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

ORDER PO-2152

Appeal PA-020132-1

Ministry of Community, Family and Children's Services

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NATURE OF THE APPEAL

The Ministry of Community, Family and Children's Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> All documents pertaining to dispute between the Ministry of Community and Social Services and [a named leasing company].

The requester explained that the dispute involved leasing agreements for technology equipment.

The Ministry identified two responsive records. After notifying a consulting company that authored one of the records (the consultant), pursuant to section 28 of the *Act*, and considering its position that the records should not be disclosed, the Ministry decided to release both records to the requester. Before doing so, the Ministry advised the consultant, who appealed the Ministry's decision on the basis that the records qualify for exemption under section 17(1)(a) and (c) of the *Act*.

Mediation did not resolve the appeal and the matter was transferred to the adjudication stage of the appeal process.

I initiated my inquiry by seeking representations from:

- the consultant, as the appellant resisting disclosure;
- the leasing company identified in the request (the leasing company), as an affected party with a potential interest in the records; and
- the Ministry, in order to determine its position on the impact that disclosing the records would have on the leasing company's interest.

I received representations from the consultant and the leasing company, but not from the Ministry.

I then provided the requester with a copy of the non-confidential portions of these representations, and he responded. In his representations, the requester raised the potential application of the public interest override in section 23 of the *Act*. I provided the requester's representations to the consultant and the leasing company in order to given them an opportunity to respond to this new issue, and they both made reply representations.

RECORDS:

Record 1 is a one-page letter, dated November 25, 1999, from the leasing company to the Ministry. It outlines the results of negotiations between these two parties on the terms of their leasing agreements.

Record 2 is a two-page cover letter from the consultant to the Ministry, dated November 3, 1999, and an attached report. The report is titled "Computing Equipment Lease Portfolio Review" and reflects the results of the consultant's review of the Ministry's "Caseworker Project".

DISCUSSION:

THIRD PARTY INFORMATION:

Sections 17(1)(a) and (c) read as follows:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under sections 17(1)(a) and/or (c), the parties resisting disclosure (in this case the consultant and the leasing company) must satisfy 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.

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

3. The prospect of the disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraphs (a) and/or (c) will occur.

The Court of Appeal for Ontario approved this three-part test. In its decision upholding my Order P-373, the Court 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 have 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 474 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)] (*Workers' Compensation Board)*)

Part 1: Type of Information

Representations

The consultant submits that the records contain "business trade secrets" and that disclosing them would reveal "specific expertise, accounting processes, analytical skills and tactics" that the consultant has developed to perform evaluations.

The leasing company also submits that the records contain "trade secrets", as well as "financial" and "commercial" information about its leasing agreements with the Ministry. The leasing company also points to Order PO-2027, which involved the consultant, the leasing company and a different ministry. In the leasing company's view, Adjudicator Donald Hale in that case found that records containing information that was "virtually identical" to the information at issue here were "clearly of a commercial nature as it addresses agreements for the supply of goods and services by the leasing company to the [other ministry]."

The requester argues that it is unlikely that the records would contain trade secrets unique to the consultant, since there are many competitors in the field of forensic consulting. He also points out that the cities of Toronto, Waterloo, and Guelph, as well as the Union Water System and the Essex-Windsor Waste Management Authority have provided him with access to the same type information in response to access requests for information relating to their agreements with the leasing company.

The terms "trade secret" and "commercial" and "financial" 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)

Commercial information

Commercial information is information that 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 methods, 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 for Part 1 of the test

I find that neither record contains any "trade secrets". Record 1, which communicates the results of negotiations between the Ministry and the leasing company, clearly does not contain any of the types of information associated with a trade secret. The cover letter portion of Record 2 outlines the consultant's suggestions for how the Ministry might approach the leasing company on issues relating to its leasing agreements, which also does not contain any of the types of information associated with a trade secret. The report portion of Record 2 consists, for the most part, of a chronology of activity relating to various Ministry equipment leases covering the period 1994 to 1999. It also includes a summary and series of recommendations as well as 7 pages of spreadsheets used to generate figures, some of which are referred to in the body of the report. Although the consultant may have used its proprietary methodologies and techniques in order to produce various figures contained in the report or to substantiate its conclusions and recommendations, no trade secret is evident on the face of the report. In addition, I am not persuaded, based on the consultant's representations and my review of the content of the report, that disclosing the report would reveal any such trade secrets.

Record 1 reflects amendments to contractual agreements negotiated by the Ministry and the leasing company, which brings it squarely within the definition of "commercial information".

The portions of Record 1 that reflect monetary adjustments to these agreements also contain "financial information".

Record 2 also contains "financial information", specifically various monetary details of leasing agreements between the Ministry and the leasing company, as well as financial analyses conducted by the consultant in the context of its review of these agreements. There is no financial information in Record 2 relating to the consulting company, but the record itself constitutes the product purchased by the Ministry from the consultant and therefore falls within the scope of the definition of "commercial information".

Accordingly, I find that part 1 of the section 17(1) test has been established for both records.

Part 2: Supplied in Confidence

To satisfy the second part of the test requires that the information be "supplied" to the Ministry, and further that it was supplied "in confidence."

Record 1

Previous orders have found that, because an agreement is typically the product of a negotiation process, the content of a contract between an institution and a third party does not normally qualify as having been "supplied" for the purposes of section 17(1). In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by an affected party, not information that has resulted from negotiations between an institution and an affected party (Orders P-36, P-204, P-251), P-1105, PO-1698 and PO-2018).

In my view, this reasoning applies to Record 1. The subject matter of this letter concerns various existing lease agreements between the Ministry and the leasing company, and amendments to them that were negotiated by these parties in 1999. The opening sentence of the letter makes it clear that the commercial and financial arrangements between the parties are being changed as a result of negotiations. Accordingly, although Record 1 was authored by the leasing company and sent to the Ministry, I find that the contents of this record reflect negotiated terms, which were not "supplied" for the purposes of part 2 of the section 17(1) test.

Because all three parts of the test must be established in order for a record to qualify for exemption under section 17(1), Record 1 does not qualify for exemption and should be disclosed to the requester.

Record 2

Record 2, on the other hand, is a report prepared by the consultant under the terms of its contract for services and transmitted to the Ministry with a cover letter summarizing the outcome of its review and suggesting a course of action. As such, I find that it was "supplied" for the purposes of section 17(1) of the *Act*.

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that there was a reasonable implicit or explicit expectation of confidentiality on the part of the supplier at the time the information was provided. This expectation must have an objective basis (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

- communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the consultant prior to being communicated to the Ministry
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose which would not entail disclosure

(Order P-561)

The consultant submits:

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

Referring to Record 2, the leasing company submits:

> [T]he underlying information used to generate the Report and supplied by [the leasing company] to the Ministry was understood to be confidential. It was found in Order PO-2027 that the expectation of confidentiality "was reasonably-held, particularly given the highly competitive nature of the IT equipment leasing and leasing consultation business".

The requester points to the Ministry's willingness to disclose Record 2 as evidence that it was not received in confidence. He also argues that the consultant sold its services to the Ministry and the desire to preserve what it sees as a confidential relationship should not block the release of the report.

The consultant and the leasing company both rely on Order PO-2027 to support the position that Record 2 was supplied in confidence. The leasing company quotes a portion of that order where Adjudicator Hale states that "the very nature of the information contained in the report...can be construed as having been provided with an expectation of confidentiality by both the supplier of the information (the leasing company) and the consultant who then evaluated it."

Dealing first with Order PO-2027, in that case Adjudicator Hale concluded that the records satisfied the confidentiality component of the section 17(1) test "despite the lack of a clearly explicit statement of confidentiality in the records themselves". In contrast, Record 2 in this appeal is headed "confidential to [a Ministry official]", which represents strong evidence that it was supplied by the consultant with an explicit expectation that the Ministry would treat it confidentially. As far as the other requirements of confidentiality in Order P-561 are concerned, I find that:

- based on the nature and content of the report, as well as the purpose for its creation and the contractual provisions regarding confidentiality referred to by the consultant, I accept that the consultant would have treated the record confidentially before submitting it to the Ministry;
- it is reasonable to conclude that that record would not otherwise be available to the public from other sources; and
- it was prepared for the purpose of providing confidential advice to the Ministry in its internal decision-making processes, which would not generally entail disclosure to the public.

Accordingly, I find that Record 2 was supplied by the consultant with a reasonably-held expectation that it be treated confidentially by the Ministry, thereby satisfying the second part of the section 17(1) test.

Part 3: Harms

For this exemption to apply, the parties resisting disclosure must demonstrate that disclosing the record "could reasonably be expected to" lead to a specified result. To meet this test, the consultant and/or the leasing company must provide "detailed and convincing" evidence to establish a "reasonably 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.)).

With respect to section 17(1)(a), the consultant submits:

> [T]he contents of the subject 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 financial consulting and forensic services in the 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 [the consultant's] core business services approach. Easy access to the subject 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 [the consultant] to potential clients. While we certainly are prepared to compete for business, one of the principle barriers to entry to our consulting marketplace is the requisite experience and investment in time to develop a sustainable and unique service offering.
>
> The suite of services and approach offered by [the consultant] represent economic value to [the consultant] by not being generally known, difficult to develop and accordingly must be protected.

As far as section 17(1)(c) is concerned, the consultant submits:

> [T]he 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 Ministry]. 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.

With specific reference to Record 2, the consultant submits that it "summarizes the work conducted for and provided to [the Ministry] under a specific contractual and confidential basis", and argues that confidentiality is required in order to protect and maintain the secrecy of its trade practices.

The leasing company submits that disclosing Record 2 could reasonably be expected to "seriously prejudice [its] competitive position in a highly competitive industry where commercial advantage is very important." The leasing company argues that disclosure could "potentially hurt future negotiations with the Ministry, other customers and/or suppliers", and that "knowledge of such information would be an undue and ill-begotten gain on the part of a competitor that would hurt not only [the leasing company] but would also give that competitor an unfair advantage over other leasing companies as well".

The leasing company and the consultant also rely on the findings in Order PO-2027. The leasing company states that the records at issue in that appeal are similar in nature to Record 2, and quotes Adjudicator Hale's finding that "the leasing company is engaged in a very competitive industry where commercial advantage is important" and that "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".

The requester takes the position that the consultant and the leasing company have failed to provide the detailed and convincing evidence necessary to establishing either of the section 17(1)(a) or (c) harms.

Having carefully considered all of the representations and reviewed the actual content of Record 2, I find that the consultant and the leasing company have failed to establish a reasonable expectation of harm under sections 17(1)(a) or (c) should this record be disclosed.

As stated earlier, Record 2 consists of a 2-page letter from the consultant to the Ministry, together with an attached report the outlines the results of the consultant's review of leasing arrangements between the Ministry and the leasing company. The letter consists of a relatively high-level summary of the results, together with a suggested course of action the Ministry might follow in subsequent discussions with the leasing company. The report outlines the chronological history of ongoing dealings between the leasing company and the Ministry on its various equipment leases. Potential problems are noted and scenarios are presented to help the Ministry determine future action. Appendices to the report consist of spreadsheets detailing certain financial aspects of the lease agreements.

The consultant's arguments concerning part three of the test deal primarily with harm associated with disclosing its proprietary trade secrets. In my view, the letter portion of Record 2 clearly does not contain any trade secrets. It is essentially an advisory opinion provided by the consultant, which is similar in nature to the type of record that might fall within the scope of the section 13 discretionary exemption. The Ministry has not claimed section 13 for this letter, and in deciding that Record 2 should be disclosed has presumably either concluded that section 13 does not apply or exercised discretion not to rely on it in this case. The letter contains none of the types of information referred to in the consultant's representations on part three of the test, and the evidence and argument submitted by the parties fails to meet the "detailed and convincing" standard required by part 3 of the section 17(1)(a) and/or (c) test.

As far as the report portion of Record 2 is concerned, I found in my part 1 discussion that the report does not contain any trade secrets. Although I accept that the consultant may indeed have developed trade secrets in order to conduct its business, and that these trade secrets may well have been utilized in order to prepare the report portion of Record 2, in my view, any potential section 17(1) harm in this context is dependent on the disclosure of actual trade secrets. Because no trade secrets are contained in or revealed by the contents of Record 2, I find that the potential for any section 17(1)(a) or (c) harm described by the consultant is not reasonable in these circumstances.

As far as the leasing company's commercial or financial information contained in Record 2 is concerned, it is important to state that none of it was supplied to the Ministry by the leasing company. Rather, it either reflects components of various negotiations that took place between the leasing company and the Ministry over the course of several years of administering the equipment leases, or was developed by the consultant during the course of its review. As such, the leasing company's commercial and financial information was either not "supplied" for the

purposes of section 17(1), for the same reasons that Record 1 does not meet part 2 of the section 17(1) test, or is too remotely connected to any information supplied by the leasing company to the Ministry to reasonably be expected to harm its competitive position or to cause undue loss in future negotiations with the Ministry.

As far as Order PO-2027 is concerned, I should state at the outset that the Commissioner is not bound by the principle of *stare decisis*, and thus is entitled to depart from earlier interpretations (*Hopedale Developments Ltd. v. Oakville (Town)* (1964), 47 D.L.R. (2d) 482 (Ont. C.A.); *Portage la Prairie (City) v. Inter-City Gas Utilities* (1970), 12 D.L.R. (3d) 388 (Man. C.A.), Orders PO-1709 and PO-1931).

In any event, in my view, Record 2 can be distinguished from the records that were at issue in Order PO-2027.

First, none of the records in Order PO-2027 resembled the 2-page cover letter portion of Record 2 in this case.

The records that Adjudicator Hale considered in the previous appeal consisted of a detailed review of leasing arrangements between the Ministry of Natural Resources and the leasing company. They contained an analysis of specific terms and conditions contained in lease provisions and a critique of the lease structures. The records also included detailed written explanations to accompany the financial spreadsheets, providing information such as explanations as to what the particular spreadsheets are to illustrate, definitions for technical terms used in column headings, and descriptions of the processes applied in order to determine the resulting calculations. The report portion of Record 2, in contrast, is a more generalized review of the chronology of the leasing arrangements between the leasing company and the Ministry. It provides an overview of the leasing options to assist the Ministry to determine its future actions, but it does not include an analysis of specific terms and conditions of the leases, nor does it provide details on how results were obtained or detailed explanations of how to interpret the data contained in the spreadsheets.

Adjudicator Hale also found on the particular facts and records in Order PO-2027 that "the methodologies employed by the consultant in conducting its review would be revealed [through disclosing the records] and could reasonably be expected to by used by its competitors in bidding on and performing work of a similar nature for the Ministry or another client". I came to the opposite conclusion in this case, based on a different set of facts and a record that, in my view, does not contain nor would it reveal the type of proprietary information that formed the basis of Adjudicator Hale's decision.

Finally, Adjudicator Hale based his decision to protect the information about the leasing company contained in the records in Order PO-2027 on the fact 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". Having found that no information about the methodologies and analytical process employed by the consultant are reflected in Record 2, it is not necessary to deny access to the information about the leasing company on the basis of harm to the interests of the consultant.

In summary, I find part 3 of the section 17(1)(a) and/or (c) test has not been established for Record 2. Because all three parts of the test must be established in order for the exemption to apply, Record 2 does not qualify for exemption and should be disclosed to the requester.

Because of my findings in this order, it is not necessary for me to consider the possible application of section 23 of the *Act*.

ORDER

1. I order the Ministry to disclose Records 1 and 2 to the requester by providing him with copies no later than **July 10, 2003** but not before **July 5, 2003**.

2. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the requester.

Original signed by: June 5, 2003
Tom Mitchinson
Assistant Commissioner