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

ORDER PO-2027

Appeal PA-020011-2

Ministry of Natural Resources

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

BACKGROUND:

In 1997, the Ministry of Natural Resources (the Ministry) entered into two leasing agreements relating to the supply of computer servers and workstations. The agreements were the subject of some discussion by the Provincial Auditor in 1997 and the Ministry then undertook a review of its financial and contractual obligations with the leasing company. As part of this review, the Ministry engaged the services of an external leasing consultant to examine and comment on the Ministry's existing lease portfolio. In 1998, the review by the consultant was completed and a report prepared for submission to the Ministry. As a result of the study undertaken by the consultant, the Ministry took certain steps to address the concerns and recommendations for the leasing of its computer equipment identified by the consultant.

NATURE OF THE APPEAL:

Management Board Secretariat (MBS) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "copies of any documents concerning the findings of a consultant who was hired by Management Board to review its contracts with [a named leasing company]." The requester identified both the consultant and the leasing company, as well as the time period of the consultant's retainer. As it appeared that the responsive record was in the custody and under the control of the Ministry of Natural Resources (the Ministry), MBS transferred the request to the Ministry pursuant to section 25 of the *Act*.

The consultant was notified of the request by the Ministry under section 28 of the *Act*. The consultant objected to the disclosure of portions of the report and consented to the disclosure of others to the requester. The Ministry decided to grant the requester access to those portions of the record which were not objected to by the consultant. Access to the remaining portions of the responsive consultant's report was denied under section 17(1) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision. Mediation of the appeal was not successful and the matter was moved to the adjudication stage of the appeal process.

I decided to seek the representations of the Ministry and the consultant, initially, as they were resisting disclosure of the information remaining at issue and, accordingly, bear the onus of demonstrating the application of the section 17(1) exemption. I also decided to seek the representations of the leasing company as its interests may be affected by the disclosure of the information contained in the record.

All three parties provided me with representations in response to the Notice of Inquiry. I shared the non-confidential portions of the Ministry's representations, along with the complete submissions of both affected parties, with the appellant, who then made representations. The submissions of the appellant were then shared with the Ministry, the consultant and the leasing company, who all made representations by way of reply.

The records remaining at issue consist of those portions of the consultant's report comprising Pages 3 to 8 of Record A0013997.TIF, Pages 9 to 13 of Record A0013998.TIF, Pages 14-16 of Record A0013999.TIF and Pages 17 to 24 of Record A00114000.TIF.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the leasing company and consultant, all of whom 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), (b) 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

The Ministry submits that the undisclosed portions of the record contain information which qualifies as "commercial" and "technical" information as those terms have been defined in previous orders of the Commissioner's office. The consultant takes the position that the record contains "trade secrets" as their disclosure would reveal "specific expertise, accounting processes, analytical skills and tactics" which it has developed in order to perform evaluations of this sort. The leasing company also argues that the undisclosed portions of the record contain trade secrets belonging to it and financial and commercial information about its leasing agreements with the Ministry.

The appellant suggests that the records are not likely to contain trade secrets as there are many competitors in the field of forensic consulting. It also indicates that the type of technical, commercial and financial information contained in the record is routinely disclosed, as was the case following similar requests made to the cities of Toronto, Waterloo and Guelph, as well as another provincial Ministry, the Union Water System (in southwestern Ontario) and the Essex-Windsor Waste Management Authority for their leasing agreements with the leasing company.

In its reply submission, the Ministry points out that while other institutions may choose to disclose their leasing agreements, the record at issue consists of the consultant's evaluation of a similar agreement, rather than the lease itself. The Ministry reiterates that the record contains information which qualifies as commercial and financial information for the purposes of section 17(1).

The leasing company responded to the appellant's suggestion that because there are many competitors in this field, the record cannot contain information which qualifies as a trade secret by pointing out that such corporate information continues to be subject to section 17(1) protection regardless of the number of other firms conducting business in the field, providing it meets the definition in the *Act*.

In reply, the consultant repeats the arguments which he put forward at the initial stage and indicates that his firm has appealed the decision of another provincial institution to disclose a similar consultation report and that he has consistently sought to protect the information contained in these reports.

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

> ***Trade Secret***
>
> "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]

Technical Information

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

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]

Financial Information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include 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]

In my view, the undisclosed portion of the record contains information which qualifies as financial and commercial information. The undisclosed information relates directly to the pricing practices of the leasing company and provides a detailed analysis of the long-term cost to the Ministry of each aspect of the leases under review. The information is clearly of a commercial nature as it addresses agreements for the supply of goods and services by the leasing

company to the Ministry. This information qualifies as commercial information as that term has been defined in many previous orders.

In addition, the undisclosed portions of the record also contain commercial information belonging to the consultant as it describes the methodologies and techniques employed by the consultant in performing an analysis of the terms and conditions of the leasing agreements. Accordingly, I find that the first part of the section 17(1) test has been satisfied with respect to all of the undisclosed information in the record.

Part II: Supplied in Confidence

In support of its contention that the record at issue was supplied in confidence to the Ministry by the consultant, the leasing company submits that:

> The information was supplied to MNR over a number of years. Information may have been provided pursuant to a confidential proposal submitted by [the leasing company] to MNR (or MBS) pursuant to a Request for Proposal or the information could have been provided throughout the life of the leases, as part of the ongoing administration. Commercial and financial information, including pricing and lease rates are not available to the public, and are treated as confidential internally at [the leasing company]. All proposals issued by [the leasing company] are marked as confidential and such information is not otherwise disclosed.

The consultant also made submissions with respect to this aspect of section 17(1), as follows:

> All of the subject records were provided to the MNR on an explicit confidential understanding. This claim is referenced to and supported by the "Schedules" to each Contract Agreement signed by the [consultant] and MNR. Each contract clearly states "*All information and opinions of [the consultant], either verbal or written will be treated as confidential by the MNR".*

The Ministry submits that the record was prepared and submitted by the consultant to it with an expectation that it would be treated confidentially. It goes on to add that:

> As noted above the records were created when the Ministry was considering or had entered into negotiations around leasing agreements for equipment. The review that was conducted was for the purpose of assisting in those negotiations. By their very nature, the negotiations would be sensitive and be surrounded by an aura of confidentiality. If the leasing company or a third party was aware of the details of the review [at] an inopportune time, it would adversely affect those negotiations. There was a clause in the agreement which required the reviewer [the consultant] to keep all information confidentially. Furthermore, the parties to the agreement would be aware that there was a limited number of companies capable of doing the review and the release of certain details of that agreement could adversely affect the reviewer's competitive position. Accordingly, these factors combined to create an atmosphere of confidentiality in which the affected

> party could reasonably expect that the severed information was supplied in confidence to the Ministry.

The appellant suggests that because, as acknowledged in the Ministry's submission, "there is no explicit indication that the records were supplied in confidence", it is up to the consultant to demonstrate that the information was supplied with an implicit expectation of confidentiality. He argues that the consultant sold his services, and his report, to the Ministry and that the consultant's desire to preserve what it sees as a confidential relationship should not operate to block the release of the report.

In reply to this argument, the Ministry points out that "the sale of one's services does not automatically mean that one automatically waives any right or expectation of confidentiality."

The leasing company reiterates that all commercial or financial information such as bid documents, proposals and pricing information which it supplies to institutions are supplied on a confidential basis. It concludes by submitting that "the underlying information [contained in the record and supplied by it to the Ministry] used to generate the report was understood to be confidential."

The consultant refers to the responses it provided to the Request for Proposal which gave rise to this consulting contract as evidence of its reasonably-held expectation of confidentiality.

In my view, the very nature of the information contained in the report which is the subject of this request can be construed as having been provided with an expectation of confidentiality by both the original supplier of the information, (the leasing company) and the consultant who then evaluated it. I find that despite the lack of a clearly explicit statement of confidentiality in the records themselves or the submissions made to me, I am able to discern an implicit understanding between the parties that this information was to be treated as confidential. The leasing company's concerns about the disclosure of the terms of the leases is reflected in the confidentiality language used in the initial contracts. Similarly, I find that the consultant has provided me with sufficient evidence of his expectations regarding the confidentiality of the information which he provided to the Ministry. The consultant has taken steps to prevent the disclosure of the pertinent information in this record and in other similar records held by other institutions.

Clearly, the Ministry, the consultant and leasing company were of the view that the information which is reflected in the record at issue was supplied to the Ministry with an expectation that it would be treated as confidential. I further find that this expectation was reasonably-held, particularly given the highly-competitive nature of the IT equipment leasing and leasing consultation businesses. I find that the second part of the section 17(1) test has been met.

Part III: Harms

The leasing company takes the position that:

> Disclosure of the Report and [its] sensitive commercial information contained therein would prejudice its competitive position. [The leasing company]'s competitors do not and should not have access to its pricing, formulas and contractual terms. [Its] ability to negotiate on an even playing field with other customers would be severely prejudiced under section 17(1)(c). Such an impairment to [its] ability to successfully compete, and to negotiate leasing arrangements would inevitably result in an undue loss to [its] core business – public and private sector IT leasing.

With respect to the harms contemplated by sections 17(1)(a) and (c), the consultant submits that:

> . . . the content of the records are proprietary and confidential. The specific expertise, accounting processes, analytical skills and tactics developed by [it], and used in this case, will be disclosed. These business trade secrets comprise the core competitive position of [the consultant] in carrying out forensic services in the corporate financing consulting marketplace.
>
> Today, the depth of experienced expertise in the area of Corporate Lease Financing continues to be limited. This does not, however, deny the absence of competitive entities that may seek out, duplicate and remarket [its] core business services approach. Easy access to our records through this process would surely benefit competitors at the expense of [the consultant]. The entry of new "consultants" to the marketplace is mostly due to the recent media reports of questionable lease financing transactions undertaken by other Lessees. [The consultant] has developed superior methods of approach and analysis over the last five years that enhance the competitive "value-added" position of [it] to potential clients. While we are certainly prepared to compete for business, one of the principle barriers to entry to our marketplace is the experience and investment in time to develop a unique competitive service offering.
>
> The suite of services and approach offered by [the consultant] represent economic value to [it] by not being generally known, difficult to develop and accordingly must be protected.
>
> . . .
>
> The skills used by [the consultant] are unique. As stated in section (a), the loss of business to [it] would be material. Future business volume would suffer. This specific harm would be primarily due to the disclosure of the core analyses and the structured financial approach used by [it] in the subject records.
>
> . . .

> [The consultant] also advises clients on lease portfolio management issues such as the forensic examination work conducted for the MNR. We are often requested to audit and research lease transactions with an end to independently advising our clients of potential remedies and the appropriate approach to resolving contractual disagreements. It is this element of our business activity that represents our competitive edge and marketplace differentiation with the experience [it] can bring to bear on difficult assignments. We have made major investments over the last five years in time and money in developing and refining our total services offering.
>
> The subject records summarize the work conducted for an provided to the MNR under a specific contractual and confidential basis. Under these circumstances, this will maintain the secrecy of [the consultant's] trade practices, which must be protected.

The Ministry also addressed this aspect of the section 17(1) exemption as follows:

> Disclosure of the severed details of the agreement and the review would reveal techniques used and conditions under which they were prepared to work. Revelation of the details would allow competitors to underbid the affected party [the consultant] or alter their review techniques in order [to] successfully compete for work against the affected party. Accordingly, it is the position of the Ministry that disclosure of the information would result in prejudice to the competitive position of the affected party.

Arguing in favour of the disclosure of the severed information remaining at issue, the appellant submits that:

> I believe that [the consultant and the leasing company] failed to provide the "detailed and convincing" evidence to establish potential harm, as explained in Order P-373.

Findings

The undisclosed portions of the record at issue consist of the consultant's evaluation of each term of the leasing agreements entered into between the Ministry and the leasing company. As such, they examine these contractual provisions in great detail, weighing the benefits to the Ministry and identifying potential problems for it. The records also contain extremely detailed financial spreadsheets outlining and providing analysis on all of the financial aspects of the agreements.

In Order PO-2018, Adjudicator Sherry Liang commented on the application of section 17(1)(a) to information relating to the disclosure of a contractor's "methodologies". She found that:

> Prior orders, such as Order PO-1818, have accepted that harm within the meaning of section 17(1) can reasonably be expected to ensue from the disclosure of a

> contractor's business methodologies. To the extent that the definitions in Schedule "A" describe some of the affected party's business methodologies, I accept that disclosure of this information could reasonably be expected to lead to harm to its competitive position.

I adopt the reasoning expressed in that decision for the purposes of the present appeal. I find that by disclosing the information contained in the report, the methodologies employed by the consultant in conducting its review would be revealed and could reasonably be expected to be used by its competitors in bidding on and performing work of a similar nature for the Ministry or another client. I find that the methodologies contained in the record are unique and belong to the consultant. Their disclosure to competitors could reasonably be expected to result in undue loss to the consultant and undue gain by its competitors, as contemplated by section 17(1)(c) of the *Act*. In addition, I find that the disclosure of the records would prejudice significantly the competitive position of the consultant as its competitors would be able to adopt the techniques and analysis created by the consultant in bidding on similar work for other clients. In my view, I have been provided with the kind of detailed and convincing evidence required to uphold the application of the section 17(1) exemption with respect to the information provided by the consultant.

The records also contain a great deal of information which qualifies as the commercial and financial information of the leasing company. The consultant undertook a review of the commercial agreements between the leasing company and the Ministry and the records contain a great deal of very specific information relating to the commercial terms contained therein. As was the case with the information relating to the consultant, the leasing company is engaged in a very competitive industry where commercial advantage is important.

I find that the information relating to the leasing company is inextricably intertwined with the methodologies and analytical processes employed by the consultant in its evaluation of the agreements. Previous decisions of this office, such as PO-1974, PO-1816 and PO-2018, have held that because the information in a contract is typically the product of a negotiation process between the institution and a vendor, supplier or contractor, the content of contracts generally will not qualify as originally having been "supplied" for the purposes of section 17(1) of the *Act*. The conclusion 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.

In the present case, I am specifically not making such a finding as I was not provided with sufficient evidence of the negotiation process which gave rise to the agreements between the leasing company and the Ministry. Based on the material before me, it is not clear whether the information contained in the subject record is the same as that provided originally to the Ministry by the leasing company. However, I find that I have been provided with sufficient evidence to establish that the analysis performed by the consultant on the information relating to the leasing company falls within the ambit of section 17(1) as its disclosure could reasonably be expected to prejudice significantly the competitive position of the consultant, as described above.

Accordingly, as all three parts of the section 17(1) test have been satisfied, I find that the undisclosed portions of the record are properly exempt under that exemption.

ORDER:

I uphold the Ministry's decision not to release the undisclosed portions of the record at issue.

Original Signed By: June 28, 2002
Donald Hale
Adjudicator