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

ORDER PO-2031

Appeal PA-010346-1

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- Copies of any final contracts related to IJP [Integrated Justice Project] work between the Ministry of Attorney General and any one (or all) of [5 named companies].
- Financial statements and/or budget projections summarizing both anticipated and current, updated actual costs of any Integrated Justice Project-related work contracted to [5 named companies].
- Any staff memos or progress reports related to the IJP work of [a named company] sent to IJP Director [a named individual] (or any other acting IJP Project Director) and/or to the Senior Project Advisor to the IJP Director during the period between September 1, 2000 to June 30, 2001.

The Ministry subsequently clarified with the requester that he was seeking access to:

> records with respect to the Integrated Justice Project and [the named company]. In particular, a copy of the final contracts, financial statements and/or budget projections summarizing both anticipated and current up-dated actual costs, any staff memos or progress reports sent to [a named individual] and/or to the Senior Project Advisor to the IJP Director between September 1, 2000 and June 30, 2001.

The Ministry's decision of September 18, 2001 was to deny access to the records which it identified as responsive pursuant to section 17(1) of the *Act*. The requester (now the appellant) appealed the Ministry's decision.

In discussions with the Mediator, the appellant advised that he was only interested in obtaining access to the "term and termination" provisions of the Agreement, identified as Article 10. With respect to the remaining records, the appellant confirmed that he is seeking full access to Schedule B to the Agreement and the IJP weekly status reports.

In a letter dated November 15, 2001, the Ministry advised the appellant that access to the records was also being denied under section 18(1) of the *Act*. Although this letter was not received by the appellant or this office until November 27, 2001, the appellant advised the Mediator that he was not objecting to the Ministry's late raising of this additional discretionary exemption.

Also during mediation, the Mediator notified the named company (the affected party) which advised that it has no objection to the disclosure of Article 10 to the Agreement. However, the affected party indicated that it objects to the disclosure of both Schedule B to the Agreement and the IJP weekly status reports.

The Ministry subsequently advised the mediator that it no longer intended to rely on section 18(1) of the *Act* to deny access to the records, and agreed to provide the appellant with a copy of Article 10 of the Agreement. The Ministry also confirmed that it is relying on sections 17(1)(a) and (c) of the *Act* to deny access to the remaining records.

In discussions with the Mediator, the appellant also raised the issue of a compelling public interest in the disclosure of the remaining records at issue (section 23 of the *Act*).

I provided the Ministry and the affected party with a Notice of Inquiry, seeking their representations on the application of the section 17(1) exemption and section 23 to the remaining records. Both parties made submissions, which were shared, in their entirety, with the appellant, who also provided me with representations. The appellant's submissions were subsequently shared with the Ministry and affected party and I received reply representations from the affected party.

The records remaining at issue consist of Schedule B to a document entitled "Integrated Justice Supplier Agreement" (44 pages) and IJP weekly status reports (132 pages).

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a) or (c), the Ministry and/or the affected party, who are resisting disclosure, must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) or (c) of subsection 17(1) will occur.

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

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> 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.)]

Part 1: Type of Information

In support of its contention that the information contained in Schedule B to the Agreement and the Weekly Status Reports are exempt under section 17(1), the affected party submits:

> Schedule B to the Agreement contains [the affected party's] proprietary trade secrets as well as technical and commercial information. Schedule B contains a specific list of the programs, functionalities and information to be embodied in the software product that [it] was developing for the IJP. Schedule B also describes the techniques, methods and processes by which [it] would construct the software product. The [affected party] product's program and functionalities, as well as the information about [it] generally, (i) are used in [the affected party's] business, (ii) are not generally known to others in the case management software industry, (iii) are valuable to [the affected party] because they are not generally known, and (iv) are subject to reasonable efforts by [the affected party] to keep them secret. Such efforts include confidentiality agreements with [its] employees, consultants and customers. [The affected party], therefore, believes the Ministry of the Attorney General must not disclose Schedule B due to the mandatory trade secret exemption.
>
> Schedule B also contains detailed task charts prepared in part by engineering professionals that describe the construction and specifications of [its] software product. Accordingly, the information in Schedule B is protected as technical information. In addition, Schedule B contains commercial information (including product prices and [the affected party's] hourly labour rates) relating to IJP's purchase of the [affected party's] software, which is within the *Act's* commercial information exemption. Finally, we note that the request to disclose 'financial statements and/or budget projections summarizing both anticipated and current, updated actual costs' is on its face a request to disclose financial information protected by the first part of the three-part test. As noted above, Schedule B

> contains specific pricing information and labour rates that provide insight into [the affected party's] pricing practices and costs, and is, therefore, within the *Act's* mandatory exemption.

With respect to the Weekly Status Reports, the affected party submits that:

> The information contained in the IJP weekly status reports, while not directly supplied by [the affected party], would reveal proprietary information supplied by [it] because accurate inferences could easily be drawn with respect to trade secret information, technical information and commercial information supplied by [it] to the IJP.
>
> . . .
>
> The IJP weekly status reports are similar to Schedule B in that they directly and indirectly contain information provided by [the affected party], including trade secrets that describe the methods, techniques and processes used by [it] to develop the software product for the IJP. These are the same methods, techniques and processes the [it] otherwise uses in its business and they are not generally known to others in the case management software business.
>
> . . .
>
> The IJP weekly status reports also contain and make reference to technical information prepared by [the affected party's] engineers describing the construction of the [affected party] software product. In addition, the IJP weekly status reports contain and make reference to commercial information in that they were prepared with an eye to evaluating the progress of the IJP initiative and the need to supplement the [affected party's] software with additional features. They also make reference to [the affected party's] commercial pricing and cost information. For these reasons, IJP's weekly status reports are within the mandatory exemption because they contain [the affected party's] trade secrets, technical information and commercial information.

The Ministry submits that:

> In Order P-1605, the adjudicator determined that a record containing information relating to a specific and unique business proposal with references to the development of technological solutions and programs for the Ministry qualified as a 'trade secret' within the meaning of section 17(1) of the *Act*.
>
> The Ministry submits that with respect to part 1 of the test the information contained in Schedule B to the Agreement and the weekly status reports are trade secrets, scientific, technical, commercial, financial or labour relations information.

> The Integrated Justice Project (IJP) was instituted to provide financial and qualitative benefits to users of the justice system. IJP is a complex project in terms of its business transformation, its information technology transformation, as well as its partnership with a private sector consortium.
>
> The information system designed for development and implementation of a court case management system constitutes a trade secret. The project deals with the design and implementation of technological solutions necessary to modernize the justice system and includes source code, hardware and customized software. The records requested address financial arrangements among the parties to the Agreement and delivery of systems and related services.
>
> The records also contain information pertaining to labour relations matters. The project will affect thousands of employees in hundreds of different locations across the province, as well as municipal police services, judges, private lawyers and the public across Ontario. As a technological and business transformation, it is the largest and most complex project of its kind ever initiated.
>
> It is also the Ministry's position that Schedule B to the Agreement may also be viewed as consisting of commercial information relating to the buying and selling of technology services.

The appellant takes issue with the Ministry's characterization of the information contained in the records as a "trade secret". He argues that "IJP contemplates the radical transformation of the province's judicial system. That provincial justice system is a public institution; it is not a 'trade'." The appellant goes on to submit that:

> . . . the [M]inistry of the [A]ttorney [G]eneral, which solicited the private-public partnership, does not operate in the same fashion or for the same purpose as a private commercial enterprise. The [M]inistry's primary role in the IJP project is not to become involved in the commercial 'trade' of developing information technology. Rather, the [M]inistry is acting as an accountable public representative in a project that will ultimately develop technological alternatives to the way justice is currently delivered in the province.

The terms "commercial" and "technical" information have been defined in previous orders as follows:

> Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must

> be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act*. [Order P-454]
>
> Commercial information is 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]

Schedule B to the Agreement is entitled "Project Management Plan and Statement of Work". It sets out in detail the scope and the schedule of work to be undertaken by the affected party in performing its contract with the Ministry. The Schedule to the Agreement also describes the work to be performed by Ministry staff and the costs involved in each step of the process. I find that each of the items referred to in Schedule B relate directly to the commercial transaction between the Ministry and the affected party for the completion of the contract which they entered into. Accordingly, I find that Schedule B as a whole contains "commercial" information. I also find that certain portions of Schedule B contain "technical" information.

For the same reasons, I find that some specific portions of some of the weekly status reports also contain information which qualifies as "commercial and or technical information" within the meaning of section 17(1). However, most of these reports contain information which is neither "commercial" nor "technical", but rather simply describe the progress being made on the work to be performed under the Agreement. Non-technical details concerning the development of the required software and the difficulties encountered in bringing the systems into operation are set out in detail and form the majority of the information contained in the weekly status reports.

As noted above, the affected party also claims that the information contained in Schedule B and the weekly status reports qualifies as "trade secrets" for the purposes of section 17(1). The term "trade secret" has been defined in previous orders as follows:

> "Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> [Order M-29]

Given the nature and scope of the IJP, and the complex systems design components it envisions, it is possible that records produced by the affected party, either on its own or in conjunction with its justice sector partners, might contain information which would qualify as a "trade secret". However, it does not necessarily follow that all records created or supplied to the Ministry in the context of the IJP qualify as "trade secrets". Each record must be reviewed individually, and its content must be assessed against the requirements of the definition of "trade secret" outlined above.

In my view, the information contained in both Schedule B and the weekly status reports does not qualify as a trade secret for the purposes of section 17(1). The records describe in some detail the work being performed by the affected party, but none of them set out the actual formula, programme, method or technique to be employed in fulfilling its contractual obligations to the Ministry. Schedule B does not describe the methodologies to be undertaken by the affected party with any degree of specificity; rather it simply describes the scope of the work to be performed, the allocation of responsibilities between the affected party and the Ministry and certain appendices outlining the protocols for acceptance by the Ministry and the arrangements surrounding changes to the terms of the contract as agreed to during its term.

Similarly, the weekly status reports describe the work being performed and the solutions arrived at with respect to the problems encountered, but do not describe the affected party's overall strategy and techniques for meeting the requirements of the contract. Accordingly, I find that the information contained in these records does not qualify as a "trade secret" as that term has been defined in relation to section 17(1). It may be that information which qualifies as "trade secrets" could exist in other related records but none of the information in the records before me contain such information. In my view, my findings with respect to the presence of information which qualifies as technical and commercial information adequately addresses the concerns raised by the affected party with respect to the protection of its information.

By way of summary, I find that the first part of the test under section 17(1) has been met for Schedule B and for some portions of the weekly status reports which contain commercial and/or financial information.

Part II: Supplied in Confidence

In order to satisfy part two of the test, the affected party and/or the Ministry must show that the information was *supplied* to the Ministry *in confidence*, either implicitly or explicitly.

In support of its contention that the information contained in Schedule B was supplied to the Ministry with an expectation of confidentiality, the affected party submits:

> All of the information in Schedule B was supplied to IJP in confidence pursuant to the explicit confidentiality provisions contained in Article 11 of the Agreement. Schedule B was supplied by attaching it to the Agreement at the time the Agreement was executed. It was intended as a "road map" of the software development project. [The affected party] fully expected that this information

> would be kept confidential under Article 11 (specifically Article 11.1(b)(i) and (ii)) of the Agreement, and [the affected party] believed that the IJP was in fact *obliged* not to disclose the information under the Act. Schedule B was prepared solely for the IJP and it is not publicly available. Indeed, we understand that the Ministry of the Attorney General has treated Schedule B as confidential, and it has so far refused disclosure in response to the appellant's request, consistent with its obligations under the Agreement and the Act.

With respect to the weekly status reports, the affected party acknowledges that the information which they contain was "not directly supplied by [it]" though it takes the position that the disclosure of these documents "would reveal proprietary information supplied by [it] because accurate inferences could easily be drawn with respect to trade secret information, technical information and commercial information supplied by [the affected party] to the IJP." The affected party suggests that it was "willing to supply all of this information to the IJP because [it] expected (and continues to expect) that it would be kept confidential pursuant to Article 11 of the Agreement and the Act."

The Ministry submits that:

> . . . the information in the IJP weekly reports supplied to the Ministry was supplied in confidence explicitly or implicitly. Previous orders of the Information and Privacy Commission have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Order M-169). Business information is generally accepted as being highly confidential and supplied to the Ministry in confidence and treated as such.
>
> As well, the Ministry is concerned that provision of the IJP Weekly Reports will affect the nature of the disclosure provided by its consortium partners in related contracts with other parties.

The appellant takes the position that "the expectation of confidentiality between the IJP partners does not have a 'reasonable basis'". He goes on to add that:

> . . . commercial businesses entering into agreements with the public sector will wish to maintain the confidentiality of their 'trade secrets' for subsequent commercial use. On the other hand, private-sector partners are well aware of the risks in engaging in a public-sector partnership[s].
>
> . . .
>
> It is unreasonable for the Ministry and the commercial partners in the IJP project – a project that involves millions of dollars worth of taxpayer's money- to expect the details of such a major public project to be kept confidential. The Ministry is not in a position, as a public institution, to guarantee confidentiality to commercial

partners concerning matters that will ultimately transform a public institution like the justice system.

Findings with Respect to Part II of the Section 17(1) Test

Supplied

In Order MO-1553, Adjudicator Bernard Morrow reviewed the Commissioner's decisions regarding the interpretation placed on the term "supplied" in section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, which is the equivalent provision to section 17(1) of the provincial *Act*. In that decision, he found that:

> The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of this *Act*:
>
> > . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
> > (pp. 312-315) [emphasis added]
>
> Because the information in a contract is typically the product of a negotiation process between an institution and an affected party, the content of contracts will generally not qualify as originally having been "supplied" for the purposes of section 10(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. 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 the information that has resulted from negotiations between the institution and the affected party. [Orders P-36, P-204, P-251 and P-1105]
>
> The fact, however, that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been "supplied" by a third party, even where they were proposed by the third party and agreed to with little discussion [see Order P-1545].
>
> In addition, information contained in a record not actually submitted to an institution will nonetheless be considered to have been "supplied" for the purposes of section 10(1) if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the City [Orders P-179, P-203, PO-1802 and PO-1816].

The preamble to Schedule B, the Project Management Plan and Statement of Work, indicates that this part of the Agreement is intended to describe the work to be performed and to define the "Deliverables" for the implementation required by the end users of the system being created. The preamble goes on add that Schedule B forms part of the main Agreement.

The cover page of Schedule B indicates that it is Version 3.2 of the document. A "Revision History" included in the document further states that Version 3.2 is the 13th iteration of this Project Management Plan. The "Revision History" further indicates in a column entitled "Description of Revisions" the source of the changes and the reasons for various revised versions of Schedule B being created. The original version was dated March 17, 2000 and the copy which has been provided to me is dated September 20, 2000. In my view, this is strong evidence that the contents of Schedule B have been the subject of much discussion between the Ministry and the affected party. References to a multitude of revisions clearly indicate that the contents of Schedule B were negotiated by the parties to the Agreement and were not simply supplied by the affected party to the Ministry.

I also note that Schedule B is incorporated and forms part of the main Supplier Agreement. As noted above, in order for information contained in a contract between an institution and an affected party to qualify as having been "supplied" for the purposes of section 17(1), it must be the same as that originally provided by the affected party. In the present case, I have not been provided with evidence that would substantiate such a finding. The contents of Schedule B indicate that the information contained therein has been the subject of much discussion and negotiation between the Ministry and the affected party. In addition, I find that the disclosure of Schedule B would not permit the drawing of accurate inferences with respect to information which was supplied to the Ministry by the affected party. I have not been provided with any evidence to indicate that portions of Schedule B were supplied directly to the Ministry by the affected party, and none is apparent to me from my reading of the record. For these reasons, I find that the information contained in Schedule B was not "supplied" by the affected party to the

Ministry for the purposes of section 17(1) and the second part of the test under this exemption has not been met with respect to Schedule B. As all three parts of the test must be met in order for a record to be exempt under section 17(1), I find that this exemption does not apply to the information contained in Schedule B.

As far as the weekly status reports are concerned, the affected party acknowledges that they were created by Ministry staff and not supplied by it. Having reviewed these records, I accept that certain technical information contained in them was submitted by the affected party in accordance with its reporting obligations during the course of the performance of its contract. In my view, these portions were "supplied" by the affected party for the purposes of section 17(1). All other portions of the weekly status reports, which were prepared by Ministry staff, were not supplied by the affected party for the purposes of section 17(1).

In Confidence

The affected party relies on the provisions of Article 11 in support of its contention that the information in the records was supplied to the Ministry with an explicit understanding that it was to be treated in a confidential fashion. Articles 11.1(b)(i) and (ii) define the "confidential information" of the affected party to include its software, practices and procedures and a host of other information relating to the manner in which the affected party conducts its business. Article 11.2 of the Agreement describes the limitations on the use of such information by the Ministry, generally prohibiting the disclosure of this type of information except "as required by law."

In my view, the technical information contained in the weekly status reports is one type of information outlined in Articles 11.1(b)(i) and (ii). This information describes certain technical aspects of the project undertaken by the affected party to accomplish its obligations under the Agreement. I find that the affected party's expectation of confidentiality with respect to this information was reasonable, given the language contained in Article 11 respecting the restrictions on its disclosure by the Ministry. Accordingly, I am satisfied that the technical information in the weekly status reports was provided to the Ministry by the affected party with a reasonably-held expectation that it would be treated confidentially. The second part of the test under section 17(1) has, therefore, been satisfied with respect to these discreet portions of the weekly status reports.

Part III – Harms

The affected party submits that the disclosure of the contents of Schedule B and the weekly status reports would provide an unfair advantage to its business competitors. It argues that:

> The nature of the trade secrets, technical information, pricing and labour cost information contained in the document [Schedule B], and the detailed blueprint it provides of [the affected party's] software development process, means a competitor for this or similar projects would be able to utilize the information in Schedule B in bidding against [it] and/or in creating a proposal at a lower cost

> (because they would have had the benefit of [the affected party's] work without having incurred the costs to create the work plan.
>
> Not only could such harms 'reasonably be expect to' occur as a result of the disclosure, [the affected party] believes that they would be almost inevitable. The case management software business is a highly competitive one with a small number of software development companies all trying to outbid each other for a limited number of projects sponsored by government entities that typically utilize 'lowest-bid' selection procedures. The abilities to create low-cost proposals and to underbid competitors are of paramount importance in winning new government contracts. Giving [the affected party's] competitors this advantage would give them an unearned and, therefore, undue gain. At the same time, [the affected party] would be subject to a corresponding undue loss as a result of having to disclose proprietary information that otherwise would have remained confidential, but for having entered into the Agreement with the Ontario government.
>
> Finally, public disclosure of [the affected party's] pricing information, labour costs, trade secrets and other information could harm its ability to negotiate favourably with its future customers. The package of development services that were to be performed for the IJP enabled [the affected party] to offer certain prices for the package components within the context of the overall IJP initiative. Future customers, however, may attempt to 'pick and choose' certain customer-favourable portions of the IJP package by demanding that [the affected party] offer them the same prices, even though their overall contexts may have different and higher cost structures. Such a situation would place [the affected party] at a significant negotiating disadvantage.

Specifically with respect to the weekly status reports, the affected party submits that:

> . . . disclosure of the information in the IJP weekly status reports, as well as information that can be inferred from those reports, would significantly prejudice [the affected party's] competitive position in the case management software business by giving its competitors undue insight into [its] business, including but not limited to its pricing and its costs. Because of the competitive nature of the case management software business, it is more than reasonable to expect that [the affected party] would suffer an undue loss as a result of having its proprietary secrets disclosed.

The Ministry submits that one or more of the harms enumerated in section 17(1) could reasonably be expected to result from the disclosure of the weekly status reports. It states that:

> The Ministry, together with private sector partners, invested considerable time, money and expertise to design, structure and develop a unique business arrangement to modernize and manage the justice system. As other jurisdictions

> are considering court reform, the Agreement could be used as a template to structure reforms in other jurisdictions.
>
> . . . the information must be protected as access to the records may have significant monetary value to companies wishing to embark upon similar complex multi-phased information technology projects. A competitor for a similar project would be able to use the information in bidding against [the affected party] at a lower cost, having the benefit of not having to incur the costs to create a work plan/proposal. These harms are present or are reasonably foreseeable.

The Ministry relies upon the decision of former Adjudicator Mumtaz Jiwan in Order P-1605 which involved a request for contract documents relating to an earlier phase of the Integrated Justice Project. In that decision, the former Adjudicator found that:

> I have reviewed the record and the submissions of the parties. I find that, given the present circumstances, where there is a joint business venture between the public and private sector and given that the information relates to a unique and specific information technology program affecting the entire justice system and given that the project is in its initial stages and that the record contains sensitive business and proprietary information, there is a strong basis for the information to be protected. I also find that based on the nature of the information in the record, disclosure could have a significant negative impact on the affected party's competitive positive in its continuing relationship with the Ministry, other sectors of this government and other jurisdictions and interfere significantly with the affected party's contractual and other negotiations for other government contracts and with its sub-contractors.

The Ministry concludes its representations on this aspect of the section 17(1) exemption by arguing that:

> The Ministry of the Attorney General receives IJP reports from its private sector partners. These reports are supplied in confidence as they contain detailed comparisons representing significant scientific and technical details of the project. These reports have been used to compare the private sector's detailed knowledge of software with Ministry business practices. The third party's reports have been used, in part, to highlight areas where the Justice Ministries had to alter original business case assumptions. The reports include feedback on results of field testing of software applications. This trade knowledge has been gained, in part, from the considerable amount of testing and analysis. In the competitive business environment of software developers the information is considered to be of great value. The commercial interests of the third party may be considered to be at risk should this information be made available publicly.

The appellant suggests that the harms contemplated by section 17(1) have not been made out by the affected party and the Ministry. He argues that the technical information contained in the

records is peculiar to the needs of the IJP in Ontario's justice system and need not be "relevant to any other comparable project in Canada." The majority of the appellant's submissions address his concerns about the public's need to have access to information regarding cost overruns and other problems associated with the implementation of the IJP's joint venture with the affected party. I will address these concerns in my discussion of section 23 below.

Findings with Respect to Part III of the Section 17(1) Test

In my view, the affected party has provided me with the kind of "detailed and convincing" evidence required to establish that the harms contemplated by sections 17(1)(a) and (c) could reasonably be expected to flow from the disclosure of the technical information contained in the weekly status reports. These portions of the records contain descriptions of the technical work performed by the affected party in fulfilling its contractual obligations to the Ministry. The affected party has invested time, energy and resources into the development of its software and information management systems and, in my view, the technical information in the weekly status reports would be of significant interest to its competitors in the field of case management software design. I find that the disclosure of the technical information contained in these records could reasonably be likely to prejudice significantly the competitive position of the affected party and the requirements of section 17(1)(a) have been established for this information.

I also find that the disclosure of the technical information contained in the weekly status reports could reasonably be expected to result in an undue loss to the affected party, which operates in a very competitive environment. The disclosure of information relating to the software products and information systems described in the records would also result in an undue gain to the affected party's competitors. These firms would gain the advantage of the affected party's investment of time and resources in the development of these systems without having to incur these expenses themselves. In my view, the harm contemplated by section 17(1)(c) could reasonably be expected to result from the disclosure of the technical information contained in these records.

As a result, I find that all three parts of the section 17(1) test have been satisfied with respect to those portions of the weekly status reports which contain technical information. I have highlighted those portions of the records which are subject to the section 17(1) exemption on the copy of the records provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.

PUBLIC INTEREST IN DISCLOSURE

The appellant, a journalist with a legal publication, submits that even if it is found that the third party information exemption in section 17(1) applies to the information contained in the records, section 23 of the *Act*, the "public interest override" operates to require their disclosure. Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

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

In order for section 23 to apply, two requirements must be established: there must be a compelling public interest in disclosure, and 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), 118, O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply, in this case, section 17(1). 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 that has been requested.

Representations of the Parties on the Application of Section 23

The appellant makes extensive submissions on the possible application of the public interest override to the information contained in the records. His submissions begin as follows:

> As of March 2001, this project [the IJP] has cost Ontario taxpayers $90 million. This price tag comes with no guarantees – or any idea – of how much more will be required to finish the project. The public has a right to know details about the technologies they will co-own as a result of the ministry's investment on their behalf. The public also has a right to know what work is expected of [the affected party], how much the work will cost, contractual timelines [in order to determine future costs], and why such timelines are not accurate or met.
>
> Our readers include users and workers within the public court system. They are entitled to know how the IJP project is progressing. For example, the future success of the IJP is based on the benefits the project will realize. 'Benefits' are to be realized through public sector layoffs and potential user fees. Both will significantly affect the public's access to justice services in the future.
>
> It is not surprising the ministry does not wish to disclose its "labour information". Nevertheless, the public has a right to know if public sector layoffs will be greater than first anticipated in 1995. The prospect of an increased number of layoffs within the justice system seems especially likely in light of the provincial auditor's November 2001 report. The auditor found the 'benefits' of IJP are now half of what was originally expected: this suggests a higher number of layoffs will be necessary in order to restore projected benefits. Projected layoffs will undoubtedly affect the public's access to justice in the future.

> It is the public's right to know the aggregate number of justice workers who might be displaced and/or removed as a result of the IJP project. Public access to justice may also be altered through contemplated increases in user fees. The public has a right to know how much extra they might have to pay in order to access aspects of the court system.
>
> The public's access to the justice system will be significantly altered, in part as a result of the ministry's relationship with [the affected party]. The extent to which the public's relationship with the justice system will be changed is believed to be contained in the ministry's progress reports. It is aggregate public information we are seeking, not 'labour relations information' that would identify any specific individual.

The appellant has also provided me with a number of articles which have appeared in the legal publication he writes for. These articles describe the difficulties encountered by the affected party and the Ministry in achieving the goals of the IJP. The appellant has also referred me to the Provincial Auditor's Annual Report for 2001 which makes extensive recommendations for improvements to the IJP in meeting its timelines and cost goals. The Provincial Auditor reviewed the performance of the IJP and the contractors it has engaged and made specific proposals and suggestions to alleviate the substantial and ongoing problems with the project.

In response to the appellant's representations, the affected party submits the following:

> Nothing in Schedule B or the weekly status reports will 'contribute in any meaningful way to the public's understanding of the activities of government'.
>
> . . . Schedule B is a technical document containing [the affected party's] proprietary trade secrets and engineering information, as well as pricing and labour information. It was supplied to the Ministry of the Attorney General in confidence pursuant to an explicit confidentiality provision in the Integrated Justice Supplier Agreement and in reliance on the mandatory exemptions specified in the Act. The weekly status reports similarly contain and make reference to [the affected party's trade secrets and its technical and engineering information. The records at issue are technical documents that describe the methods, techniques and processes by which [the affected party] is to develop a software program as one part of the Integrated Justice Project. These records "shed light" on the operations of [the affected party], not the operations of the *government*.
>
> . . .
>
> The precise specifications and functionalities of the proposed software and the methods and procedures used by [the affected party] to produce the software are simply not of compelling interests to the citizenry of Ontario. Nothing in either Schedule B or the weekly status reports will help the public make more informed decisions or better express their opinions. The only parties that could be said to

> have a compelling public interest in the records at issue are [the affected party's] competitors.

Findings with Respect to Section 23

I find the representations of the affected party to be persuasive as they relate to the technical information contained in the weekly status reports. I find that there does not exist the requisite compelling public interest in the disclosure of technical information relating to precisely how the contracted software is to be designed and implemented. The articles tendered into evidence by the appellant indicate that a great deal of interest exists in the reasons behind the delays and expense incurred by the Ontario Government in its efforts to bring the project to completion. However, it is not reasonable to infer that the same level of interest exists in the "nuts and bolts" of software design, as is reflected in those portions of the weekly status reports which I have found to be exempt under section 17(1).

The information conveyed in the weekly status reports is, in the main, information detailing the steps taken by the affected party and the Ministry's staff in managing the implementation of one aspect of the Integrated Justice Project. In my view, the disclosure of the technical information contained in these records would not serve to enlighten the public as to the reasons why the Project is delayed and over-budget.

In my view, the public interest in the disclosure of the technical information contained in these records does not meet the first part of the test under section 23, as it is not properly characterized as "compelling".

I conclude by finding that section 23 has no application in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to those portions of the weekly status reports which I have highlighted on the copy of these records provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator.

2. I order the Ministry to disclose those portions of the weekly status reports which are not highlighted and Schedule B in its entirety to the appellant by providing him with a copy by no later than September 5, 2002 but not before August 31, 2002.

3. In order to verify compliance with the terms of Order Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant.

Original signed by: August 2, 2002
Donald Hale
Adjudicator