



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

## ORDER P-1629

Appeal P\_9800043

Ministry of Economic Development, Trade and Tourism



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## **NATURE OF THE APPEAL:**

The Cabinet Office and Office of the Premier received a request under the Freedom of Information and Protection of Privacy Act (the Act) which was forwarded to the Ministry of Economic Development, Trade and Tourism (the Ministry). Specifically the request was for:

... all correspondence, documents, reports, notes to files, briefing notes, telephone conversation records and all other records related to any formal or informal provincial involvement in Industry Canada's \$60-million investment in [a named company] under the Technology Partnerships Canada Fund.

Included should be any correspondence or records of meetings or telephone calls between Ontario Premier Mike Harris and representatives of [the named company], its parent companies or anyone acting on the company's behalf. Also included should be any provincial records related to any discussions about the company involving, but not exclusive to, [federal] Minister [of Industry John] Manley, former Health Minister David Dingwall and Ontario Premier Mike Harris.

Also, the documents should encompass any trips by government officials to France to meet with company officials and any visits to Canada by company officials.

The Ministry identified 62 responsive records, and granted full access to 22, and partial access to 34 of them. The Ministry denied access in whole to the remaining six records. The Ministry claimed one or more of the following exemptions as the basis for denying access:

- section 13 - advice to government
- section 15 - relations with other governments
- section 17 - third party information

The requester, now the appellant, appealed the Ministry's decision. In his appeal letter, the appellant expressed concern "at the number of times the designation "N.R." standing for Not Relevant is used to withhold often large blocks of information."

During the course of mediation, the appellant removed a number of severed passages from the scope of this appeal, including most of those designated by the Ministry as "N.R.". Specifically, the appellant removed the following severances: Record 2 - page 1; Record 16 - pages 4 and 5; Record 19 - pages 3 and 4; Record 27 - last bullet point paragraph on page 2; Record 28 - third and fourth severances on page 1, and all severances on page 2; Record 31 - first and second severances on page 1 and all severances on page 2; Record 32 - first severance on page 1; Record 38 - first severance on page 2; Record 39 - all "N.R." severances; Record 42 - second severance on page 1; Record 49 - all severances on pages 1 and 3; Record 50 - last severance on page 2; and Record 54 - first three severances on page 1, and all severances on pages 2 and 3.

Our office issued a Notice of Inquiry to the appellant, the Ministry and the named company (the affected party). Representations were received from the Ministry and the affected party only.

Thirty-three records are at issue in this appeal, as follows: the whole of Records 6, 7, 41, 43, 51 and 62; and the remaining severances in Records 1, 2, 4, 13, 16, 19, 21, 27, 28, 30, 31, 32, 33, 34, 35, 38, 39, 40, 42, 44, 48, 49, 50, 52, 54, 55 and 59. The records are comprised of memos, briefing notes, house notes, reports, computer e-mails and correspondence.

## **DISCUSSION:**

### **RESPONSIVENESS OF RECORDS**

In its representations, the Ministry addresses the appellant's concern regarding the portions of records marked "N.R." which are still at issue in this appeal as follows:

- the last severance at the bottom of page 1 of record 31 does not refer to or relate in any way to the request in this matter. It refers to a different company with a different project;
- in record 34, the severance of [a named company] is a different company and does not relate in any way to the request in this matter;
- the parts of record 42 that were severed and marked "NR" all relate to other matters and issues that are not related to and do not have anything to do with the request in this matter. This record is a summary of a meeting between Ontario and federal government officials to discuss many matters and issues, only one of which relates to the affected party's project and the request in this matter. The parts severed are concerned with entirely separate matters.

It is therefore respectfully submitted that the aforesaid severances are not relevant to the request and are not responsive to the request.

In Order P-880, former Adjudicator Anita Fineberg considered the standard to be applied in deciding whether records are responsive to a request. She stated:

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 a 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 the Ministry that the withheld information referred to on Records 31, 34 and 42 relates either to another company or to other matters totally unrelated to the request, and I find that these portions of the records are not responsive to the appellant's request.

### **THIRD PARTY INFORMATION**

The Ministry claims section 17 for specific severances in Records 1, 2, 4, 13, 16, 19, 21, 27, 28, 30, 31, 32, 33, 34, 38, 39, 40, 42, 49, 50, 52, 54, 55 and 59, and to the whole of Records 41 and 42. The affected party claims that section 17 applies to all of the undisclosed information in all records.

The Ministry states that it "supports the arguments, representations and submissions" made by or on behalf of the third party regarding section 17.

Sections 17(1)(a), (b) and (c) of the Act read as follows:

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;

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

### **Type of Information**

Commercial information has been defined as “information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.” (Order P-493)

Financial information has been defined as information “pertaining to finance or money matters” (Orders 47 and P-607) and as “information which refers to specific data on the use and distribution of money, such as information on pricing practices, profit and loss data, overhead and operating costs.” (Order P-80)

Scientific information has been defined as information “belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics.” (Order P-463)

Technical information has been defined as information "belonging to an organized field of knowledge which would fall under the general categories of applied science or mechanical arts." (Order P-463)

The Ontario Court of Appeal recently considered the application of section 17 of the Act in overturning the Divisional Court’s decision and restoring my Order P\_373. The Court of Appeal found that “the Commissioner adopted a meaning of the terms [including “commercial information” and “financial information”] which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable” (see Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1995), 23 O.R. (3d) 31 (Div. Ct.); reversed on appeal, unreported decision, dated September 3, 1998 (Ont. C.A.)).

With respect to the severed records, the Ministry states that:

... the majority of the severances are exemptions pursuant to section 17 of the Act. Most of these documents are documents of the Ministry, however the information and statistics contained therein and relating to scientific, technical, commercial and financial information of [the affected party], are information and statistics that were supplied to the Ministry by [the affected party] ...

The affected party submits that:

All of the severed information contained in all the Records constitutes “scientific, technical, commercial or financial” information within the meaning of subsection 17(1) of the Act.

Specifically, the affected party states that:

The severed information in all of the Records [contains] either:

- (a) confidential financial information regarding the cost of the affected party's research development initiatives in respect of cancer vaccines;
- (b) confidential financial information regarding the affected party's revenues, sales and research and development spending;
- (c) confidential financial information and strategic information regarding the affected party's need to obtain additional funding to facilitate its investment in cancer research and development initiatives;
- (d) confidential and highly sensitive information regarding the relationship between the affected party and its parent company, as well as its affiliated companies who are bidding for the cancer vaccine mandate in competition with the affected party;
- (e) confidential financial information regarding the funding and proposed funding to be provided by the Government of France;
- (f) confidential information relating to the scope, location, infrastructure and timing of the affected party's cancer vaccine research and development initiatives and future plans with respect to the stimulation of research interest in this field including the establishment of manufacturing facilities, pilot plans, job creation ...
- (g) confidential scientific information regarding when the affected party believes that therapeutic vaccines and preventative vaccines could reach the market; ... cancer vaccine and the scientific properties of the cancer vaccine itself ...

I find that information concerning the proposed amounts of investments, funding assistance, sales revenue, research and development spending, job creation/employment costs etc., all pertain to finance and/or money matters, and meet the definition of "financial information". I also find that information relating to the business or the proposed business activities, plans and strategies of the affected party relates to the buying and selling of the products under development by the affected party, and is properly characterized as "commercial information" for the purposes of section 17. The severances that fit into these two categories are:

- all severances in Record 1
- the remaining severances in Record 2
- all severances in Records 4, 13, 16, 19 and 21
- the remaining severances in Records 27 and 28
- the severance in paragraph 2 of Record 30
- all severances in paragraphs 2 and 6 of Record 31
- the severance in item 1 of Record 32
- all severances in paragraph 7 of page one of Record 38
- all severances in second bullet point in Record 39
- all severances in Record 40

- all severances in the last line of bullet 6 of page one of Record 42
- the remaining severance on page 2 of Record 49
- the severed third last paragraph on page one and the severed first paragraph on page 2 of Record 50
- the severances in paragraphs 1, 3, 4 and 5 on page one, all severances on page two of Record 52
- the remaining severances on page one of Record 54
- all severances in Records 55 and 59.

The remaining severances on Records 30, 31, 32, 33, 34, 35, 38, 39, 42, 44, 48 and 50 are contained mainly in e-mails between federal and provincial government employees. These severances include names of employees, their employment positions and e-mail addresses, and in some cases, opinions and advice related to the affected party's project. I find that none of this information falls within any of the categories of information listed in section 17.

Access to Records 6, 7, 41, 43, 51 and 62 has been denied in full.

Record 6 is a two-page, unsigned letter from Premier Harris to the Prime Minister, seeking support for the affected party's vaccine initiative. Record 7 is a one-page, unsigned "draft" letter from the Premier to the President and Chairman of the affected party's parent company which expresses similar words of support.

I find that portions of paragraphs 1, 3, 4 and 5 of Record 6 and a portion of paragraph 1 of Record 7 make reference to the proposed business activities of the affected party, and as such qualify as "commercial information". The rest of these records contain no information which would fall within the definition of any of the types of information listed in section 17.

Record 43 is an overview of the affected party's project prepared by Technology Partnerships Canada (TPC), part of the federal government; and Record 41 is an e-mail sent by one provincial government employee to several others which comments on the contents of Record 43.

Both Records 43 and 41 have been exempt in full under sections 17(1)(a) and (c). The Ministry states:

... record 43 contains significant and detailed scientific, technical, commercial and financial information and statistics relating to [the affected party] and its business and proposed cancer vaccine project. It appears that, and it is respectfully submitted that, much of this record is clearly exempt from disclosure pursuant to Sections 17(1)(a) and (c) of the Act, subject to the arguments, representations and submissions on behalf of the [affected party].

...

... the content of this record [record 41] refers to, and analyzes some of the content of record number 43 ... The release of record 41 would disclose some of the content of record 43.

Having examined these two records, I find that they also contain the type of information which meets the definition of “commercial information” or “financial information” as defined earlier in this order.

Record 51 is a fax covering sheet attaching a handwritten cover note from the affected party to an employee of the provincial government. Both of the pages are simply transmission documents and I find that neither of them contain any of the categories of information outlined in section 17.

Record 62 is a printout of a French-language e-mail prepared by a federal government employee on the subject of federal Minister Dingwall’s visit to Lyon, France. Because of the way in which I will be disposing of Record 62 in my discussion of sections 15(a) and (b), it is not necessary for me to address it here.

In summary, I find that Record 51, portions of Records 6 and 7 and the remaining severances in Records 30, 31, 32, 33, 34, 35, 38, 39, 42, 44, 48 and 50 do not contain any of the categories of information outlined in section 17(1).

### **Supplied in Confidence**

In order to satisfy the requirements of the second part of the test, the Ministry and/or the affected party must establish that the records or parts of records that contain financial or commercial information were supplied to the Ministry, in confidence, either implicitly or explicitly. The information will also 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 (Orders P-203, P-388 and P-393).

The Ministry states that although most of the records were created by the Ministry, the undisclosed information they contain was supplied to the Ministry by the affected party “in confidence either implicitly or explicitly, in connection with the particular cancer vaccine project, and also in connection with various other dealings between [the affected party] and the Ontario Government.”

The affected party submits that:

All of the severed information in the Records was supplied by [the affected party] in confidence to the Ministry or to the federal government in connection with [the affected party’s] applications for financial assistance under the Ministry’s infrastructure program and for funding under TPC [Technology Partnerships Canada]. The history of the relationship between [the affected party] and the Ministry (as well as Industry Canada) has been that information such as the severed information will always be held in confidence by the Ministry, as a matter of policy and practice. [The affected party] has always reasonably expected that the Ministry will treat its confidential information relating to its costing, its financial affairs (revenues and sales), its research and development expenditures, its employment levels, future projects, its relations with [its parent company] and



its affiliates, the scope and timing of its research and development initiatives in strict confidence.

The affected party also submits:

All information relating to [the affected party's] costs, financial affairs and research and development activities are treated consistently in a confidential manner within [the affected party]. [The affected party] employs elaborate measures to maintain the confidentiality of information such as the severed information.

The affected party goes on to describe the physical security arrangements it undertakes to ensure the confidentiality of its information including security guards, security cards, the signing of confidentiality agreements by employees etc.

The affected party states that:

It should be noted that confidentiality is of utmost priority to a biotechnology company such as [the affected party]. Its competitive position can be maintained only if its products are protected by patents or as trade secrets. Premature disclosure of the products that [the affected party] has in its research and development portfolio can preclude the patentability of the discovery.

The records which I have found to contain commercial or financial information were, for the most part, prepared by Ministry staff. As stated previously, Record 43 was prepared by TPC, part of the federal government. However, I find that the undisclosed information contained in all of these records was either supplied by the affected party to the Ministry, or its disclosure would permit the drawing of accurate inferences with respect to the information that was actually supplied by the affected party to the Ministry. I also accept the submissions of the affected party as to the highly confidential nature of the circumstances under which this information was supplied.

Therefore, I find that the second part of the section 17(1) exemption test has been established for all records or parts of records which I have found contain commercial or financial information.

### **Harms**

In order to satisfy the third requirement of this exemption claim, the Ministry and/or the affected party must present evidence which is detailed and convincing, and must describe a set of facts or circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17 would occur if the information was disclosed (Orders P-249, P-278 and P-1621).

The affected party states:

[The affected party's] plans to research, develop, commercialize and market cancer vaccines were developed through many years of research by [the affected

party] and its affiliates and after the expenditure of millions of dollars by [the affected party] and its affiliates ... Disclosure of [the affected party's] plans and strategies with respect to its cancer vaccine initiative to its competitors could reasonably be expected to result in material financial loss to [the affected party]; in material gain to [the affected party's] competitors; and to prejudice [the affected party's] competitive position. The vaccine industry is a highly competitive one ... Disclosure of the severed information reveals [the affected party's] investment concerns ...

The Ministry's representations support the position taken by the affected party.

I accept that the vaccine industry is a highly competitive one in which the affected party is an active participant. I am satisfied that the disclosure of the commercial and financial information relating to the affected party's vaccine initiative, its research and development plans, and marketing and business strategies could reasonably be expected to prejudice the affected party's competitive position or lead to undue loss to the affected party or gain to its competitors. Therefore, I find that the three-part test in sections 17(1)(a) and (c) has been established with respect to all records or parts of records containing commercial or financial information.

Therefore, I find that the following records or parts of records qualify for exemption under sections 17(1)(a) and (c) of the Act:

- Records 41 and 43 in their entirety (but not Record 51);
- all severed information with the exception of the portions of Records 30, 31, 32, 33, 34, 35, 38, 39, 42, 44, 48 and 50 which I have found do not contain any of the types of information listed in section 17(1);
- the portions of Records 6 and 7 which I have found do not contain any of the types of information listed in section 17(1).

No other exemption claims have been made by the Ministry with respect to Record 51, so it should be disclosed to the appellant. Similarly, Record 34 should be disclosed, subject to the severance of the name of another company which I found to be non-responsive to the appellant's request.

## **RELATIONS WITH OTHER GOVERNMENTS**

The records which remain at issue for consideration under this section are Record 62; the remaining portions of Records 6 and 7; and the severed portions of Records 30, 31, 32, 33, 35, 38, 39, 42, 44, 48 and 50.

Section 15 of the Act provides:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
- (b) reveal information received in confidence from another government or its agencies by an institution; or
- (c) reveal information received in confidence from an international organization of states or a body thereof by an institution,

and shall not disclose any such record without the prior approval of the Executive Council.

For a record to qualify for exemption under section 15(b), the institution must establish that:

1. the record reveals information received from another government or its agencies; **and**
2. the information was received by an institution; **and**
3. the information was received in confidence.

[Order 210]

In its submissions, the Ministry states in reference to Record 62 that:

Record 62 is a printout of an e-mail in the french language prepared by a federal government employee on the subject of federal government Minister Dingwall's visit to Lyon, France, as it relates to [the parent company and the affected party's] cancer vaccine project, and attached as part of record number 62 is the English translation of the e-mail. A copy of this record was sent to an employee of the Ontario Government. The record is a communication and consultation between the Ontario Government and federal government and contains and refers to information about the proposed ... cancer vaccine project and the negotiations for government financial assistance. It also discloses the content of in-depth meetings held by a federal government minister with various companies, agencies and individuals in France, and related to [the affected party's] project and the federal government's requested financial assistance. ... this record was intended as a confidential memorandum from federal government officials about meetings held in France between a federal government minister and various parties in order to assist the Premier of Ontario and the Government to prepare for Premier Harris' pending trip to France for similar purposes. The record would therefore be exempt from disclosure pursuant to Sections 15(a) and (b).

As far as Record 50 is concerned, the Ministry submits :

... the severed portions of record 50 are a summary of the notes from the Minister Dingwall's meetings in Lyon, France, which are set out in Record 6. ... [I]f record 62 is exempt from disclosure, then the portion severed from record 50 is also exempt from disclosure in that they contain the same information.

I agree with the Ministry's descriptions of Records 50 and 62. Record 62 is a summary of the federal Minister's visit to France that was sent to the Ministry. Record 50 was prepared by a provincial government employee and is a briefing note which includes information found in Record 62. I find that both records contain sensitive information about meetings and discussions held by the federal Minister with various parties in France with respect to the affected party's vaccine project. I am satisfied that the Ministry received this information in confidence from the federal government. Therefore, I find that Record 62 and the remaining severances in Record 50 qualify for exemption under section 15(b) of the Act.

With respect to the remaining severances in Records 30, 31, 32, 33, 35, 38, 39, 42, 44 and 48, the Ministry states:

... These severances include communications between the federal and provincial government representatives which contain information, opinions, statistics and advice which the Head in the exercise of his discretion determined were exempt from disclosure pursuant to subsections (a) and/or (b) of Section 15 of the Act.

The majority of these records are e-mails between federal and provincial employees. I agree with the Ministry's position that the severances in Records 31, 33, 35, 38, 39, 42 and 48 contain sensitive information directly related to the affected party's project, and that this information was received by the Ministry from the federal government in confidence. Therefore, I find that these severances qualify for exemption under section 15(b).

However, in my view, the same cannot be said for the remaining severances in Records 30, 32 and 44. The information at issue in Record 30 is the name of a federal employee (which appears unsevered elsewhere) and the program he is responsible for. The severances in Records 32 and 44 are similar (i.e. names of employees, e-mail addresses etc.). I do not accept that this information was provided on a confidential basis, and I find that these severances do not qualify for exemption under section 15(b). Similarly, I find that disclosure of this information could in no way prejudice the conduct of intergovernmental relations between Ontario and the federal government, and that the information does not qualify for exemption under section 15(a).

### **Records 6 and 7**

As stated previously, Records 6 and 7 are letters of support from Premier Harris to the Prime Minister and to the President and Chairman of the affected party's parent company respectively. I have found that certain portions of Records 6 and 7 qualify for exemption under section 17(1).

In its representations on Records 6 and 7, the Ministry states that it is prepared to "withdraw its claims for exemptions [sections 13 and 15], and to release copies of these two records to the Requester, subject however to the Commissioner's consideration of any arguments or submissions made on behalf of [the affected party] with respect to the disclosure of these two records."

The affected party's representations make no specific reference to Record 6.

As far as Record 7 is concerned, the affected party states that it is not subject to exemption under sections 15(a) or (b).

In addressing section 13, the affected party states:

Record numbered 7 is a draft of a letter which has been prepared by a public servant for review by the Premier of Ontario in respect of [the affected party's] initiative. The Record contains a specific course of action to be accepted or rejected by the Premier ... The record is highly confidential and is subject to the exemption to disclosure pursuant to subsection 13(1) of the Act.

Because the purpose of the discretionary exemptions in sections 13 and 15 is to protect institutional interests, it would be only in the most unusual of cases that an affected party could raise the application of one of these exemptions if it were not also being claimed by the institution [see Orders P-1137 and P-549]. Having reviewed the remaining portions of Records 6 and 7, and acknowledging the change in the Ministry's position with respect to disclosure of these records, I am not persuaded that disclosure of this information could reasonably be expected to result in any of the harms envisioned by sections 13 and/or 15(a) and (b) of the Act. The two records are supportive of the affected party, and the Ministry's willingness to air the contents of these records publicly is, in my view, strong evidence of the absence of any harm or interference with the purposes of these exemption claims, if the remaining portions are disclosed.

Therefore, I find that the remaining portions of Records 6 and 7 do not qualify for exemption under sections 13(1) or 15(a) or (b) and should be disclosed to the appellant.

## **ORDER:**

1. I order the Ministry to disclose Record 51 in its entirety, the remaining portions of Record 44, and the portions of Records 6, 7, 30, 32 and 34 which have **not** been highlighted on the copy for the Ministry's Freedom of Information and Privacy Co-ordinator by **December 14, 1998** but not earlier than **December 7, 1998**.
2. I uphold the Ministry's decision not to disclose the remaining records or portions of records.
3. In order to verify compliance with 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: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ November 6, 1998