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

ORDER PO-2145

Appeal PA-020292-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care, (the Ministry) received two related requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*). In the first request, the requester sought access to a copy of the licence issued to a named company (the affected party) permitting the affected party to operate a medical laboratory at a certain address. The requester also asked for copies of records related to any request by the affected party for a change in the location of the laboratory. The requester is the former landlord of the affected party.

In the second request, the requester advised the Ministry that the affected party had moved the location of its laboratory and asked the Ministry for a copy of any record relating to a request by it to relocate its medical laboratory, and for a copy of the new licence issued. The requester also asked for copies of any inspection reports carried out by the Ministry on the affected party's medical laboratory since 1997.

The Ministry combined the two requests and located 27 responsive records. After notifying the affected party pursuant to section 28 of the *Act*, the Ministry issued a decision granting access to six of the responsive records, identified as Records 1-5 and 8. Access to the remaining 21 records was denied under the mandatory exemption in section 17(1) of the *Act*. The Ministry also provided an index of records to the requester.

The requester, now the appellant, appealed the Ministry's decision.

Mediation of the appeal was not successful and the appeal was moved into the adjudication stage of the process. As the Ministry and the affected party are resisting disclosure of the remaining records, they bear the onus of demonstrating that the information contained in these records falls within the mandatory exemption in section 17(1) of the *Act*. I sought and received the representations of the affected party and the Ministry in response to the Notice of Inquiry. I then provided the appellant with the complete representations of the Ministry and the non-confidential portions of the submissions of the affected party, along with a copy of the Notice, to assist him in making his representations. The appellant also made submissions that were, in turn, shared with the affected party and the Ministry. Both of these parties then made additional representations by way of reply.

RECORDS:

The 21 records remaining at issue consist of correspondence, facsimile transmissions, inspection reports and notes, as described in the index of records provided to the appellant.

DISCUSSION:

PRELIMINARY ISSUE:

IS THE AFFECTED PARTY ENTITLED TO MAKE REPRESENTATIONS IN RESPONSE TO THE NOTICE OF INQUIRY?

The appellant submits that under section 53 of the *Act*, the head of the institution bears the onus of demonstrating the application of one or more of the specified exemptions contained in the *Act*

to the records under consideration in an appeal. He argues that the *Act* does not appear to give the affected party "standing in this regard, except to make submissions under section 28 of the *Act*".

In support of its contention that the affected party ought to be entitled to make representations and participate in the adjudication process, the Ministry relies on the wording of IPC Practice Direction #4. This IPC document, entitled "Guidelines for parties whose commercial or business information is at issue in an appeal", raises the principle of "shared onus". The Ministry urges that this principle was first enunciated in Order 3 and has been re-iterated in many subsequent decisions of this office. The Ministry also relies on the following quotation from the text Ontario *Freedom of Information and Protection of Privacy Acts*, McNairn and Woodbury, (1998) at p.273 favouring the inclusion of affected parties in appeals involving section 17(1):

> . . . since the third party is in the best position to present relevant and detailed evidence to support the case against disclosure, particularly in respect of the harm that might reasonably be expected to result from such disclosure.

In my view, the principle of "shared onus" is well-established in the jurisprudence of the Commissioner's office. In order to obtain the best possible evidence, particularly with respect to potential harms which might flow from the disclosure of third party information, it is necessary to receive and consider submissions from those parties with respect to the application of the section 17(1) exemption. I find that the appellant's submissions have no merit and I will consider the representations received from the affected party, as well as those of the Ministry.

THIRD PARTY INFORMATION

The Ministry and the affected party rely on the mandatory exemption in section 17(1) to exempt from disclosure the information contained in all of the remaining records. This section states:

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

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

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the parties resisting disclosure, in this case the Ministry and/or the affected party, 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 Representations of the Parties on Part 1

The Ministry takes the position that the records contain:

> . . . specific information regarding [the affected party's] application to renew their licence, the Ministry's consultations with affected parties, conditional and final approvals to grant the licence and lastly, licensing fees; and, inspection reports conducted by experts in the Ministry who are responsible [for] conducting inspections and making recommendations relating [to] the laboratory facility. These records represent highly sensitive confidential proprietary information (scientific, commercial and financial); the disclosure of which would prejudice the competitive position of [the affected party].

The Ministry goes on to refer to the definitions of the terms "scientific", "commercial" and "financial" from previous orders of the Commissioner's office.

The affected party concurs with the representations of the Ministry and specifically submits that Records 13, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26 and 27 contain information which qualifies as "commercial" information while Records 14, 19, 22, 24, 25, 26 and 27 include "technical" information for the purposes of section 17(1). It argues that the disclosure of the information contained in these records would reveal information pertaining to its plans for future operations, detailed information relating to its manufacturing processes and equipment, billings and revenue information, methodologies employed as well as those no longer undertaken by the affected party, pricing data relating to its products and equipment and specific information relating to turn-around times for the conducting of certain laboratory tests.

The appellant disputes that all of the records contain information which falls within the ambit of the defined terms in section 17(1). He argues that much of the information is already known publicly and that it does not qualify as confidential commercial, technical, financial or scientific information.

Definitions of the Types of Information

Previous orders have defined certain types of information identified in section 17(1) as follows:

Scientific Information

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act*. [Order P-454]

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]

Findings with Respect to Part 1 of the Test

I have reviewed the contents of each of the records at issue in this appeal and have come to the following conclusions, based on their contents and the submissions of the parties.

Records 6, 7, 9, 10, 11, 12, 15 and 18

These documents pertain to an application by the affected party to the Ministry to relocate its operations to a new location. They include the actual application (Record 6), the acknowledgement of its receipt (Record 7) and the consent of the Ministry to the relocation, along with the conditions for the relocation (Records 9 and 10), the effective date of the transfer (Record 11, which is the same as Record 15) and a public notice respecting the change of address (Record 18). In my view, these records do not contain information which meets the criteria set out above for exemption under section 17(1). I specifically find that they do not include information which qualifies as either commercial, technical, financial or scientific information for the purposes of section 17(1).

As all three parts of the test under section 17(1) must be met in order for a record to qualify for exemption under this section, I find that Records 6, 7, 9, 10, 11, 15 and 18 are not exempt. I will, accordingly, order that they be disclosed to the appellant.

Record 12 sets out in detail the arrangements agreed upon at meetings between the Ministry and the affected party for the billing of tests during the relocation period. I find that Record 12 contains financial and commercial information as contemplated by section 17(1) and that the first part of the test under that section has been satisfied. The record also describes certain agreed-upon conditions relating to specific categories of tests to be undertaken by the affected party. I find that this information qualifies as both technical and scientific information within the meaning of section 17(1).

Records 13, 14, 16 and 17

I find that each of these records contain information relating to the affected party's strategy with respect to the licensing requirements of the Ministry and that this information qualifies as commercial information under section 17(1). The information addresses the business plans of the affected party and a strategy which it has decided to pursue from that perspective.

In addition, I find that Record 14 and 17 contain detailed information concerning the equipment and processes used by the affected party in performing its work. This information also qualifies as technical and scientific information under section 17(1).

Records 19 to 27

Records 19 to 27 are inspection reports and responses received by the Ministry from the affected party following Ministry inspections of the affected party's laboratory between March 1997 and February 2001. The records contain a great deal of detailed information relating to the processes and methodologies employed by the affected party. I find that this information qualifies as commercial, technical and scientific information for the purposes of section 17(1). The first part of the test under that exemption has, accordingly, been met with respect to Records 19 to 27.

Part 2: Supplied in Confidence

Submissions of the Parties

The Ministry submits that documents provided to it by the affected party were "done so in conjunction with the *Laboratory and Specimen Collection Centre Licensing Act*" (the *LSCCLA*). It argues that:

> Disclosure by Ministry of a proposed relocation by a third party is received and maintained as confidential information pursuant to the Ministry's position that relocation planning will thereby be accessible to other parties. In the case of the third party of this appeal, the third party expressly set out its expectation that the information provided would be kept confidential. [sic]

It goes on to conclude this portion of its representations by adding that "*The Laboratory and Specimen Collection Centre Licensing Act* requires operators to provide specific information in order to make application for a licence."

Neither the Ministry nor the affected party have made specific representations concerning the contents of Record 12. I note, however, that Record 12 is a letter from the Ministry's Laboratories Branch to the affected party. As such, the information contained therein was not "supplied", nor would its disclosure reveal information which was supplied by the affected party to the Ministry, as is required for section 17(1) to apply. Accordingly, I find that the parties resisting disclosure have failed to provide me with sufficient evidence to make a finding that Part 2 of the section 17(1) test has been satisfied. As all three parts of the test must be met, I find that Record 12 is not exempt and will order that it be disclosed.

The affected party submits that certain information contained in Records 13, 14, 16 and 17 relates to the manner in which it intended to make use of its licence. It argues that this information was provided to the Ministry by its General Manager with an expectation that it would be treated confidentially. The affected party made additional submissions with respect to these records, the disclosure of which would reveal the contents of the records themselves. For this reason, these submissions were not shared with the appellant at the inquiry stage of the appeal process and I am unable to refer to them in more detail in this decision.

The affected party also takes the position that certain information was provided to the Ministry's inspectors and that this information is reflected in the contents of Records 19 to 27. It argues that it had a reasonable expectation that any information provided to the inspectors concerning the operation of its laboratory facility would be treated in a confidential manner by the Ministry. It submits that the covering letter to Record 21 is marked as "confidential" and that this represents its understanding with respect to all of the correspondence and communications between the Ministry and itself regarding Ministry inspections of its facility.

The affected party submits that the commercial, technical and scientific information contained in Records 19 to 27 was supplied by it to the inspectors, who were granted full access to any information sought. It suggests, however, that this unfettered access was granted with an expectation that any information gleaned by the inspectors would be kept confidential. Similarly, information contained in Records 22, 23, 24, 25, 26 and 27 about the processes and methodologies employed by the affected party was conveyed to the inspectors and Ministry officials with an expectation that they would be treated in a confidential fashion.

The appellant's representations do not explicitly touch on this issue. He does, however, indicate that I should examine each record in order to determine whether the Ministry has met the burden of proof under section 53.

Findings with Respect to Part 2 of the Test

Based on my review of the records themselves and the representations of the parties, I make the following findings with respect to Part 2 of the test under section 17(1):

- the information contained in Records 13, 14, 16 and 17 relating to the use of its licence was supplied to the Ministry by the affected party with a reasonably-held belief that it would be treated confidentially.

- portions of the information contained in Records 19 to 27 were supplied to the Ministry by the affected party in the course of the inspections referred to above, or in the course of responding to the issues raised by the inspections.

- the second part of the test for exemption under section 17(1) has been satisfied with respect to Records 13, 14, 16, 17 and 19 to 27, but not Record 12.

Part 3: Harms

Representations of the Parties

The Ministry indicates that "the third party is in a better position to provide evidence on any harms to their interests under section 17" and adds that it "defers to the representations of the affected third party opposing disclosure by the Ministry of the records at issue."

The affected party has provided submissions on Part 3 of the section 17(1) test for each of the records remaining at issue. It submits that Records 13, 14, 16 and 17 contain information about its plans for the use of its licence and that the disclosure of this information could be used by one of its competitors to its detriment, as contemplated by section 17(1)(a). The representations of the affected party on this matter were not disclosed to the appellant at the inquiry stage because they refer directly to the contents of the records. Accordingly, I am unable to describe these submissions in greater detail in this order.

In addition, the affected party indicates that the disclosure of other references contained in Record 14 to certain processes and equipment used by it could be used by its competitors to undermine its market position. The affected party describes in detail the consequences which it feels could reasonably be expected to result from the disclosure of this information and the subsequent loss to its competitive position. It submits that:

> Should a competitor become aware of the specific type and number of particular pieces of equipment, it could easily ascertain the volume of tests [the affected party] is capable of. This then would allow a competitor to ascertain [the affected party's] 'turn-around' time. A competitor could then easily take commercial advantage of this information by offering to [the affected party's] customers faster turn around times on various tests.

Referring again to Record 14, the affected party submits that, under section 17(1)(b):

> . . . it is in the public's interest from a policy perspective that the entire document be kept confidential. Businesses concerned that confidential information will be made public are less likely to provide the Ministry with unfettered access to such information.

With respect to the documents regarding Ministry inspections at Records 19 to 27, the affected party submits that the disclosure of information relating to its processes and methodologies which are contained therein:

> . . . could reasonably be expected to significantly prejudice the competitive position of [the affected party]. A competitor, if aware that particular tests were not performed by [the affected party], could take commercial advantage of this information by offering to provide a complete spectrum of all tests including those test that [the affected party] does not perform, thereby resulting in direct loss to [the affected party's] revenues.

It also indicates that Record 23 contains equipment pricing information whose disclosure to its competitors could reasonably be expected to result in harm to the affected party's revenues. The affected party also suggests that the disclosure of information relating to its employees may result in competitors enticing staff to leave its employ, thereby resulting in an undue loss under section 17(1)(c).

The appellant points out that, under the *Laboratory and Specimen Collection Centre Licensing Act*, laboratories such as that operated by the affected party have a statutory obligation to provide certain information to the Ministry. He suggests that businesses faced with such a legal reporting obligation will continue to cooperate fully with the Ministry and will continue to provide the information requested by the Ministry regardless of the outcome of this appeal. As a result, he submits that the harms set out in section 17(1)(b) cannot reasonably result from the disclosure of the information contained in the records.

The appellant also discounts the notion of a competitor making use of information in the records relating to the identities of staff persons employed by the affected party. He suggests that rosters of medical technologists are available through the college which regulates these individuals and that:

> The threat of one competitor inducing an employee to leave a current employer upon learning the name or identity of the employee is not great as the name or identity of any employee is readily available.

The appellant also states that the licence granted to the affected party sets out the types of tests which it is licensed to perform and that the disclosure of information of this nature which is contained in the records would not cause harm to its competitive position.

The appellant also submits that because the documents described as inspection reports *involve the Appellant's building* [the appellant's emphasis], they are relevant to him and should not be exempt from disclosure.

Findings with Respect to Part 3 of the Test

The appellant's arguments with respect to the possible application of section 17(1)(b) are well-taken. The information contained in the inspection reports and the correspondence which

followed was provided as a requirement of firms doing business under the *Laboratories and Specimen Collection Centre Licensing Act*. In my view, entities such as the affected party would not restrict or limit the information shared with the Ministry should this information be subject to possible disclosure under the *Act*. Rather, as these entities are under a legal obligation to provide information to the Ministry, I find that they would continue to do so.

Similarly, information pertaining to the types of tests performed by the affected party is included as an Appendix to its licence, a copy of which was provided to the appellant. Accordingly, I find that the information contained in the records relating to this type of information cannot be exempt from disclosure under section 17(1)(a) or (c).

However, the mere fact that the appellant represents the former landlord of the affected party does not somehow entitle him to access to information which is otherwise exempt from disclosure under section 17(1). While this information may be "relevant" to him, it is still subject to the exemptions in the *Act*, where those exemptions apply.

I find that the affected party has provided me with sufficient evidence to demonstrate that the disclosure of information relating to the use of its licence contained in Records 13, 14, 16 and 17 could reasonably be expected to result in harm to its competitive position. I have been provided with detailed and convincing evidence as to the nature of the harm and I find that Part 3 of the section 17(1) test has been satisfied with respect to this information. As I noted in my discussion above, much of the evidence and argument submitted by the affected person with respect to this information was of a confidential nature and I am unable to provide more detail in this order about the contemplated harms.

Records 19 to 27 contain information gleaned from the inspections undertaken by Ministry officials of the affected party's facility and information provided by the affected party in response to the reports prepared by the inspectors. In my view, portions of this information, particularly that dealing with the affected party's processes and methodologies, fall within the ambit of the exemption in section 17(1). In my view, the affected party has demonstrated that prejudice to its competitive position is reasonably likely to result from the disclosure of this information. This information would be useful to the affected party's competitors and its disclosure would prejudice its competitive position and cause it undue loss as contemplated by sections 17(1)(a) and (c). Accordingly, as all three parts of the test enunciated above have been met, I find that portions of Records 19 to 27 qualify for exemption under section 17(1).

The disclosure of much of the remaining information contained in these records, however, does not give rise to a reasonable expectation of harm to the affected party. Rather, this information is included in the terms of the affected party's licence with the Ministry or is otherwise not exempt under this exemption. The affected party has not provided me with sufficient basis to make a finding that this information qualifies for exemption from disclosure under section 17(1).

I have provided the Ministry's Freedom of Information and Protection of Privacy Coordinator with a highlighted copy of Records 19 to 27 indicating which portions are subject to the exemption in section 17(1). The highlighted portions of these records are **not** to be disclosed to the appellant.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 13, 14, 16 and 17, in their entirety and to the highlighted portions of Records 19 to 27.

2. I order the Ministry to disclose Records 6, 7, 9, 10, 11 and 12 in their entirety, and those portions of Records 19 to 27 which are **not** highlighted on the copy of the records I have provided to the Ministry's Freedom of Information and Protection of Privacy Coordinator by providing the appellant with a copy by **June 24, 2003** but not before **June 19, 2003**.

3. In order to verify compliance with 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: May 20, 2003
Donald Hale
Adjudicator