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

ORDER PO-2023

Appeal PA-010290-1

Ministry of Consumer and Business Services

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NATURE OF THE APPEAL:

The Ministry of Consumer and Business Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "copies of the Performance Activity Reports (PAR) for the years 1995 to 2000", of the Ontario New Home Warranty Program (ONHWP) that are provided to the Ministry on a quarterly basis. The requester identified four Ministry employees who she believed might be in possession of these records.

The Ministry located two responsive records and denied access to both of them, claiming the mandatory exemption in section 17 (third party information). The requester, now the appellant, appealed the decision.

During mediation, the Ministry explained to the Mediator and the appellant why only two records had been located. In a letter to the appellant, the Ministry stated:

> The Ontario New Home Warranty Program (ONHWP), a private not-for-profit corporation, is fully responsible for the day-to-day administration of the *Ontario New Home Warranties Plan Act*. Section 5 of the *Act* requires ONHWP to make a report annually to the Minster of Consumer & Business Services on the affairs of the Corporation, but there is no statutory or other requirement for ONHWP to share its quarterly Performance Activity Reports with the Ministry. Therefore, with the exception of 2 documents, there are no copies of the quarterly ONHWP Performance Activity Reports in the care and custody of the Ministry. Access to these 2 documents has been denied pursuant to section 17 of the *Act*.

The appellant accepted the Ministry's explanation as to why only two responsive records had been located, but continued to object to the Ministry's basis for denying access to these records.

The appellant also raised the possible application of the public interest override contained in section 23 of the *Act*.

Mediation was not successful in resolving this appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry initially to the Ministry and ONHWP as an affected party with an interest in the records. Both of these parties submitted representations in response, the non-confidential portions of which were shared with the appellant. The appellant also provided representations in response to the Notice.

RECORDS:

There are two records at issue in this appeal:

Record 1 - a two-page document titled "Flash Reports as at December 31, 2000"; and

Record 2 - a 55-page report titled "Performance & Activity Report, 1st Quarter 2000".

Both records are authored by the ONHWP.

DISCUSSION:

Third party information

Section 17(1) of the *Act* reads, in part, as follows:

17. (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> …

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

Previous orders have defined "commercial" and "financial" information as follows:

> ***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]

The Ministry and ONHWP both submit that the records contain commercial and financial information. The appellant maintains that the records do not contain scientific information or trade secrets, but does not address whether they contain commercial and/or financial information.

The top portion of the first page of Record 1 consists primarily of ONHWP's 4th quarter financial activity for 2000, broken down by various specific income and expense categories. This information clearly falls within the definition of "financial" information for the purposes of section 17(1). Most of the second page of Record 2 outlines various performance-based

activities undertaken by ONHWP during the 4th quarter, together with comparisons for the same period in 1999. I find that this information relates to the business operation of ONHWP and falls within the definition of "commercial" information. Some portions of the second page also contain financial figures relating to 4th quarter operations, which qualifies as "financial" information. The bottom section of pages 1 and 2 both contain information concerning the number of employees working in various departments of ONHWP as well as the numbers of phone calls and correspondence received during the period. Although less directly related to the business activities of ONHWP, I find that this information relates to its commercial operation, and qualifies as "commercial information" for the purpose of section 17(1) of the *Act*.

Record 2 deals with a different quarter of business activity (the 1st quarter of 2000), but can otherwise accurately be described as a more detailed version of Record 1. It is titled "Performance and Activity Report", and describes various components of ONHWP's 1st quarter business activities. For the same reasons as Record 1, I find that the entire record contains "commercial" information, and that a large portion of the record also contains "financial" information, as those two terms are used in section 17(1) of the *Act*.

Part 2: Supplied in Confidence

Supplied

The Ministry explains that the two records were provided to a senior Ministry official during the course of a meeting between staff of the Ministry and ONHWP. ONHWP's representations confirm the Ministry's position. I concur, and find that the "supplied" component of part 2 of the test has been established.

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. [Order M-169]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The Ministry submits that the circumstances under which the records were supplied "support the inference that they were supplied implicitly in confidence". ONHWP's representations support the Ministry's position, and state "the fact that the documents were disclosed in response to a threat of impending competition from other warranty insurers clearly indicates that there was indeed an implicit claim of confidentiality by ONHWP over the records, notwithstanding their disclosure [to the Ministry]."

The appellant's representations do not address this aspect of the section 17(1) exemption.

The Ministry's representations provide the context under which the records came into its custody:

> ONHWP's annual report for the year 2000 also contains information relevant to this appeal. Under the heading "Government Relations", the report discusses the work of the Building Regulatory Reform Advisory Group (BRRAG), which had been established by the Ministry of Municipal Affairs and Housing in January 2000 to make recommendations for reforming the regulatory and insurance regime within Ontario's building industry.
>
> Members of ONHWP participated in BRRAG, and ONHWP was generally supportive of the recommendations in BRRAG's report. However, ONHWP did take issue with one key recommendation: that Ontario assess the benefits of moving to a competitive new home warranty model. …

According to the Ministry, the BRRAG report was submitted to the Ministry of Municipal Affairs and Housing during the summer of 2000. The Ministry and ONHWP both submit that the records at issue in this appeal were provided by ONHWP to senior Ministry officials during discussions about the BRRAG report and, according to the Ministry, in the context of "ONHWP's concerns over potential competition from other warranty providers."

Based on the representations provided by the Ministry and ONHWP, I accept that the records were supplied to the Ministry with a reasonably-held implicit expectation of confidentiality. The records are internally generated documents that would appear to be generally treated on a confidential basis by ONHWP. They are not otherwise publicly available and are prepared for business-related purposes that would not entail disclosure. In my view, it is reasonable to

conclude in the circumstances that any discussions between the Ministry and ONHWP regarding the BRRAG report were confidential, and that records provided to the Ministry in that context would similarly be treated confidentially by the Ministry.

Therefore, I find that part two of the section 17 exemption test has been established for both records.

Part 3: Harms

To discharge the burden of proof under the third part of the test, the parties opposing 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. As stated earlier, in order to establish that the harm "could reasonably be expected" to result from disclosure, the Ministry and/or ONHWP must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)]. [See also Orders PO-1745 and PO-1747]

The representations from the Ministry and ONHWP focus on the harms outlined in sections 17(1)(a) and (b). There is no reference to the section 17(1)(c) harms, and I find that the evidence necessary to establish the requirements of section 17(1)(c) of the *Act* is not present in this appeal.

Section 17(1)(a)

In order to establish the harms component of section 17(1)(a), the Ministry and/or ONHWP must establish a reasonable expectation that disclosure would result in significant prejudice to ONHWP's competitive position or interfere significantly with its contractual or other negotiations.

The Ministry and ONHWP both acknowledge that ONHWP does not operate in a competitive environment. However, they also both point out that a move to a competitive home warranty regime continues to be a possibility.

ONHWP submits that disclosure of the records would reveal detailed information on the business activities of ONHWP, and that this information would harm ONHWP's competitive position in the future if the government decides to implement the BRRAG recommendation to open up the home warranty industry to competition.

The Ministry points out in its representations:

> [A]lthough there is currently no competition in this area of activity, there is the clear possibility that this will not always be the case. That ONHWP chose to disclose this information to [the Ministry] in connection with the debate over competition indicates that it views the contents of the records as relevant to the choice of home warranty models for Ontario.

The appellant points to the current monopoly situation for home warranty services enjoyed by ONHWP, and submits that, "as the sole entity in Ontario which provides new home warranty coverage, ONHWP is not obligated to negotiate with any person, persons or organizations".

In my view, the possibility that the home warranty program may be opened up to competition at some point in the future is a relevant consideration when assessing the reasonable expectation of harm under section 17(1)(a). However, I find that the Ministry and ONHWP have not provided the necessary detailed and convincing evidence to establish that ONHWP's future competitive position is reasonably likely to be harmed if the particular records at issue in this appeal are disclosed.

First, there is nothing before me to suggest that a move to a competitive regime is likely to occur. The BRRAG report is now two years old and, although the government has apparently not formally made a decision on whether to accept the competition recommendation, I have been provided with nothing to suggest that this is likely to happen. Governments regularly receive recommendations from various bodies on a wide range of issues, a large proportion of which are never implemented. Absent evidence to indicate that this particular recommendation is likely to be adopted, in my view, the potential harm identified by ONHWP and the Ministry is speculative.

And even if competition is introduced, it is not clear what type of information held by the current monopoly service provider would be made available. In my view, it is not reasonable to conclude that the contents of the two records at issue in this appeal, which deal with financial and commercial operations of ONHWP during specific business quarters, would necessarily be treated confidentially in that context.

I have also compared the contents of the two records with the text of ONHWP's 2000 annual report, which was provided to me by ONHWP. It is significant to note that much of the information contained in the two records is similar in nature to the publicly available information concerning the activities of ONHWP. The annual report includes audited financial statements as well as a series of notes that elaborate on business operations of ONHWP for 2000. ONHWP acknowledges in its representations that much of the information contained in the two records is also included in the annual report, but points out that certain more detailed breakdowns and descriptions contained in the records are not. Clearly, disclosure of the portions of the two records that contain the same information as ONHWP's annual report could not reasonably be expected to result in any of the section 17(1) harms. While I accept that the content of the two records is not identical to the text of the annual report, in my view, disclosure of the additional or

different information contained in the records is not the type of information that could reasonably be expected to result in harms to ONHWP's competitive position, even if the government decides to open up the market to competition at some point in the future.

Accordingly, I find that the section 17(1)(a) harms have not been established.

Section 17(1)(b)

To establish the section 17(1)(b) harms, the Ministry and/or ONHWP must establish a reasonable expectation that disclosure of the two records would result in similar information no longer being supplied to the Ministry where it is in the public interest that it be supplied in the future.

ONHWP submits:

> With respect to Section 17(1)(b), ONHWP is in a position to confirm that, should disclosure of the subject documents occur, ONHWP will not supply similar information to [the Ministry] again. This is, of course, because of the aforedescribed threat of the introduction of competition into the new home warranty marketplace. Also, in light of the consumer protection role played by ONHWP pursuant to the Act, it is surely in the public interest that the free flow of information between ONHWP and its responsible Ministry be maintained.

Significantly, the Ministry's representations do not address the requirements of section 17(1)(b).

I do not accept ONHWP's position. The *Ontario New Home Warranties Plan Act* governs the operation of new home warranty services in the province. It creates ONHWP and identifies the type of information that body must provide to the government in order to satisfy public interest and public accountability considerations. The records at issue in this appeal need not be supplied by ONHWP in order to satisfy its statutory obligations. They were provided, on a voluntary basis, in order to assist ONHWP in making its views known to the Ministry regarding the BRRAG recommendation to introduce competition to the new home warranty regime. Although ONHWP may decide not to provide similar records to the Ministry in future, in my view, this would have no impact on the statutory system of public accountability for the operation of the new home warranty program.

Accordingly, I find that the harms component of section 17(1)(b) has not been established.

In summary, I find that part three of the section 17(1) test has not been established for either of the two records at issue in this appeal. Because all three parts of the test must be established in order for the exemption to apply, the records do not qualify and should be disclosed to the appellant.

Given my finding, it is not necessary for me to consider section 23 of the *Act*.

ORDER:

1. I do not uphold the Ministry's decision to withhold the requested records from disclosure.

2. I order the Ministry to disclose the records at issue to the appellant by providing her with a copy of the records by **July 17, 2002** but not earlier than **July 13, 2002**.

3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 2, only upon request.

Original signed by: June 11, 2002
Tom Mitchinson
Assistant Commissioner