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

ORDER PO-1970

Appeal PA-000267-2

Management Board Secretariat

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NATURE OF THE APPEAL:

The Ministries of Agriculture, Food and Rural Affairs, the Attorney General, and Natural Resources (the Ministries) each received the same request, under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant's request for access to records was made in the context of a named MPP's business interests in two named companies. The two named companies are business associates which are operating under a separate third business name. For the purpose of this Order, I refer to all three companies as "the affected party".

The appellant specifically requested:

> … any and all records relating to the tendering and purchasing practices of your ministry concerning travel expenses, and also for any and all records relating to contracts or ongoing arrangements with an entity described as [the affected party] … or with one [the affected party] … and further, for any and all records relating to purchases from and amounts paid to these entities since June 8, 1995, and more particularly in the last 2 years, and still more particularly in the last year.

In accordance with section 25, the Ministries forwarded the request to Management Board Secretariat (MBS) which has custody and control of the responsive records. MBS sought to clarify the appellant's request and confirmed that he was seeking records relating to any contract or other agreements that Management Board Secretariat has with the affected party. After further discussions with the appellant, MBS clarified the request to read:

> records relating to any contract or other agreements Management Board Secretariat has with [the affected party];
>
> records relating to the Ministry's tendering and purchase practices for travel expenses;
>
> any purchases paid to these companies within the last two years prior to the date of your request

MBS located nine responsive records, notified the affected party of the request and asked for its views. The affected party objected to the release of certain records. After reviewing the affected party's response, MBS advised the appellant it was granting full access to records 1, 4, 7 and 9, and partial access to records 2, 3, 5, 6 and 8. In withholding information, MBS relied on the exemptions at section 17(1) (third party information) and 21(1) (personal information).

The appellant appealed MBS' decision.

During mediation of this appeal, two issues were resolved. The appellant agreed that he is not seeking access to the personal information of employees. Section 21 and the following pages, therefore, have been removed from the scope of the appeal: pages 97 – 105; the staff list at pages 116a and b of record 2; pages 31 to 40 of record 5; and the severed portions of pages 36 and 37 of record 8.

In discussions with the Mediator, the appellant raised the issue of the existence of additional records. He subsequently advised that MBS provided him with a letter which adequately addressed his concern about additional records and reasonableness of search has been removed as an issue. At that time, the appellant also raised the possible application of the "public interest override" at section 23 of the *Act*, which has been added as an issue in this appeal.

Further mediation was not possible and the matter proceeded to the adjudication stage. I sent a Notice of Inquiry to MBS, initially, soliciting its representations with respect to the exemptions claimed, and received a response. I then sent a copy of the Notice to the appellant along with MBS' complete representations. A copy of the Notice was also sent to the affected party. Both the appellant and the affected party submitted representations.

RECORDS:

There are five records at issue in this appeal, in full or in part. They are:

- **Record 2** (Travel Management Proposal submitted, May 1994)
- **Record 3** (Travel Agency Services Agreement with Management Board of Cabinet (MBC), November 1994)
- **Record 5** (Travel Management Proposal, January 1996)
- **Record 6 (**Regional Travel Services Agreement with MBC, August 1996)
- **Record 8 (**Travel Management Proposal, January 1999)

DISCUSSION:

THIRD PARTY INFORMATION

General Principles

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

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

One of the principal purposes of the *Act* is to make transparent the workings of government. 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 stated that this provision was designed to "protect the 'information assets' of businesses or other organizations which provide information to government institutions."

For a record to qualify for exemption under section 17(1)(a), (b) or (c), the institution and/or the affected parties 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.

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

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it

> unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]
>
> [*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 (Div. Ct.)]

MBS and the affected party rely on the exemptions at sections 17(1)(a), (b) and (c).

Part 1: Types of Information

The affected party and MBS both characterize the information in the records as relating to the affected party's commercial and financial interests as between the affected party and the government. The affected party does not respond specifically to the requirements in parts 1 and 2 of the three-part test. Rather, he states generally that the information disclosed does not provide him with sufficient information to discern the nature of the proposals or to gauge the monetary value of the transactions.

The terms "commercial" and "financial" information have been defined in previous orders of the Commissioner's office as follows:

> *Commercial Information* is information which relates solely to the buying, selling or exchange of merchandise or services. [Order P-493]
>
> *Financial Information* refers to information relating to money and its use or distribution and must contain or refer to specific data. For example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

I have reviewed the information contained in the five records and accept that it relates directly to the buying and selling of travel agency services to the provincial government. The three proposals, records 2, 5 and 8, were submitted in response to RFPs. They contain information on the affected party's proposed business activities, such as its pricing structures, budget and payment terms, financial benefits and cost savings, the nature of the services provided, business plans, corporate structure, employee qualifications, corporate clients, and information on proprietary products and procedures. I am satisfied that this information clearly on its face meets the definitions of commercial and/or financial information.

Similarly, records 6 and 8 are agreements between the affected party and MBS for the provision of travel agency services. Among other terms, both documents include information on bookings, nature of services to be provided, revenue-share calculations and related financial information, and proprietary information for managing reporting. The only information at issue in both records concerns revenue-sharing and related provisions, and proprietary information.

I find that this information may be properly characterized as commercial and/or financial information for the purposes of sections 17(1), and the first requirement of the section three-part test has been met.

Part 2: Supplied in Confidence

In order to satisfy the second requirement, MBS and/or the affected parties must show that the information was "supplied" to MBS, either implicitly or explicitly in confidence. Information contained in a record not actually submitted to an institution will nonetheless be considered to have been "supplied" for the purposes of section 17(1) if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to MBS. [Orders P-179, P-203, PO-1802 and PO-1816]

"Supplied"

Records 2, 5, and 8 – the proposals

MBS submits that records 2, 5 and 8 are proposals in response to provincial government RFPs and were therefore "supplied" by the affected party. The affected party makes the same argument, stating that the information in the proposals was provided in the course of a "commercial bidding process" and as such was "supplied" within the meaning of section 17(1).

I have reviewed the records and it is clear that each of the proposals was supplied by the affected party in response to an RFP.

Records 3 and 6 – the agreements

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*. Records of this nature 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. If disclosure of a record would reveal information actually supplied by an affected party, or if disclosure would permit the drawing of accurate inferences with respect to this type of information, then past orders have also found that this information satisfies the requirements of the "supplied" portion of the second requirement of the section 17(1) exemption test. [Orders P-204, P-251 and P-1105]

In its representations, MBS submits:

> … In this case, the information severed from the two agreements between [the affected party] and MBS is pricing information that was actually supplied by [the affected party] in its corresponding RFP response proposal.

Similarly, the affected party states that the information in the agreements qualifies as being "supplied" "because it is not the product of negotiations" and "is the same as that originally provided by [the affected party] in its proposals."

My review of record 6 indicates that the information at issue was drawn from record 5. I accept that the references contained in the agreement would permit the drawing of accurate inferences with respect to the information actually supplied to MBS by the affected party in its proposal.

With respect to record 3, I am satisfied that the information severed at paragraph 6 is drawn from record 2. The balance of the withheld information at page 11, however, is the result of negotiations between MBS and the affected party. In my view, disclosure of this information would not reveal information actually supplied by the affected party nor would it allow the drawing of accurate inferences to this type of information. As all three parts of the section 17(1) test must be met in order for a record or part of a record to qualify exemption, I find that that the information severed at page 11 of record 3 does not qualify for exemption and should be disclosed to the appellant.

"In Confidence"

As I have found that the information contained in records 2, 3, 5, 6 and 8 was supplied to the institution by the affected party, I will now consider whether it was supplied in confidence, either implicitly or explicitly.

MBS submits:

> It is MBS' normal and consistent practice to treat the proprietary business and financial information in RFP responses as confidential information. Consequently, only that information was severed from the three [the affected party] proposals, whereas the background information and extracts from the RFP were disclosed to the Appellant. … All three proposals include a statement to the effect that the proprietary and confidential information contained therein should remain confidential, and that the proposed data may not be used by MBS for any purpose than to evaluate the response.
>
> …
>
> As for the two contracts, [the affected party's] pricing structure, which was also supplied to MBS in the RFP proposal was submitted by [the affected party] with the expectation that MBS would treat it as confidential information, and MBS has, in fact treated it as such.

The affected party refers to the explicit confidentiality statements found at the beginning of each proposal, and asserts that they are "evidence of a consistent intention that the information supplied would be treated in a confidential fashion." It also maintains that the pricing information provided in the agreements was initially supplied to MBS in the RFP responses.

I find that the proposals were submitted in response to RFPs, during the competitive process, with an explicit expectation of confidentiality. I also find that the affected party supplied the information severed from the agreements with an expectation of confidentiality, and that this expectation was reasonable by virtue of the nature of the relationship of record 3 to record 2, and of record 6 to record 5.

Part 3: Reasonable Expectation of Harm

To discharge the burden of proof under the third part of the test, the party resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Order P-373].

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), 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.), as well as Orders PO-1745 and PO-1747).

On this part of the test, the appellant contends that only record 8 is "current", pointing out that the information in records 3 and 6 "lapsed some time ago". He submits that, "given the date of the agreements and the age of the information, the third party's claim of harms is remote and unrealistic."

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

The affected party and MBS both state that disclosure of the information severed from the proposals and the agreements would significantly prejudice the affected party's competitive position. Although the affected party does not specifically refer to sections 17(1)(a) and (c), its representations suggest that it relies on these exemptions. It submits:

> The records at issue contain confidential pricing information and confidential information about the manner in which [the affected party] carries on business and proposes to provide services to the MBS. Disclosure of this information would allow any and all of [the affected party's] competitors to see exactly how [the affected party] operates. Significant prejudice to its competitive position would result from disclosure of this information. Disclosure would provide exact details of the pricing structure to a potential competitor who could adjust its price accordingly on future bids, thereby gaining a significant competitive advantage and placing [the affected party] at a competitive disadvantage. It is therefore reasonable to expect that disclosure of this information could significantly

> prejudice [the affected party's] competitive position in the travel industry generally, as well as in future dealings with the MBS.

In its representations, MBS agrees with the affected party that disclosure of the information severed from the three proposals could reasonably be expected to prejudice significantly the affected party's competitive positioning in the travel industry. MBS submits that the withheld information contains details of the affected party's business and financial operations, and submits:

> More particularly, the severed information consists of [the affected party's]: financial statements, business strategies and products, implementation plan, human resources organization plan, information about its pricing, client information and answers to the RFP Agency Profile Questionnaire, all of which reveal commercial, financial or proprietary business information about [the affected party] and could be used by competitors to prejudice [affected party's] competitive position.

MBS further submits:

> Of particular significance in this regard are the details of [the affected party's] methodology – the business strategies and products it proposes to use and implement to meet the government's travel needs, and satisfy the RFP requirements. If this information were disclosed, [the affected party] would gain an undue advantage because they could imitate this methodology in future government proposals, without having to expend the time, money and expertise that [the affected party] did to develop it. As a corollary, [the affected party] would suffer an undue loss from the free disclosure of this information which, in other contexts, it could theoretically sell to other companies in the travel industry.

With respect to the agreements, MBS states that disclosing pricing information would permit the affected party's competitors to alter its prices and pricing structure. This would give competitors a competitive edge in future government RFPs and result in an undue gain for the affected party's competitors and therefore undue loss for the affected party.

I am satisfied that the affected party and MBS have provided the kind of detailed and convincing evidence which demonstrates that the disclosure of certain portions of the proposals in response to RFPs, and the information severed from the agreements, could reasonably be expected to result in significant prejudice to the affected party's competitive position. I also accept that disclosure of the records would reveal the strategies adopted by the affected party to win the bids, including its use of substantive material, methodology, and pricing. It is reasonably likely that a competitor could make use of this information to undercut the affected party's future proposals thereby resulting in significant prejudice to its competitive position [see, for example, Orders PO-1818 and PO-1957]. Previous orders of this office have examined proposals submitted during the competitive tendering process and have found, in many cases, that disclosure of the unique details of a tender, such as the price structure, could reasonably be

expected to result in the harms in sections 17(1)(a) and/or (c) [see, for example, Orders P-1553, P-1613 and P-1637].

Having said this, records 2 and 5 also contain information that does not fall within the categories indicated above. The Table of Contents for record 2 and record 5 also list general information relating to the requirements of the Request for Proposal which do not include or provide details of the proposals themselves. I am not persuaded that disclosure of information of a general nature could reasonably be expected to result in any of the harms described in section 17(1), and should be disclosed to the appellant. I have highlighted the information on the enclosed copies of the Tables of Contents of records 2 and 5, which I found to be exempt under sections 17(1)(a) and (c).

In summary, I find that the third requirement of the sections 17(1)(a) and (c) test has been established, with the exception of the information that I find to be general information in records 2 and 5.

Section 17(1)(b)

I will now consider the general information contained in records 2 and 5, which I found not to be exempt under sections 17(1) (a) and (c).

MBS relies on the exemption at section 17(1)(b) in three aspects. First, it claims that businesses would be reluctant to reveal details of the "financial and commercial information about their companies if they could not expect that information to remain confidential." Second, it is in the public interest that responses to RFPs contain detailed information so that proposals can be properly evaluated to allow the government to purchase the "best services available for taxpayers' money." Third, proponents would be reluctant to submit pricing information on government RFPs if such information is made available upon request to competitors or the public in general.

In the context of requests for proposals, this office has found that because it is in the proponent's own interest to provide as much information as possible, particularly as required by an RFP, it is unlikely that a proponent would withhold such information (Orders MO-1199F, P-1637 and PO-1707]. Here, there is nothing in the general information at issue which would take this case outside the norm, and I find that it is unlikely that proponents in future RFPs would withhold this type of information. Therefore, section 17(1)(b) does not apply.

PUBLIC INTEREST OVERRIDE

Introduction

Section 23 of the *Act* reads:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and 21 does not apply where a compelling public

> interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added].

In order for the section 23 "public interest override" to apply, two requirements must be met: (i) there must be a **compelling** public interest in disclosure; and (ii) this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note).

If section 23 applies, it would have the effect of overriding the application of section 17(1), and the appellant would have a right of access to the records.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [see, for example, Order P-1398]

Representations

The appellant submits that there is a compelling public interest in the disclosure of the information and relies on the provisions of the *Members' Integrity Act, 1994*.

In his initial request to the Ministries, the appellant indicated that "there is a compelling public interest in establishing that government purchases and contracts have been entered into fairly and without preference." In his representations, he further submits:

> … the public takes a keen interest in the private dealings of elected members, particularly when a member is prominent, and when the dealings involve the government. Much of the subject matter of these requests was published in a front-page article of Peterborough This Week on [date and title of article]. Peterborough This Week has a circulation of about 46,000 and adult readership exceeding 90,000, giving it dominant position in the Peterborough area.

The appellant provided this office with a copy of a 1995 letter from the Office of the Integrity Commissioner (Integrity Commissioner) and addressed to the named MPP. In it, the Integrity Commissioner confirmed that he reviewed the contract between the named MPP and the affected party, and found that neither the named MPP nor the company in which s/he is a shareholder is a party to a contract with the Ontario government. The Integrity Commissioner concluded that the provision of that *Members' Integrity Act, 1994,* pertaining to "Government Contracts with Members", was not applicable, but noted that on expiry of the agreement at issue, "the matter should be reviewed."

MBS submits:

> All the information at issue consists of the proprietary business, commercial and financial information of a private sector business, and the pricing structure of the two contracts between it and MBS. … Disclosure of the information would only serve to inform [the affected party's] competitors of [the affected party's] financial and commercial business operations, and its implementation plan and pricing structure strategies for providing travel agency services to the Ontario government. As such, the interest served by its disclosure is essentially private in nature, not public.

MBS continues by stating that even if there exists a compelling public interest, the interest would not outweigh the purpose of the section 17(1) exemption, which is to protect the commercially valuable information of third party entities which do business with the government. In its representations, the affected party supports MBS' position asserting that the interest served is "private in nature, not public."

Is there a compelling public interest in disclosure?

In Order P-1398, Inquiry Officer John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding former Inquiry Officer Higgins's decision in Order P-1398, the Court of Appeal for Ontario in *Minister of Finance* (above) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at 342].

In light of the Court of Appeal's comments, I adopt former Inquiry Officer Higgins's interpretation of the word "compelling" contained in section 23.

I accept the appellant's general assertions that the public has an interest both in ensuring that government contracts have been entered into fairly, and in scrutinizing the private dealings of elected members. These important public interests are reflected in the *Members' Integrity Act, 1994*, cited by the appellant. In this regard, there is some degree of public interest in disclosure of the records at issue. However, an independent officer of the Legislative Assembly, the Integrity Commissioner, has responsibility for overseeing the *Members' Integrity Act, 1994* and has, in fact, reviewed the matter to which the records at issue in this appeal relate. In the circumstances, especially given the Integrity Commissioner's involvement, I am not persuaded that there is a "compelling" public interest in disclosure of these records. As a result, section 23 does not apply.

ORDER:

1. I uphold MBS' decision to withhold the severed portions of record 3, 6 and 8.

2. I order MBS to provide the appellant with the severed copies of the Tables of Contents of records 2 and 5, and record 3, as indicated (severances highlighted), by **December 27, 2001**, but not earlier than **December 22, 2001**.

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

Original signed by: November 22, 2001
Dora Nipp
Adjudicator