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

ORDER PO-1885

Appeal PA_000144_1

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Royal Ontario Museum (the ROM), under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) made a request to the ROM in December 1999 for a lengthy list of records pertaining, in the main, to the employment and departure from employment of a named president of the ROM (the primary affected party). The appellant also sought a list of consultants retained by the ROM from February, 1997 to the date of the request and payments made to those consultants (other affected parties).

The issues have been considerably narrowed and clarified since the initial request, both through correspondence between the ROM and the appellant, and through the assistance of a mediator with this office. The ROM has released certain records responsive to the appellant's request, denied access to other records in their entirety, and indicated that records do not exist with respect to other parts of the request (which is not an issue in this appeal). In its decision denying access to certain records, the ROM relies on the mandatory exemption found in section 21 of the *Act* (unjustified invasion of personal privacy), the mandatory exemption found in section 17 (third party information), and the discretionary exemption found in section 18 (economic and other interests of an institution). The appellant has raised the applicability of section 23 of the *Act* (the "public interest override").

I sent a Notice of Inquiry to the ROM and to the affected parties initially, inviting their representations on the issues raised by the appeal. I was unable to contact some of the affected parties. I received representations from the ROM, the primary affected party and some of the other affected parties, some of whom have also provided their consent to release of the information or part of the information pertaining to them. Some of these representations were shared with the appellant, who was also invited to make submissions, and has.

RECORDS:

Record 1 The Employment Agreement between the former president and the ROM, including a Loan Agreement and Amendment to Loan Agreement.

Record 2 Form entitled "Confirmation of Status and Responsibilities", relating to the former president.

Record 3 Document entitled "Supplemental Pension Plan for Designated Executive Employees of the Royal Ontario Museum: Revised Statement of Supplemental Benefits Upon Termination" and document entitled "The Royal Ontario Museum Plan: Revised Statement of Benefits Upon Termination and Election of Option Form", setting out details of a retirement income relating to the former president.

Record 4 Memorandum dated March 31, 2000 on the subject of "Performance/Stay Bonus", from the Chairman of the ROM to the members of the Executive Committee, with attachment consisting of a draft letter of agreement between the ROM and the former president.

Record 5 Termination Agreement between the former president and the ROM, consisting of a cover letter and attached agreement and release.

Record 6 List of consultants retained in relation to specified ROM projects (Our Stories Our Future, Cultural Innovations, Saudi National Museum), their addresses, and remuneration in the years 1997, 1998 and 1999.

In relation to Records 1 to 5, the ROM relied on section 21 of the *Act* in its access decision. With respect to Record 1, the ROM also relied on section 18. With respect to Record 6, the ROM relied on sections 17, 18 and 21.

CONCLUSION:

With the exception of a limited amount of personal information detailed below, I order disclosure of the information in the records.

DISCUSSION:

I will discuss the applicability of section 21 of the *Act*, and then sections 17, 18 and 23.

PERSONAL INFORMATION

In determining whether the records are exempt from disclosure under section 21, I must first decide whether the records contain personal information, since the section 21 exemption only applies to information which qualifies as "personal information" under the *Act*. "Personal information" is defined in section 2(1), in part, as "recorded information about an identifiable individual".

Records 1 to 5

The appellant states that it accepts that Records 1 to 5 contain "personal information" and I agree. Prior cases have found that information about terms of employment such as salary and benefits is about individuals in their personal capacity, although it also relates to their employment (see, for instance, Order MO-1391).

There is information in Records 1 to 5 which, however, is not of a personal nature. Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621). Thus, for instance, where information may be described as being related to the employment or professional responsibilities of individuals, such information is not personal in nature, even where the individuals are identifiable (Reconsideration Order R-980015).
To the extent that some of the information in Records 1 to 5 relates to employment responsibilities, as distinct from information which is particular to an identified individual, I find

that it does not qualify as personal information. Further, the records also contain other information which is non-personal, such as standard contractual terms (Records 1 and 5) and generic information about benefits (Record 3).

Record 6

As I have described above, Record 6 is a list of consultants together with their addresses and the amounts paid to them during the years 1997, 1998 and 1999. Some of the consultants are named individuals. Others are businesses, some of which are identified as being incorporated and others which are not.

The consultants were notified of this appeal. Of nine responding to the invitation to submit representations, five have given consent to release of their information, and three have objected. Apart from this, one affected party has consented to the release of the "total amount", but not "rates and particulars".

Of the three consultants objecting to release of their information, none are identified as individuals on Record 6. Two of the three appear to be unincorporated businesses. One of these consultants has referred to section 21(3)(f) of the *Act* (information about an individual's finances, income etc.). The other states that "since my company consists of only myself...any financial information released would directly reflect my own personal income." The last objecting consultant is an incorporated entity.

The ROM relied on the provisions of section 21 in denying access to Record 6. Presumably, it takes the position that Record 6 contains personal information. However, the ROM has not made any submissions in this appeal with respect to the application of section 21 to Record 6, and whether any of the information in that record qualifies as "personal information".

In Order 16, former Commissioner Sidney B. Linden made the following general statement:

> The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear.

However, Commissioner Linden went on to state in Order 113 that:

> It is, of course, possible that in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information.

Having regard to all of the above, and on my review of Record 6, I am satisfied that information in that record about payments received by *named individuals* (along with their addresses) is the personal information of those individuals. I also accept that information about payments

received by the two consultants who have referred to section 21(3)(f) or asserted that "my company consists of only myself", is personal information, in that it relates to identifiable individuals.

Where Record 6 refers only to a non-personal business name, however, it cannot be established that the information about those businesses is "personal information" in the sense that it relates to an identifiable individual. I find, therefore, that information about entities which are not named individuals and which cannot be related to an identifiable individual does not constitute personal information within the meaning of the *Act*. Section 21 accordingly does not apply to exempt this information from disclosure.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. Section 21(1)(a), which authorizes disclosure upon written consent of an individual, applies to the information in Record 6 for which this office has received written consent to disclosure. The only other exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if "the disclosure does not constitute an unjustified invasion of personal privacy."

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is *presumed* to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome, however, if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption. I will first turn to consider the application of section 21(4) to the records.

Section 21(4)

Sections 21(4)(a) and (b) state:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution or a member of the staff of a minister;

(b) discloses financial or other details of a contract for personal services between an individual and an institution;

Records 1 to 5

The ROM submits that section 21(4) has no application to the records in dispute, in that this section mandates only the disclosure of benefits or compensation relating to an ongoing contract of employment or contract for personal services. It does not apply to entitlements or payments which deal with the entering into or termination of the contract, but rather speaks in terms of benefits paid during the course of the employment or personal service contract.

The appellant submits that the word "benefits" in section 21(4)(a) encompasses all entitlements the primary affected party received as a result of being employed by the ROM including the bonus and other benefits that are paid on or after resignation or retirement from the job. The statement of pension benefits merely clarifies a financial or salary benefit. It was not negotiated at the time of a departure from employment, but was an existing plan.

In deciding whether the provisions of section 21(4)(a) or 21(4)(b) apply to Records 1 to 5, it is necessary to determine whether the primary affected party was an employee, or an independent contractor. None of the parties making representations take a specific position on this, but various references are made to the "employment contract", "employment history"and the "early retirement package". The terms which parties choose to describe their legal relations are not necessarily determinative of the true legal significance, but in this case, they are consistent with the nature of the relationship between the primary affected party and the ROM as described in Record 1. On my review of that document and the parties' representations, I am satisfied that the primary affected party was "an officer or employee" of the ROM within the meaning of section 21(4)(a).

Record 1, as indicated above, is the agreement between the ROM and the primary affected party setting out the terms and conditions of his employment with the ROM. Attached to the agreement is a signed Loan Agreement and an unsigned Amendment to Loan Agreement.

The appellant has not made any specific submissions about Record 1. In addition to that set out above, the ROM has submitted that, to the extent that Record 1 contains information about certain "incentives and assistance" provided to the primary affected party with respect to causing him to move to Canada to enter into an employment contract, the term "benefits" in section 21(4)(a) does not apply. The ROM distinguishes between benefits "relating to an ongoing contract of employment" and those which deal with "the entering into" the contract.

I see no basis for making the distinction urged by the ROM. In balancing the rights of access to information about the activities of government and personal privacy rights, the provisions of the *Act* sometimes give precedence to openness. Sections 21(4)(a) and (b) reflect a policy of open disclosure about the compensation paid to persons who provide services to government. In Order M-23, Commissioner Tom Wright discussed the meaning of "benefits" under the municipal equivalent of section 21(4)(a) of the *Act*:

> Since the "benefits" that are available to officers or employees of an institution are paid from the "public purse", either directly or indirectly, I believe that it is consistent with the intent of section 14(4)(a) and the purposes of the Act that "benefits" be given a fairly expansive interpretation. In my opinion, the word "benefits" as it is used in section 14(4)(a), means entitlements that an officer or employee receives as a result of being employed by the institution. Generally speaking, these entitlements will be in addition to a base salary. They will include insurance-related benefits such as, life, health, hospital, dental and disability coverage. They will also include sick leave, vacation, leaves of absence, termination allowance, death and pension benefits. As well, a right to reimbursement from the institution for moving expenses will come within the meaning of "benefits".

I agree with the above, and I do not read the expansive meaning given to the term "benefits" in Order 23 to exclude "incentives and assistance" given as inducements to enter into a contract of employment. All are, generally speaking, types of compensation for services, whether rendered or anticipated. I am satisfied, therefore, that much of the information contained in Record 1 is about "benefits" within the meaning of section 21(4)(a) of the *Act*. Further, as I have stated above, some of the information in Record 1 is non-personal in nature, such as information about employment capacity and standard contractual terms.

In sum, I am satisfied that the whole of Record 1 either relates to the matters enumerated in section 21(4)(a), or is non-personal information. Accordingly, disclosure of the information in this record would not constitute an unjustified invasion of personal privacy under the *Act*.

Record 2, consisting of a facsimile cover page and unsigned document entitled "Confirmation of Status and Responsibilities", relates to the negotiation of the termination of the primary affected party's employment, and confirmation of the dates on which the termination or the transfer of certain responsibilities was effective. The information about the transfer of responsibilities is either non-personal in nature (see discussion above) or, if it can be considered as personal information, is information about "employment responsibilities" whose disclosure is authorized by section 21(4)(a).

Information in the record about the termination of employment, however, qualifies as personal information and is not covered by the matters enumerated in section 21(4)(a).

Record 3 consists of a statement of the pension available to the primary affected party as of a given retirement date, under the ROM's pension plan and supplemental pension plan for executive employees. This document contains information such as the social insurance number and date of birth of the primary affected party, dates of commencement and termination of employment, normal retirement and early retirement dates, name of spouse, date of birth of spouse, beneficiary, amount of monthly and supplemental monthly pension and commuted value of pension and supplemental pension.

It is true that the statement was generated as a result of the termination of employment, and that the amount of the benefits is limited by the date of termination. However, participation in the pension plans was specifically provided for in the original contract of employment, as part of a

package of entitlements in return for services. To this extent, I am satisfied that the pension benefits described in Record 3 are benefits to which the primary affected party is entitled "as a result of being employed" by the ROM.

My finding is supported by the conclusions reached in Order P-1212, in which all of the entitlements provided to a former president of a college "as part of his employment or upon conclusion of his employment" were found to constitute "benefits" for the purpose of section 21(4)(a). It is also consistent with Order M-23, excerpted above, which refers to "pension benefits".

The case *may* be different if parties have negotiated special pension provisions as part of a severance package, which differ from those provided in the contract of employment. In Order M-173, former Assistant Commissioner Irwin Glasberg concluded, with respect to the municipal equivalent of section 21(4)(a), that the term "benefits" does not include entitlements which have been negotiated as part of an early retirement package:

> ...the entitlements reflected in the retirement agreements were not received by the former employees as a result of being employed by the City. Rather, they were negotiated by the three individuals in exchange for the acceptance by them of early retirement packages from the City. On the basis that these entitlements did not derive from the original contracts of employment entered into between the parties, nor from periodic changes made to these contracts, I must conclude that these entitlements do not constitute benefits as defined in Order M-23. Consequently, I find that the personal information contained in these agreements does not fall within the ambit of section 14(4)(a) of the Act.

In the case before me, however, there is nothing to indicate that the pension benefits which are detailed in Record 3 were negotiated as part of an arrangement to terminate employment. They are simply those to which the primary affected party is entitled under his original contract of employment. In sum, I conclude that section 21(4)(a) applies to the information about pension benefits found in Record 3.

I find, however, that personal information in that record such as retirement dates, social insurance number, date of birth, name and date of birth of spouse and beneficiary does not qualify as information about benefits, and section 21(4)(a) does not apply to it.

Record 4 deals with the negotiation of a performance/stay bonus between the ROM and the primary affected party, and Record 5 consists of the termination agreement between them. On my review of these records, I am satisfied that these contain information about entitlements negotiated specifically in relation to the termination of employment, rather than entitlements deriving from the contract of employment. Accordingly, and consistent with the reasons expressed in Order M-173, above, I find that the personal information in these records does not fall within the ambit of section 21(4)(a) of the *Act*.

Record 6

As I have indicated above, only the information in Record 6 which relates to identifiable individuals qualifies as "personal information". It is apparent that these persons are not employees of the ROM. The only part of section 21(4) which may apply, therefore, is section 21(4)(b). No submissions have been made by any party about the applicability of section 21(4)(b) to this list of consultants. I find that it has not been established that each of these persons was engaged pursuant to a "contract for personal services" within the meaning of that section. Accordingly, section 21(4)(b) does not apply to authorize disclosure of their information.

Conclusion

I have found that section 21(4)(a) applies to the personal information in Record 1. Section 21(4)(a) also applies to some of the information in Records 2 and 3. The disclosure of the information to which I have found section 21(4)(a) applies does not therefore constitute an unjustified invasion of personal privacy.

The information in Records 4 and 5, however, does not fall under the provisions of either section 21(4)(a) or (b), nor does any of the personal information in Record 6.

I will therefore turn to consider whether the disclosure of personal information in the records which is not covered by section 21(4)(a) or (b) would constitute an unjustified invasion of personal privacy, having regard to other provisions in the *Act*.

Section 21(3)

The parts of section 21(3) which are at issue in this appeal are:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

Records 1 to 5

The ROM has submitted, in general, that the information sought contains employment history pursuant to section 21(3)(d). Further, it states that some of the information deals with the primary affected party's personal assets, finances, net worth and financial activities relating to the sale of a home, moving expenses and financial counselling matters, and is therefore covered by the presumption in section 21(3)(f).

I am satisfied that information about the start and end dates of employment is information relating to "employment history" within the meaning of section 21(3)(d). Disclosure of this information is accordingly presumed to constitute an unjustified invasion of personal privacy.

Some of the information which the ROM asserts is covered by section 21(3)(f) has already been found above to fall within the term "benefits" in section 21(4)(a), such as the information in Record 1 about negotiated entitlements in the contract of employment. Thus, the presumptions in section 21(3) cannot be applied to this information to exempt it from disclosure. This is apparent from the wording of section 21(4) which authorizes the disclosure of such information "despite" the provisions of section 21(3). The public policy expressed by these sections is clear: information about the "classification, salary range and benefits, or employment responsibilities" of public officials should be made available, even where it might reveal financial information about those individuals [see the discussion in Order PO-1763 on the relationship between section 21(4) and the other parts of section 21].

With respect to Records 4 and 5, in Order M-173, cited above, Assistant Commissioner Irwin Glasberg found that "one time payments to be conferred immediately or over a defined period of time that arise directly from the acceptance by the former employees of retirement packages" do not qualify as the sort of financial information described in section 21(3)(d). Consistent with this, I find that information in Records 4 and 5 about the negotiated payments to the primary affected party by the ROM upon the termination of employment do not fall within the provisions of section 21(3)(d), and its disclosure cannot be presumed to constitute an unjustified invasion of personal privacy.

Record 6

I find that disclosure of payments made to identifiable individuals is information about those individuals' "financial activities" within the meaning of section 21(3)(f). Disclosure of those portions of Record 6 which reveal payments made to those individuals would accordingly be presumed to constitute an unjustified invasion of the privacy of their personal privacy. It has been found that the section 21(3)(f) presumption does not require that the information describe the individual's finances or income "as a whole" (see Order PO-1834).

Conclusion

I find that the presumption in section 21(3)(d) exempts information about the start and end dates of the primary affected party's employment from disclosure. The presumption in section 21(3)(f) applies to exempt information in Record 6 about payments to identifiable individuals. None of the remaining personal information in the records is, however, subject to a presumption that its disclosure would constitute an unjustified invasion of personal privacy.

Section 21(2)

Records 1 to 5

As I have stated above, where none of the presumptions in section 21(3) apply, the factors listed in section 21(2) assist in a determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In this appeal, the ROM has referred to sections 21(2)(f), (h) and (i). On my review of the submissions and records, section 21(2)(a) may also be relevant to the remaining information. These sections state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The provisions of section 21(2) do not provide a limit on the factors which may be relevant to a determination of whether the disclosure of personal information would constitute an unjustified invasion of privacy. Other circumstances may also influence this determination, and some are identified below.

Factors weighing against disclosure

Section 21(2)(f)

Apart from its assertion that section 21(2)(f) applies, the ROM has provided no basis for the application of this section. The primary affected party objects strenuously to the disclosure of the information in question, and it is obvious that the prospect of disclosure is highly discomforting to him. I accept that details of financial settlements such as those contained in the records are highly sensitive (see Order MO-1184). I find, therefore, that section 21(2)(f) is a consideration favouring privacy protection. I find, however, that this factor is only of moderate importance. The financial settlement was negotiated in the wake of a resignation from employment, rather than in other, more sensitive circumstances.

Section 21(2)(h)

In order for section 21(2)(h) to be a relevant consideration, the information in question must have been "supplied" by the primary affected party. In this case, the information about the termination arrangements was negotiated, rather than supplied, and section 21(2)(h) accordingly has no application.

However, on the basis of the submissions of the parties and on my review of the records, I am satisfied that it would not be unreasonable for the affected person to have an expectation that the terms of his departure from employment would not be released to the public, at least by the

ROM. This expectation is a relevant circumstance which weighs in favour of privacy protection (Orders M-173, M-278 and P-1348) although again, I give it only moderate weight.

Section 21(2)(i)

The ROM submits that the use of the information in the records, in isolation or together with other commentary, could unfairly damage the reputation of the affected person or the ROM. The affected person expresses a similar concern, stating that materials and details relating to his expenses have found their way into the hands of journalists. He states that if the information at issue in this appeal were likewise supplied to journalists and reported, it could damage his career.

For the present purposes I will assume, without deciding, that section 21(2)(i) may apply to the ROM, and not just to a natural person.

I accept, as I have indicated above, that disclosure of the information at issue may well be discomforting to the ROM and the primary affected party, and they have stated as much. I am not sure that I can conclude that its public disclosure, and even the dissemination of the information through the media, would be unfairly damaging to the reputation of any person. The information conveys the details of an arrangement reached between the ROM and the affected person. In itself, this information is neither disparaging nor misleading. It does not contain allegations of misconduct as have been present in some cases where section 21(2)(i) has been applied (see, for instance, M-1053). I conclude that section 21(2)(i) is not a relevant factor.

I do not preclude the possibility that once the information is disclosed, it may be the subject of public commentary. That, however, is not a reason under the *Act* to favour withholding information. The possibility of commentary does not by itself lead to a conclusion that the disclosure of the information may unfairly damage the reputation of the affected person.

The affected person also expresses a concern that disclosure of the information could affect his ability to negotiate future employment contracts, thereby restricting his economic opportunities. I am inclined to view this assertion as speculative, and do not therefore find it relevant to my determination under section 21.

Factors weighing in favour of disclosure

The appellant has submitted that the ROM is

> one of the premier museums or public institutions in Canada. The President of the ROM is the most important museum position in Canada and there is an entitlement for the public to know the financial details of the salary/benefits/etc. Paid to the head of this important institution. The ROM receives both public money and private donations and the public are entitled to review the stewardship of the President including all financial entitlements.

Although the appellant did not specifically refer to the criteria in section 21(2), in my view, the above submissions reflect the consideration in section 21(2)(a), set out above. In a number of orders, it has been found that the contents of retirement agreements entered into between

institutions and high ranking employees represent the sort of records for which a high degree of public scrutiny is warranted (see Orders M-173, P-1348, MO-1184 and MO-1405). The case before me involves a significant amount of public funds, and the highest ranking employee in one of the most important cultural institutions in the country. I am satisfied that the consideration in section 21(2)(a) should be given substantial weight in an assessment of whether disclosure of the information would constitute an unjustified invasion of personal privacy.

Conclusion

On balance, I find that the consideration favouring disclosure of the remaining information in Records 4 and 5 outweigh those favouring privacy protection of the primary affected party. Although there are considerations in favour of denying access to the information, the importance of both the institution and the individual, and their special status in a defined field of public endeavour weigh strongly in favour of openness in this instance. I find, therefore, that the disclosure of the information in Records 4 and 5 (other than that covered by the presumption in section 21(3)(d) and that discussed immediately below) would not constitute an unjustified invasion of the personal privacy of the primary affected party, and will order its disclosure.

I find, however, that certain personal information in the records, namely, retirement dates, social insurance number, date of birth, name and date of birth of spouse, and beneficiary of pension, ought not to be disclosed. The parties' submissions were related to the more substantial provisions of the records, as is my discussion of the provisions of section 21(2)(a) above. On my review of the submissions and the records, I conclude that it has not been shown that the disclosure of this information would *not* constitute an unjustified invasion of personal privacy, and this information is accordingly exempt from disclosure under section 21.

Record 6

The remaining personal information on Record 6 which remains to be considered are the addresses of identifiable individuals. I am satisfied that there are no factors favouring disclosure of this information. It has not been shown that its disclosure would *not* constitute an unjustified invasion of the personal privacy of those individuals, and this information is thus exempt from disclosure.

THIRD PARTY INFORMATION

It is asserted by the ROM that the exemptions in sections 17 and 18 apply to Record 6. Section 17(1) provides:

> 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; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

The ROM submits that section 17 is applicable in that

> the information sought relating to consulting contracts is financial and economic information relating to amounts paid to consultants, and the costs of buying services from them by the ROM for its benefit. This type of information often arises from a competitive bid process, or following difficult and lengthy negotiation. The fees paid to consultants are kept confidential in many circumstances where disclosure could prejudice either the consultant (by affecting its competitive position with others) or the ROM because its economic interests may be affected by disclosing what it is prepared to pay for certain types of work or services.

The ROM also submits that this type of financial and economic information is supplied to and received by the ROM in confidence (either implicitly or explicitly). It states that it has never made its final tender awards public and is concerned to preserve the integrity of its sealed tending process.

Section 17(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805 Senior Adjudicator David Goodis, discussing the purposes of the section, stated that this provision was designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions".

Although, as stated in other orders, one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace.

In applying section 17(1), previous orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish 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.

[Orders 36, P-373, M-29 and M-37]

Type of information

I accept that Record 6 contains information of a commercial or financial nature, within the meaning of section 17(1).

Supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects, once again, the purpose in section 17(1) of protecting the informational assets *of the third party*. Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the *Act*. Commercial contracts between institutions and private parties have been the subject of a number of past orders of this office. In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party (see, for instance, Order PO-1698). Thus, the type of information which has been found to qualify for exemption under this section are financial details of bid submissions, such as unit prices and other "proprietary" information.

In the case before me, there is no evidence, apart from the mere assertion, that the financial information in Record 6 was supplied by the consultants. The dollar figures in Record 6 reflect payments received. There is no evidence that these dollar figures represent unit prices or similar information of commercial value, or that they are even the same as those provided in the original bid submissions.

I therefore find that part two of the three-part test has not been established, in that the financial information in Record 6 was not "supplied" by the affected parties to the institution within the meaning of section 17(1) of the *Act*.

Since I have found that the financial information in Record 6 was not supplied by the affected parties, it is unnecessary to determine whether it was supplied "in confidence". I observe, however, that the evidence provided by the ROM on its confidentiality policies does not assist its position on these issues. The clauses on confidentiality which are stated to form part of the ROM's standard invitations to bid as well as its standard consulting contracts impose obligations

on suppliers with respect to non-disclosure of information acquired during the performance of services for the ROM. They do not address the confidentiality of information supplied by the contractors. Further, the evidence as to confidentiality during the bidding process does not assist insofar as I have concluded that Record 6 does not reflect original bid submissions.

In light of my finding, it is unnecessary to consider the third part of the three-part test. I conclude that it has not been established that the exemption in section 17(1) applies to Record 6.

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

The ROM has also referred to section 18(1)(c) in denying access to Records 1 to 5, and sections 18(1)(a), (d), e) and (g) with respect to Record 6.

These sections provide:

> 18. (1) A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (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;

Section 18(1)(c): Records 1 to 5

Section 18(1)(c) provides institutions with a discretionary exemption which can be claimed where disclosure of information could *reasonably be expected to* prejudice an institution in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

It has been said that in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In this appeal, the ROM has stated, with respect to Records 1 to 5 that

> [the primary affected party] is one of a small number of highly sought after individuals in the world with the background and ability to head a major cultural institution such as the ROM. Such individuals command high salaries and have the ability to bargain and negotiate incentives and entitlements from a position of strength. To disclose the terms of [the primary affected party's] retirement package, and information relating to incentives to attract him to the position, could be prejudicial to the ROM in negotiating with a potential CEO or senior officer of the institution in the future. Disclosure of this information would show what the ROM has paid in the past and would therefore be an indication of a base upon which an individual might seek to negotiate his or her own entitlements.

Previous orders have rejected arguments that disclosure of the details of contracts between senior employees and institutions, including settlement agreements, could reasonably be expected to harm the economic or competitive interests of those organizations, within the meaning of section 18(1)(c) (or its municipal equivalent) (see Orders P-1545, P-380 and MO-1184). Although each case must be determined on its own facts, assertions similar to those made by the ROM in this case as to the potential harm to its competitive position have been rejected as "speculative" (see Order P-380).

It should be noted that the *Public Salaries Disclosure Act, 1996* already requires the disclosure of the annual salary and benefits paid by the ROM to the primary affected party. Even if it were true that the market for persons like the primary affected party is competitive, some of the key information which might influence negotiations between the ROM and these individuals is in the public domain. Further, to the extent that the information which is the subject of this appeal might also influence those negotiations, it is difficult to assess how important such information may be in a given circumstance in the future. I find that the connection is speculative or, at the least, that it has not been shown that there is a "reasonable expectation of prejudice" to the interests protected by section 18(c).

I find, therefore, that the application of section 18(1)(c) to the information in Records 1 to 5 has not been established.

Sections 18(1)(a), (d), (e) and (g): Record 6

The submissions of the ROM with respect to these sections are the same as those for section 17. On my review of these submissions and the material before, I am not convinced that the

applicability of these sections has been established. Each of the sections addresses distinct and specific types of information [sections 18(1)(a) and (e)] or types of harm [sections 18(1)(d) and (g)]. The material before me does not establish that the information in Record 6 is the type of information described in sections 18(1)(a) or (e). Neither does it establish that the disclosure of the information in Record 6 could reasonably be expected to result in the type of harm described in sections 18(1)(d) or (g).

I conclude that Record 6 does not qualify for exemption under section 18(1) of the *Act*.

PUBLIC INTEREST

Section 23 provides that an exemption from disclosure under, among others, sections 17, 18 or 21 of the *Act* does not apply where a compelling public interest in disclosure clearly outweighs the purpose of the exemption. Because of my findings above, only certain personal information in Records 1 to 5 (start and end date of employment, retirement dates etc.) and Record 6 (payments to and addresses of identifiable individuals) qualifies for exemption from disclosure under any of these sections, specifically, section 21. In my view, the level of disclosure which will be made to the appellant in compliance with this order addresses any public interest issues raised by the appellant with respect to Records 1 to 5. I am accordingly not persuaded that there exists a compelling public interest in the disclosure of the remaining information which would clearly outweigh the purpose of the section 21 exemption.

With respect to Record 6, the appellant submits that the "consulting contracts are in the case of this institution "public work" and the public as a public supporter and potentially private contributor should know the costs of the work done by private consultants and be satisfied about the importance and relevance of the work being done." Further, it is submitted that the initial reason for the request for consulting contracts was to be satisfied that "neither [the primary affected party] nor anyone connected to [the primary affected party] was securing funds through consulting contracts...That can only be determined by receiving information which discloses the name of each contractor the fees earned and the nature of the service or the special project which forms the subject of the contract."

I am not satisfied that disclosure of the personal information in Record 6 is necessary to achieve the first public interest identified above, to monitor the cost of work done by private consultants. There are means available to fulfill this public purpose without the disclosure of personal information, such as less specific requests for information. The second public interest identified is to ensure that no person connected to the primary affected party was engaged as a consultant to the ROM. Even if this were a "compelling public interest" within the meaning of section 23, the disclosure of the personal information of a large number of individuals in order to be able to verify or disprove a hypothetical connection to the primary affected party is a disproportionate response.

I find, accordingly, that there is no compelling public interest in disclosure of the personal information in Record 6 which clearly outweighs the purpose of the section 21 exemption.

ORDER:

1. I order disclosure of Records 1 to 5, with the exception of information about the start and end dates of employment, retirement dates, social insurance number, date of birth, name and date of birth of spouse, and beneficiary of pension.

2. I order disclosure of Record 6, with the exception of information about identifiable individuals who have not provided written consent to disclosure.

3. For greater certainty, I have provided a copy of the records for the ROM highlighting those portions of the records which shall be **withheld**.

4. I order disclosure to be made by sending the appellant a copy of the records, excluding the exempted portions, by no later than **April 27, 2001**, but not before **April 23, 2001.**

5. In order to verify compliance with Provisions 1 and 2 of this order, I reserve the right to require the ROM to provide me with a copy of the records which it provided to the appellant.

Original Signed By: March 22, 2001
Sherry Liang
Adjudicator