



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

ORDER P-1463

Appeal P_9700117

Ontario Film Development Corporation



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BACKGROUND:

The Ontario Film Development Corporation (the OFDC) is an agency of the Ministry of Citizenship, Culture and Recreation, scheduled under the Freedom of Information and Protection of Privacy Act (the Act). Prior to 1995 (when the records at issue in this appeal were created), the OFDC had a fully functioning funding department. At that time, when an individual or corporation applied to any OFDC program for financial assistance, the applicant was required to submit documentation which provided detailed production/business information about the proposed project in support of the application. If the application was approved by the OFDC, the applicant would receive a loan or investment amount.

NATURE OF THE APPEAL:

The OFDC received a request under the Act for access to records relating to the development of a named production project. The request included copies of correspondence between the OFDC and a named production company (the Company), minutes of meetings, outlines, pitch proposals, treatment of scripts, readers reports, evaluation documents, script notes, funding applications and agreements/contracts between the OFDC and the Company.

The OFDC located 79 records responsive to the request, comprising 742 pages. Pursuant to section 28 of the Act, the OFDC notified the Company of the request and sought its representations regarding disclosure of the records. The Company objected to the disclosure of information contained in certain records specified in its representations to the OFDC. The OFDC subsequently issued a decision in which it granted access in full to 37 records, partial access to 19 records and denied access in full to the remaining 23 records. In total, the appellant received full access to 402 pages and partial access to 77 pages. For those records to which access was denied, either in whole or in part, the OFDC claimed exemptions pursuant to sections 13(1), 17(1)(a) and (c), 18(1)(a), 21(1) and 21(3)(d). The appellant appealed the OFDC's decision.

During the course of mediation, the OFDC reconsidered its position with respect to some of the records and issued a subsequent decision, granting partial access to three additional records. In addition, the appellant narrowed the scope of his request. As a result, eight records, constituting 123 pages in full and one page in part, remain at issue in this appeal. They are described as follows (I have used the OFDC's numbering scheme in identifying the records):

Record 8a - Revised Budget, dated April 21, 1993 - 30 pages - Denied in full

Record 9a - Interim Financing Agreement, dated December 10, 1992, between the Company, a subsidiary of the Company and a named partnership - 10 pages - Denied in full

Record 11a - One page letter to the OFDC from the subsidiary of the Company, dated July 29, 1993 - Denied in full

Record 11d - Purchase and Sale Agreement, dated December 10, 1992, between the subsidiary of the Company and a named purchaser - 14 pages - Denied in full

Record 19a - One page letter to the Company from a named talent and literary agency, dated July 29, 1993 - Partial access granted

Record 25a - Canadian Distribution Agreement, dated December 10, 1992, between the named partnership, the subsidiary of the Company and the Company - 20 pages - Denied in full

Record 25b - International Distribution Agreement, dated December 10, 1992, between the named partnership, the subsidiary of the Company and the Company - 18 pages - Denied in full

Record 25c - U.S. Distribution Agreement, dated May 28, 1993, between the named partnership, the subsidiary of the Company and the Company - 30 pages - Denied in full

The only exemptions claimed by the OFDC for these records are sections 17(1)(a) and (c) of the Act. Therefore, sections 13(1), 18(1)(a), 21(1) are no longer at issue.

It should also be noted that the appellant seeks access to a copy of the submissions the Company provided to the OFDC in response to the notice given pursuant to section 28 of the Act. The Appeals Officer advised the appellant that this was outside the scope of his original request. As this record clearly did not exist at the time of the request, I concur.

A Notice of Inquiry was sent to the Ministry, the appellant, the Company and another party whose interests may be affected by the outcome of this appeal (the affected party). Representations were received from the appellant, the OFDC and the Company.

A number of issues were raised for the first time in the representations:

- (i) The appellant asked to be provided with a copy of the Company's representations.
- (ii) The Company claimed that Record 8a contains personal information and is, therefore, also exempt pursuant to section 21 of the Act; Record 11a is also exempt pursuant to section 19 of the Act (solicitor-client privilege) and; section 17(1)(b) of the Act also applies to all of the records.
- (iii) The OFDC also raised section 17(1)(b) in its representations.

This office subsequently requested and received further representations from the appellant respecting his request for access to the Company's representations and the Company's section 21 claim. I will address these issues as preliminary matters.

PRELIMINARY MATTERS:

RAISING OF DISCRETIONARY EXEMPTIONS BY AN AFFECTED PARTY

In my view, the Company's submission that section 19 of the Act applies to Record 11a relates to the issue of whether an affected party may raise a discretionary exemption when it was not claimed by the institution which received the access request. As sections 17(1)(b) and 21 of the Act are mandatory exemptions, I will consider these issues, if necessary, in the discussion which proceeds my consideration of these preliminary matters.

In Order P-1137, former Inquiry Officer Anita Fineberg considered the raising of exemptions by an affected person as follows:

The Act includes a number of discretionary exemptions within sections 13 to 22 [of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of sections 6 to 16 of the Act] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The Act also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) [of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of sections 10(1) and 14(1) of the Act] respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the Act.

I agree with former Inquiry Officer Fineberg's findings and adopt them for the purposes of this order.

In my view, the interests of the Company and affected party have been taken into account by the OFDC in making its decision on access to the records and they will, of course, also be considered in the ultimate disposition in this order. The OFDC has claimed that section 17 should apply to the records and, in my view, this is the appropriate manner in which to consider such records under the Act. In addition, it should also be noted that the Company provided similar information to the OFDC at the time of its decision, and the OFDC chose not to raise the section 19 exemption claim.

In my view, this appeal is not one of those "rare occasions" when an exemption not raised by the institution should be considered. Accordingly, I find that it is not necessary for me to consider the application of the discretionary exemption sought to be applied by the Company, however, I will address the Company's arguments in my consideration of the application of section 17 of the Act.

EXCHANGE OF REPRESENTATIONS

In his representations, the appellant asks to be provided with the Company's representations so that he can be "afforded an opportunity to reply." As I stated above, the appellant was asked to provide further representations on this issue. In reply, he stated:

... natural justice demands that I know the arguments that are being raised against production of the requested documents by [the Company] and or the OFDC. Without access to these submissions my ability to appeal OFDC's ruling is fundamentally and irrevocably prejudiced.

Section 52 of the Act sets out the powers of the Commissioner with respect to conducting inquiries to review decisions of institutions that are appealed to the Commissioner. The statutory authority of the Commissioner includes the power to make a binding order, the ability to require production of any record in the custody or under the control of an institution, the right to enter the premises of an institution and the right to conduct an inquiry in private.

Section 52(13) of the Act reads as follows:

The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In responding to the request, the OFDC provided the appellant with a detailed index of all of the responsive records, in addition to the records to which the OFDC granted access. The appellant has also been provided with a copy of the Notice of Inquiry which describes the records, explains the exemption which has been relied on and the onus requirements under the Act. In my view, the appellant has already been provided with sufficient information to enable him to address the issues in this appeal.

In Order 164, former Commissioner Sidney B. Linden discussed the application of section 52(13), where he commented:

... the words [in section 52(13)] “no person is entitled” to see and comment upon another person’s representation mean that no person has the right to do so. In my view, the word “entitled”, while not providing a right to access representations of another party, does not prohibit me from ordering such an exchange in a proper case ... Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer’s Report [now referred to as the Notice of Inquiry] allow the parties a considerable degree of disclosure.

I agree with former Commissioner Linden’s views that a decision maker has the power to order the exchange of representations in the appropriate case and that the procedures established by this office, such as the Notice of Inquiry, do allow the parties “a considerable degree of disclosure.” I would also like to point out that, in order to ensure fairness in the process, it is the practice of my delegates and I to review the representations of the parties to any appeal and to consider whether the appellant should be given access to all or part of the representations, whether there is a need for clarification or whether a party should be given an opportunity to respond to the representations.

Having considered the circumstances of this appeal, I find that this is not a case where an order for the exchange of representations should be issued.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the OFDC and the Company 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]

The appellant submits that the records do not satisfy any part of the three-part test.

Part One

The OFDC and the Company submit that the records contain financial and/or commercial information. The appellant simply states that the records do not contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information within the meaning of the Act.

The information contained in the records includes budgets, production and other expenses, salaries, financing agreements, commissions and fees paid, purchase and sale agreements, distribution agreements, royalties and revenues. Accordingly, I find that these records clearly contain commercial and financial information. Thus part one of the section 17(1) test has been satisfied.

Part Two

In order to satisfy part two of the test, the parties resisting disclosure must show that the information was **supplied** to the OFDC, either implicitly or explicitly **in confidence**.

Supplied

It is clear from a review of the records that they were sent to the OFDC from the Company in support of its request for assistance and, therefore, were “supplied” to the OFDC.

In Confidence

The Company submits that the records contain confidential commercial and financial information belonging to the Company and, that, it is kept confidential by the Company. The Company further submits that it has a long standing relationship with the OFDC and at the time the records were provided to the OFDC, it was on the understanding that they would be kept confidential. The OFDC submits that the information was supplied specifically in confidence and has always treated this type of information as such.

The appellant submits that the records were not supplied to the OFDC in confidence, but offers no details in support of this position.

In Order M-169, Inquiry Officer Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, whose wording is similar to that found in section 17(1) of the Act:

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

In light of the OFDC's and the Company's submissions and the information contained in the above-noted records, I am prepared to accept the claim that the information contained in the records was communicated to the OFDC on the basis that it was confidential and that it was intended to be kept confidential. I find that this information was treated in a manner indicating a concern for its disclosure and was prepared for a purpose which would not entail disclosure.

Based on all the circumstances of this case, and considering the nature of the information, I find that the Company held a reasonable expectation, on an objective basis, that the materials it submitted to the OFDC would be kept confidential. Accordingly, I find that part two of the section 17(1) test has been met.

Part Three

With respect to this part of the section 17 test, the OFDC and the Company both submit that disclosure of the records could reasonably be expected to prejudice the competitive position of the Company. They argue that the financial and business details relating to the project and the Company would become publicly available within the film industry, which is a highly competitive field, thereby compromising its commercial relationships and future contractual negotiations.

The Company further submits that disclosure of the records would also give its competitors unfair access to information which describes in detail the Company's financial and distribution structure resulting in undue loss to the Company. The OFDC adds that the film industry in Ontario is a relatively small community, albeit a significant economic force. Disclosure of the records would allow the Company's competitors to estimate with relative accuracy the budget levels and financing sources of the Company.

Finally, the Company submits that disclosure of the records would result in the film and television industry no longer feeling confident and secure in supplying confidential commercial and financial information to government funding institutions. Therefore, it could result in

companies being reluctant to provide such information to the OFDC. I do not accept this argument. In my view, the purpose of providing the information to the OFDC in the first place, is to support a request for obtaining financial assistance. Therefore, it is not reasonable to suggest that similar information would no longer be provided to the OFDC, given that the OFDC would not likely provide such assistance in the absence of supporting documentation.

The appellant submits that the records are quite old, the most recent dating from 1993, and that given the passage of time, disclosure of the records could not reasonably be expected to result in the harms contemplated by sections 17(1)(a) or (c) of the Act.

In my opinion, the OFDC and the Company have provided sufficient evidence to establish that the harms set out under sections 17(1)(a) and/or (c) are likely to occur if Records 8a, 9a, 11d, 19a, 25a, 25b and 25c are disclosed. Consequently, I find that these records are exempt from disclosure pursuant to sections 17(1)(a) and (c) of the Act.

However, Record 11a is simply a letter which expresses an opinion regarding the Company's right to produce the film project. In my view, no connection between disclosure of this record and any of the harms contemplated by sections 17(1)(a), (b) and/or (c) of the Act has been established. Therefore, I find that it does not qualify for exemption pursuant to any of these sections.

In his representations, the appellant submits that, as the records have been provided to the OFDC, which is a government agency, "as part of a request for tax payers dollars ... [the records] should be made available to public scrutiny". The appellant appears to be raising the considerations of section 23 of the Act, the so called "public interest override", which states:

An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and 21 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (Emphasis added)

Having reviewed the representations and the records, even if I were to conclude that a compelling public interest exists, which I do not, it is my view that such an interest would be satisfied by the records which have been disclosed to the appellant by the OFDC. I find that the interest which exists is a private interest and section 23 has no application in the circumstances of this appeal.

Because of the way in which I have disposed of this issue it is not necessary to consider section 21 of the Act.

ORDER:

1. I uphold the decision of the OFDC not to disclose Records 8a, 9a, 11d, 19a, 25a, 25b and 25c.
2. I order the OFDC to disclose Record 11a, by sending the appellant a copy no later than **November 12, 1997** but not before **November 6, 1997**.

3. In order to verify compliance with this order, I reserve the right to require the OFDC to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Ann Cavoukian, Ph.D.
Interim Commissioner

_____ October 7, 1997