



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-1516

Appeal P-9700190

Ministry of Community and Social Services



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NATURE OF THE APPEAL:

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The requester, on behalf of a trade union which represents some Ministry employees, sought access to copies of any records relating to a contract for the provision of services between the Ministry and a named consulting company. The Ministry located 50 responsive records and granted access to 37 of them in their entirety. Access to ten complete records and to portions of three others was denied, pursuant to the following exemptions contained in the Act:

- third party information - sections 17(1)(a) and (c)
- economic and other interests - section 18(1)(f)
- proposed plans, projects or policies of an institution - section 18(1)(g)
- solicitor-client privilege - section 19

The Ministry also advised the requester that, because of the operation of section 65(6) of the Act, the undisclosed portions of three records and one complete record fall outside the jurisdiction of the Act. The requester, now the appellant, appealed the Ministry's decision.

During the mediation of the appeal, the Ministry agreed to disclose certain additional records, in whole or in part, and the appellant agreed not to pursue access to the document for which solicitor-client privilege had been claimed.

This office provided the appellant, the Ministry and the consulting company (the affected party) with a Notice of Inquiry soliciting their submissions on the applicability of the exemptions claimed and the possible application of section 65(6) to the records. Representations were received from all of the parties.

The records remaining at issue consist of the undisclosed portions of Schedules B and F to Record 1, Page 3 of Record 10 and all of Records 11, 16, 17, 19, 36, 37, 41 and 49.

DISCUSSION:

JURISDICTION

The Ministry submits that the undisclosed portions of Pages 5 and 20 of Schedule B to Record 1, Page 3 of Record 10 and Record 41 in its entirety fall outside the jurisdiction of the Act because of the operation of section 65(6)3. In order to fall within the scope of paragraph 3 of section 65(6), the Ministry must establish that:

1. the records were collected, prepared, maintained or used by the Ministry or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Ministry has an interest.

I find that each of these records, or parts of records, was collected, prepared, maintained or used by the Ministry in relation to meetings, consultations, discussions or communications, both within the Ministry and involving the affected party. In addition, I find that each of these documents contain information about staffing levels within the Ministry and anticipated reduction in those levels. In my view, this information addresses the collective relationship between the Ministry and its employees. I find, therefore, that their subject matter qualifies as a "labour relations" matter for the purposes of section 65(6)3 (Orders P-1223 and P-1242).

The only remaining issue with respect to these records is whether or not the matters addressed in them are ones in which the Ministry "has an interest".

In Order P-1242, Assistant Commissioner Tom Mitchinson reviewed a number of legal sources regarding the meaning of the term "has an interest", as well as several court decisions which considered its application in the context of civil proceedings. He concluded as follows:

Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

I agree with this interpretation and adopt it for the purposes of this appeal.

The Ministry states that its legal interest in the labour relations and employment-related matters contained in these records arises from:

1. its statutory obligations, including the Public Service Act (the PSA) and the Employment Standards Act (the ESA);
2. existing collective bargaining agreements, including the Central Collective Agreement between the Ontario Public Service Employees Union and the Government of Ontario (the Central Agreement);
3. general common law principles regarding employer/employee relations, including the termination of employment of public servants.

Having reviewed the record and the Ministry's submissions, I am satisfied that the meetings and discussions have the potential to affect the Ministry's legal rights and/or obligations, and for this reason, I find that they are matters "in which the institution has an interest". The information contained in these records deals with potential staff reductions, which may result from the implementation of the Agreement that constitutes Record 1 with the affected party. I find that these are matters having the capacity to affect the Ministry's legal rights or obligations, pursuant to the Central Collective Agreement or the PSA and ESA (Order P-1359).

In summary, I find that the undisclosed portions of Pages 5 and 20 of Schedule B of Record 1, Page 3 of Record 10 and Record 41 in its entirety were collected, prepared, maintained or used by the Ministry. I further find that such collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications about labour relations matters in which the Ministry has an interest. Consequently, all of the requirements of section 65(6)3 have been established by the Ministry with respect to this information. None of the exceptions contained in section 65(7) apply. Therefore, I find that these records are excluded from the scope of the Act.

THIRD PARTY INFORMATION

The Ministry and the affected party submit that a portion of paragraph 2.6 on Page 3 and paragraphs 6.5 and 6.8 on Pages 6 and 7 of Schedule B of Record 1, as well as Records 11, 16, 17, 19, 36, 37 and 49 in their entirety, are exempt from disclosure under sections 17(1)(a) and (c) of the Act.

Sections 17(1)(a) and (c) state:

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;
- (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 sections 17(1)(a) or (c) the parties resisting disclosure in this case, the Ministry and the affected party, 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) or (c) of section 17(1) will occur.

[Order 36]

Part One of the Test

The Ministry submits that the information which it has withheld from Page 3 of Schedule B to Record 1 qualifies as a "trade secret" belonging to the affected party. The information relates to the types of software and methodologies developed by the affected party which it proposes to use in this assignment. The affected party confirms the Ministry's submission with respect to this information. In Order M-29, former Commissioner Tom Wright adopted the following definition for the term "trade secret" for the purposes of section 10(1) of the municipal Act, which is the equivalent provision to section 17(1) of the Act:

"trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

For the purposes of this appeal, I adopt this test. Based on my review of the submissions of the parties and the record itself, I find that the severed information contained in Page 3 of Schedule B to Record 1 meets each of these criteria and, accordingly, qualifies as a trade secret within the meaning of section 17(1). The first part of the test has, accordingly, been met with respect to this information.

The Ministry also submits that the undisclosed information in Pages 5, 6 and 7 of Schedule B to Record 1 qualifies as commercial information for the purposes of section 17(1). I have reviewed these portions of Schedule B to Record 1 and agree that they contain commercial information within the meaning of the exemption. Accordingly, the first part of the section 17(1) test has been satisfied with respect to these records as well.

Because of the nature of Record 11, I am unable to describe it in any great detail. To do so would reveal the type of information which it contains. Based on my review of the record and the submissions of the Ministry and the affected party, I am satisfied that it contains information which qualifies as financial and commercial information for the purposes of section 17(1).

The Ministry and the affected party submit that Records 16, 17, 19 and 49 are draft versions of various components of Record 1 which passed between them during the course of the negotiation of the Agreement. I find that each of these documents contain information which may properly be characterized as commercial information for the purposes of section 17(1). The first part of the section 17(1) test has, therefore, been satisfied for these documents.

To summarize, I find that all of the documents to which the Ministry has applied the section 17(1) exemption contain information which falls within the definition of commercial or financial information or is a trade secret for the purposes of section 17(1).

Part Two of the Test

The Ministry submits that the undisclosed portions of Schedule B to Record 1 contain information which was supplied to it by the affected party with an explicit expectation of confidentiality. The affected party confirms that the information in Articles 2.6, 4.2, 6.5 and 6.8 on Pages 3, 5, 6 and 7 of Schedule B was supplied by it to the Ministry explicitly in confidence. Based on my review of the information and the submissions of the parties, I agree that this information was supplied to the Ministry by the affected party.

Schedule G to the Agreement which forms Record 1 contains a detailed statement setting out the confidentiality expectations of both the Ministry and the affected party. In my view, this document is evidence of a consistent intention on the part of both parties to the Agreement that the commercial, financial and trade secret information which it contains would be treated in a confidential fashion by both parties. I find, therefore, that both components of the second part of the section 17(1) test with respect to this information have been met.

The Ministry submits that Record 11 describes a unique arrangement between it and the affected party which was supplied to it with an implicit expectation of confidentiality. Based on my review of Record 11 and the submissions of the Ministry and the affected party, I find that it was supplied with the requisite expectation of confidentiality to meet the second part of the section 17(1) test.

With respect to Records 16, 17, 19 and 49, the Ministry argues that these records are negotiating documents which contain information supplied to the Ministry by the affected party in confidence as part of the negotiation process entered into by these two parties. It submits that these records contain the negotiating position taken by the affected party on the contentious issues which later formed the basis for the Agreement set out in Record 1.

I have reviewed Records 16 and 17 and find that they represent early draft versions of Schedules B and F to Record 1 respectively. In my view, these documents contain information relating to the affected party's bargaining position which was supplied to the Ministry by the affected party with a reasonably-held expectation of confidentiality. The second part of the section 17(1) test has, accordingly, been satisfied with respect to these records.

Record 19 is a memorandum from the Director of the Ministry's Business and Technology Integration Branch to the affected party in which she comments on the Task Order as proposed by the affected party. I cannot agree that Record 19 contains or would reveal information which was supplied to the Ministry by the affected party. As all three parts of the test must be satisfied, I find that this record does not qualify for exemption under section 17(1).

The Ministry submits that Records 36 and 37 contain information which was supplied to the Ministry by the affected party with an expectation of confidentiality. These records contain

information relating to various corporate costing models. Based on the submissions of the Ministry and the affected party and my independent review of them, I find that each of these documents contains information which was supplied by the affected party to the Ministry with an implicit expectation that they would be treated confidentially. The second part of the section 17(1) test has, therefore, been met with respect to Records 36 and 37.

Record 49 is a draft version of Record 1 which includes various amendments and revisions from both the Ministry and the affected party. I find that this document contains information which was supplied to the Ministry by the affected party with an expectation that it would remain confidential, as was the case in my discussion of Records 16 and 17 above. Accordingly, the second part of the section 17(1) test has also been satisfied for Record 49.

Part Three of the Test

Both the Ministry and the affected party indicate that the disclosure of the severed information contained in Schedule B to Record 1 would result in harm to the affected party's competitive position. They argue that the types of software, the methodologies and remuneration terms described in this record are not generally known to the affected party's competitors and that their disclosure could reasonably be expected to cause harm to the affected party's competitive position and also result in undue loss to it, within the meaning of sections 17(1)(a) and (c).

Based on my review of the record and the parties' submissions, I find that the disclosure of Articles 2.6, 4.2, 6.5 and 6.8 on Pages 3, 5, 6 and 7 of Schedule B to Record 1 could reasonably be expected to result in significant prejudice to the competitive position of the affected party. These portions of Schedule B are, therefore, properly exempt from disclosure under section 17(1)(a).

Similarly, the Ministry and the affected party submit that the disclosure of Record 11 could reasonably be expected to result in prejudice to the affected party's competitive position and result in undue loss in its negotiations with clients in the future. I agree that the disclosure of the contents of this record could reasonably be expected to result in harm to the affected party's competitive position and that this document qualifies for exemption under section 17(1)(a).

The Ministry and the affected party further submit that the disclosure of the information contained in Records 16, 17 and 49 would prejudice the competitive position of the affected party. The Ministry also submits that the disclosure of these documents would permit the appellant to draw accurate inferences with respect to the nature of the confidential commercial information that has been supplied by the affected party to the Ministry. Finally, the Ministry submits that the disclosure of this information would severely hamper the ability of the affected party to negotiate successfully with future clients. It submits that the affected party's negotiating strategy, particularly with respect to fees and other forms of compensation, would be disclosed.

Based on my review of the records and the submissions of the Ministry and the affected party, I am satisfied that the disclosure of the information contained in Records 16, 17 and 49 could reasonably be expected to result in prejudice to the competitive position of the affected party, particularly with respect to its ability to negotiate with future clients. As such, I find that these records are exempt from disclosure under section 17(1)(a).

By way of summary, I find that all of the undisclosed portions of Schedule B to Record 1 and Records 11, 16, 17 and 49 in their entirety qualify for exemption under section 17(1). However, Record 19 is not exempt under this section.

ECONOMIC AND OTHER INTERESTS/PROPOSED PLANS, PROJECTS AND POLICIES OF AN INSTITUTION

The Ministry submits that Record 19 and the undisclosed portion of Page 4 of Schedule F to Record 1 are exempt from disclosure under sections 18(1)(f) and (g). These sections state:

A head may refuse to disclose a record that contains,

- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

- (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In order to qualify for exemption under section 18(1)(f) of the Act, the Ministry must establish that a record satisfies each element of a three part test:

1. the record must contain a plan or plans, **and**
2. the plan or plans must relate to:
 - (i) the management of personnel or
 - (ii) the administration of the Ministry, **and**
3. the plan or plans must not yet have been put into operation **or** made public.

[Order P-229]

The Ministry has not made any specific submissions with respect to the application of section 18(1)(f) to Record 19. Based on my review of the information contained in that document and the exemption itself, I find that it has no application. Record 19 is not, accordingly, exempt under section 18(1)(f).

The Ministry submits that the undisclosed portion of Part 4 of Schedule F to Record 1 is a chart setting out the "Preliminary Project High Level Critical Path" which describes in detail the anticipated time frames for the successful completion of the project. It argues that these are

plans relating to the management of personnel and the administration of the project within the Ministry which have not yet been made public.

Based on the submissions of the Ministry and my review of the undisclosed information on Page 4 of Schedule F to Record 1, I find that it qualifies for exemption under section 18(1)(f) as it contains a plan relating to the management of personnel and the administration of the Ministry, which has yet to be made public.

In order to qualify for exemption under section 18(1)(g) of the Act, the Ministry must establish that a record:

1. contains information including proposed plans, policies or projects; and
2. that disclosure of the information could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

Each element of this two part test must be satisfied.

[Order P-229]

Again, the Ministry has not made any specific representations as to the application of section 18(1)(g) to Record 19. Based on my review of the information in that document, I find that it does not contain information whose disclosure could reasonably be expected to result in the premature disclosure of a pending policy decision or any undue financial benefit or loss to a person. Record 19 is not exempt under section 18(1)(g).

As no other exemptions have been claimed for Record 19, and no other mandatory exemptions apply, it should be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose Record 19 to the appellant by providing him with a copy by **February 17, 1998** but not before **February 12, 1998**.
2. I uphold the Ministry's decision to withhold access to the undisclosed portions of Schedules B and F to Record 1 and Records 10, 11, 16, 17, 36, 37, 41 and 49.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____

Donald Hale
Inquiry Officer

January 13, 1998