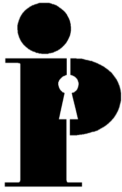

ORDER PO-2156

Appeal PA-020077-1

Fanshawe College of Applied Arts and Technology

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NATURE OF THE APPEAL:

Fanshawe College of Applied Arts and Technology (the College) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

> … photocopies of all materials such as correspondence, purchase orders, bidding documents, drawings and service reports which have been prepared by [five identified companies], and any other company which has provided services or correspondence, which apply to the Building Automation System/DDC/EMS/EMCS/HVAC/Controls and services over the past 24 months.

The College denied access to the records on the basis of the exemptions found in section 17 (third party information) and section 18 (economic and other interests) of the *Act*.

The requester, now the appellant, appealed the decision.

During mediation, the College notified approximately 35 affected parties (the third parties) of the request, and sought their views on the disclosure of the records. One of the third parties (Company A) responded in writing and objected to the disclosure of any records relating to it. A second third party (Company B) identified that it had no concerns with releasing the information, but that it was forwarding the notification to another company, and stated that the other company may have separate concerns. The representative of Company A then responded to that notification and objected to disclosure. Of the other third parties notified, a number of them verbally consented to the disclosure of records relating to them. The remaining third parties did not respond.

The College then issued a revised decision to the appellant, granting partial access to the records. Access was denied to any records relating to Company A. The appellant attended at the College to view the records to which access was granted, and he obtained copies of some of them. The appellant also indicated that he wished to continue to pursue access to the records relating to Company A.

Mediation did not resolve the remaining issues, and the file was transferred to the adjudication stage of the process. A Notice of Inquiry setting out the facts and issues in this appeal was initially sent to the College and Company A. The College was asked to address the possible application of sections 17 and 18, and Company A was invited to address only the section 17 issue.

Both the College and Company A provided representations. Company A's representations support its view that section 17 applies to the records. The College's brief representations indicate that it has read and agrees with the representations provided by Company A. The College did not provide representations on the possible application of section 18.

In the absence of representations supporting the discretionary exemption in section 18, that section is no longer at issue in this appeal.

A revised Notice of Inquiry was then sent to the appellant, inviting representations solely on the issue of the possible application of section 17. The appellant also received the non-confidential portions of Company A's representations. The appellant provided representations in response.

The issue that I must decide in this appeal is whether the records qualify for exemption under section 17 of the *Act*.

RECORDS:

There are approximately 350 pages of records remaining at issue in this appeal. These records include:

- purchase orders (approximately 34 pages)
- correspondence relating to the design and construction of the facilities and their maintenance and operations (approximately 83 pages)
- building specifications documents (approximately 35 pages)
- "on-line" information (approximately 3 pages)
- deficiencies lists (approximately 3 pages)
- quotes and information (approximately 27 pages)
- documents relating to the Energy Management Control (EMC) System (records relating to testing, verification and start-up – approximately 165 pages).

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

The College and Company A take the position that sections 17(1)(a), (b) and (c) apply to the records. Those sections read:

> 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;

For records to qualify for exemption under section 17(1)(a), (b) or (c), each part of the following three-part test must be satisfied:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 17(1) will occur.

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

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373, stated as follows with respect to the three-part test set out above:

> 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.)]

The College and Company A, as the parties resisting disclosure, must provide detailed and convincing evidence that each of these elements is present in the records and surrounding circumstances.

Type of information

This office has defined the terms "trade secret" and "technical, commercial or financial information" in previous orders. I adopt those definitions (as set out below) for the purpose of this appeal.

Trade secret

Previous orders have defined "trade secret" 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].

Company A takes the position that portions of the records contain trade secrets, and its representations on this issue read as follows:

> Portions of the information requested contain trade secrets, in that they consist of the knowledge developed by [Company A] over several years of providing service to [the College]. Its economic value derives from the fact that [Company A] has trained its employees and in other ways developed this knowledge over time, and its disclosure would permit the requester to simply capitalize on this knowledge.

Company A does not specify which portions of the records contain "trade secrets", and without doing so it is difficult to determine what information Company A considers its "trade secrets". I described the nature of the records earlier – many of the records consist of purchase orders, general correspondence regarding day-to-day matters, and records documenting "routine" testing, verification and start-up. In the absence of specific references to these records and how the information contained in them could constitute a "trade secret", based on the representations and my review of the records, it is my view that the records do not contain "trade secrets" for the purpose of section 17(1). Furthermore, I have not been provided with sufficient information to convince me that this information is "not generally known in the business" or that it has "economic value from not being generally known".

In the absence of sufficient evidence to satisfy me that any of the information satisfies the definition of "trade secret" set out above, I find that the records do not contain "trade secrets" for the purpose of section 17 of the *Act*.

Technical information

Previous orders have defined "technical information" 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].

Company A takes the position that the information in the records is technical information, and states:

> The information requested is … clearly technical in nature, as it relates to the projects undertaken by [Company A] on behalf of [the College].

I have reviewed the records and am satisfied that many of the records contain "technical information" for the purpose of this section. In particular, records relating to the specifications of the facilities, and concerning the testing, verification and start-up of the EMC system, contain technical information. A number of other records relate to work done on the HVAC systems, and go into detail regarding the operation or maintenance of the systems. In my view, many of the records contain "technical information" for the purpose of section 17 of the *Act*.

Commercial and financial information

This office has defined these terms as follows:

> 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] 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].

Company A states:

> Portions of the information are both commercial and financial since they relate to specific pricing for equipment and labour.

Again, Company A does not specify which portions of the records contain which types of information.

In reviewing the records, I find that a number of them contain information which relates to the buying or selling of merchandise or services – specifically – the provision of products and services to the College for the ongoing maintenance of the HVAC and other systems. Some other records also contain price quotations and costs. In my view, a number of the records contain commercial information for the purpose of the *Act*.

In summary, I find that many of the records contain information that qualifies as either "technical" or "commercial" information. However, because of my findings below, it is not necessary for me to specifically identify which records or portions of records fit into each of these categories.

Supplied in confidence

To meet the second part of the test, it must be established that the information in the records was actually "supplied" to the College, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the College (Orders P-203, P-388 and P-393).

In regards to whether the information was supplied "in confidence", this section 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 a business 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, previous orders have determined that 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.

[See Order P-561]

Company A takes the position that the information contained in the records has been supplied to the College in confidence. It states:

> The information has been supplied to [the] College on the expectation that it would remain confidential. The expectation in this case is implicit. This expectation is reasonable given that the information does not relate to any party other than [the College and Company A] and does not affect the public in any way. All such information relates to routine commercial transactions between a supplier and its customer. Obviously all such information has been originally supplied to [the College] by [Company A] and is not available through public bodies.

Company A states that this information relates to "routine commercial transactions" and has "obviously … been originally supplied to [the College] by [Company A]". General statements of this nature by Company A do not greatly assist me in deciding whether the information was actually "supplied" to the College. After reviewing the records, I find that, with the exception of portions of certain records (for example, portions of the purchase orders at issue, some of the correspondence from the College to Company A, as well as the "on-line" information), much of the information in the records was supplied to the College by Company A, or would permit the drawing of accurate inferences with respect to the information actually supplied.

However, in my view, Company A has not provided me with sufficient evidence to support its position that the information contained in the records was supplied to the College "in confidence".

Company A has not identified any reference in the 350 pages of records to suggest that the information contained in the records is "confidential". Company A takes the position that the expectation of confidentiality in this case is implicit, and supports its view by identifying the "routine" nature of the transactions referred to in the records, as well as its position that the records only relate to the College and Company A and do "not affect the public in any way". Regardless of whether I accept Company A's position on this point, that is not the test I must apply in determining whether the expectation of confidentiality is based on reasonable and objective grounds. The test is set out above, and the parties were referred to it in the Notice of Inquiry.

Clearly some of the information – regardless of whether or not it was supplied by Company A – was not supplied "in confidence". Examples include the on-line information, as well as some pages of the correspondence that identify general promotional information about Company A. With respect to the other information in the records, described by Company A as relating to

"routine" commercial transactions, I have not been provided with sufficient evidence to determine, based on reasonable and objective grounds, that there existed an expectation of confidentiality for these records. The information does not appear to be of a confidential nature - it relates to routine transactions between an institution and a company providing services to it. Other than Company A's general statement regarding the confidentiality of the records, I have not been provided with information supporting the view that the information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential, nor that the information was treated consistently in a manner that indicated a concern for its protection from disclosure by the affected person prior to being communicated to the College.

Accordingly, I do not accept that the records or the information contained in them were supplied with a reasonable expectation of confidentiality. I find that the second part of the section 17(1) test has not been met.

Harms

Having found that the information does not satisfy the second part of the section 17(1) test, it is not necessary for me to determine whether the requirements of the third part of the test have been satisfied. However, in the circumstances of this appeal, I have nevertheless decided to review this part of the test.

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 (Order P-373).

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The College and Company A must provide detailed and convincing evidence to establish a "reasonable expectation of harm" as described in paragraphs (a), (b) or (c) of section 17(1).

Sections 17(1)(a) and (c): Competitive position and undue loss or gain

With respect to the harms set out in sections 17(1)(a) and (c), Company A states:

> Disclosure of the extensive information requested would significantly harm [Company A] by providing competitors the exact nature of work done, and the price charged. At the same time, such competitors would receive an unearned benefit, in that they would not be required to design testing procedures, or

> calculate pricing, both of which require extensive knowledge of [the College's] systems, and which knowledge has been developed over several years by [Company A].

I do not find Company A's representations either detailed or convincing. The assertion that competitors would not be required to design testing procedures or calculate pricing is not supported by reference to any specific information in the records. Nor does Company A identify how competitors, without the benefit of the "extensive knowledge … developed over several years" would be able to capitalize on the disclosure of design testing procedures or pricing. Company A has not referred specifically to the records or documents to support its claim that section 17 applies.

Notwithstanding the lack of detail in support of Company A's position, I have reviewed the records in detail. Some portions of the records at issue do contain prices or quotations - specifically - the purchase orders (with some attached invoices) and certain documents containing "quotes". These records caused me to consider whether Company A's concern about the section 17(1) (a) or (c) harms was supportable.

The purchase orders do contain commercial information relating to the specific costs of items referred to in them; however, these items appear to relate to the day-to-day business of providing on-going maintenance and repairs to the facilities for "routine" work. Unlike the situation in other appeals, where specific purchase orders may contain information such as unit prices in tender bids (which has been protected from disclosure in numerous appeals in the past), the purchase orders at issue in this appeal refer more specifically to discreet and specific "routine" maintenance and repairs. In the absence of convincing evidence to support the position that the disclosure of these records would lead to the harms contemplated by section 17(1)(a) or (c), I find that the disclosure of these purchase orders would not lead to the contemplated harms.

With respect to the "quotes" contained in certain records, by and large these "quotes" are for the global amounts for specified work to be done. They do not contain information relating to "unit prices" or other specific information which this office has found to qualify for exemption in the past.

I have not been provided with sufficient evidence to support the position that the disclosure of any of the records at issue would lead to the types of harms set out in section 17(1)(a) or (c).

Section 17(1)(b): Information no longer supplied

Finally, Company A posits that section 17(1)(b) applies by stating:

> Because of the harm which would result to [Company A] from disclosure, [Company A] would need to consider in the future whether the risk of disclosure to competitors was justified, and therefore whether to respond to future requests for proposals from [the College].

As set out above, to qualify for exemption under this section the parties must provide detailed and convincing evidence to support the view that the disclosure of the records could reasonably be expected to:

> 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

The statement by Company A that it would have to "consider in the future whether the risk of disclosure to competitors was justified, and therefore whether to respond to future requests for proposals from [the College]" is not sufficient to meet this test. Simply stating that the possible disclosure of certain information would be a factor to consider in the future is not sufficient to establish the harm in section 17(1)(b).

In summary, although the majority of the information at issue contains technical or commercial information, in my view the information was neither supplied by Company A to the College in confidence, nor could its disclosure reasonably be expected to result in the harms set out in sections 17(1)(a), (b) or (c). Accordingly, the information at issue should be disclosed to the appellant.

ORDER:

1. I do not uphold the College's decision to deny access to the records.

2. I order the College to disclose the records at issue to the appellant by **August 1, 2003** but not before **July 27, 2003**.

3. Pursuant to Provision 2 of this order, I reserve the right to require the College to provide me with a copy of the records upon request.

Original signed by: June 27, 2003
Frank DeVries
Adjudicator