of determining whether information was "supplied" under section 17(1), it does not necessarily matter which party "prepared" the records - the determinative issue is whether the information contained in the agreement was supplied to an institution by a third party. Thus it does not necessarily follow that because the Corporation drafted the agreements, these records contain information the Corporation supplied to the Ministry.

Similarly, I do not find that the status of an agreement as either a draft or a final document impacts on the determination of the "supply" issue. At any stage of the negotiations between an institution and a third party, the agreement may contain information that was supplied by the third party to the institution. For example, in Order P-807 the record at issue was a **final**, "single source" contract which contained the specific details of the terms and conditions offered by the third party to the Ministry. Both the Ministry and the third party had submitted evidence to indicate that most of the information contained in the agreement was not the result of a

negotiating process. Rather, the agreement contained the information provided to the Ministry by the third party. Therefore, Inquiry Officer Mumtaz Jiwan found that the information was "supplied" to the Ministry for the purposes of section 17(1) of the Act.

In my view, the fact that the negotiations between the Ministry and the Corporation have not yet resulted in a final agreement does not affect my decision on the supply of information contained in the draft agreements. The orders cited by the Corporation for the proposition that negotiations leading up to the consummation of agreements are confidential go to the issue of confidentiality, not to whether the information was "supplied" at first instance.

The final point raised by the Corporation with respect to the information contained in Records 17 (the draft agreement portion) and 18 is that they contain the same confidential business information as is found in the other records. Thus, the Corporation submits that disclosure of the agreements would obviously permit the drawing of accurate inferences with respect to "... the business strategy of [the Corporation] to enter into a resource sharing arrangement with the Ministry..."

Based on the information submitted by the Corporation in its representations, I cannot conclude that the information contained in the draft agreements was supplied by the Corporation to the Ministry. First of all, the cover letter portion of Record 17 indicates that the attached draft is a "reworked" version of the one previously discussed by the Corporation and the recipient of the letter (the Director of the Agriculture and Food Laboratory Services Centre of the Ministry). In my view, without evidence to the contrary, this suggests that the agreements represent various stages of the "give and take" of the negotiation process between the Ministry and the Corporation. The six drafts which constitute Record 18 are a further indication of this process.

It is also clear that Ministry staff made several comments on the draft agreements. These appear in the form of handwritten notes on the draft agreement portion of Record 17 and Record 18. Thus, portions of the agreement were revised to reflect the Ministry's position and concerns over particular matters.

As I indicated on page 6 of this order, the Ministry and/or the Corporation share the burden of proving that the exemption in section 17(1) of the Act applies to a particular record. The Ministry's submissions on the "supplied in confidence" issue merely state that "Records submitted to the ministry by [the Corporation] were supplied in confidence". In my view, based on the information related to the negotiation of these agreements, the Ministry's comments do not assist me in determining which information in the agreements was supplied to them by the Corporation.

Finally, I am of the view that the Corporation does not satisfy the burden of proof when, as here, it states that disclosure of the agreements would reveal information it supplied to the Ministry. As was done by the affected party in Order P-807, I believe that it is incumbent on the Corporation to identify those portions of the agreements which contain information it provided to the Ministry, or that would reveal information it supplied.

In the absence of such information and, based on the circumstances concerning the negotiations of these agreements and my review of the records, I cannot find that the information contained in the draft agreement portion of Record 17 and Record 18 were "supplied" to the Ministry for the purposes of section 17(1) of the Act. As the application of this exemption requires that the information has been supplied, I find that these records are not exempt under section 17(1) of the Act and should be disclosed to the appellant.

As I have previously indicated, the appellant is not seeking access to the names of parties other than the Ministry and the Corporation. I have highlighted this information where it appears in the January 1, 1995 draft agreement which forms part of Record 18.

"In Confidence"

Above I found that the information contained in Records 3, 6, 9, 10, 12 and the cover letter portion of 17 was supplied to the Ministry by the Corporation. I will now consider whether it was supplied in confidence, either implicitly or explicitly.

The Corporation submits that its personnel and those of the Ministry involved in these initiatives have consistently treated their communications in a confidential manner. The Corporation states that information regarding the negotiations is not available to or accessible by its personnel at large nor by the public. The Ministry's submissions support the confidential nature of these discussions. Based on these submissions, I find that the Corporation held a reasonable expectation that the commercial and financial information it provided to the Ministry would be kept in confidence.

In summary, I find that the commercial and financial information contained in Records 3, 6, 9, 10, 12 and 17 (the cover letter portion) was supplied implicitly in confidence to the Ministry by the Corporation.

Harms

The Corporation submits that all of the harms set out in sections 17(1)(a), (b) and (c) of the Act could reasonably be expected to occur should the information contained in the records be disclosed.

As far as section 17(1)(a) is concerned, the Corporation states that disclosure of the records could reasonably be expected to interfere with its ongoing contractual negotiations with the Ministry with regard to the agreement with the Branch. The Corporation submits that premature disclosure of this information could attract the attention of third parties and make it difficult for it and the Ministry to come to mutually agreeable terms.

Moreover, the Corporation indicates that disclosure of information related to its business strategies could prejudice significantly its competitive position. The Corporation's competitors could utilize this information to their advantage. The Corporation submits that it could reasonably be expected to suffer the undue loss of its time and expense in developing the confidential business strategy. Similarly its competitors would unduly gain from the use of this

information without the associated development costs. Thus, the Corporation submits that the harms envisioned by section 17(1)(c) of the Act could reasonably be expected to occur upon disclosure of the records.

Based on these submissions, I am satisfied that the Corporation has provided evidence of a reasonable expectation of the probable harm which could occur as a result of the disclosure of Records 3, 6, 9, 10, 12 and 17 (the cover letter portion). As all three elements of the exemption are present with respect to these documents, I find that they are properly exempt from disclosure, under sections 17(1)(a) and/or (c) of the Act.

ORDER:

1. I uphold the decision of the Ministry not to disclose Records 3, 6, 9, 10, 12, 17 (the cover letter portion) and the highlighted parts of the draft agreement dated January 17, 1995 which forms part of Record 18.

2. I order the Ministry to send the draft agreement portion of Record 17 and all the draft agreements comprising Record 18 with the exception of the highlighted portions of the draft agreement dated January 17, 1995 to the appellant not later than **February 28, 1996** and not earlier than **February 23, 1996**.

3. 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 records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: ______________________ January 24, 1996
Anita Fineberg
Inquiry Officer

APPENDIX A

INDEX OF RECORDS AT ISSUE
Appeal Number P-9500648

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
3	Letter dated April 22, 1994 from the Corporation to the Deputy Minister	17(1) for each record	Decision Upheld
6	Diagram of the Essential Activities and Linkages of the Corporation (1 diagram was disclosed)		Decision Upheld
9	Letter dated July 20, 1994 from the Corporation to the Assistant Deputy Minister, Education, Research and Laboratories Division		Decision Upheld
10	Letter dated September 9, 1994 from the Corporation to the Assistant Deputy Minister, Education, Research and Laboratories Division (only paragraphs 4 and 5 on page 2 are at issue)		Decision Upheld
12	Letter dated September 23, 1994 from the Corporation to the Assistant Deputy Minister, Education, Research and Laboratories Division (only paragraph 4 is at issue)		Decision Upheld
17	Letter dated January 17, 1995 from the Corporation to the Director, Agriculture and Food Laboratory Services Centre with attached draft agreement (#3) between the Ministry and the Corporation		Disclosed in part
18	Six copies of the draft agreement - various versions and dates		Disclosed in part