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

ORDER PO-2233

Appeal PA-030103-3

Ministry of Finance

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NATURE OF THE APPEAL:

The Ministry of Finance (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> All submissions, reports or correspondence from third parties to the Minister of Finance [the Ministry] or staff in the Ministry of Finance (excluding staff in the Minister's Office) and the Financial Services Commission of Ontario [FSCO] on the issue of viatical insurance, viatical settlements or life settlements from April 1, 1996 to February 7, 2003.

The Ministry identified 68 responsive records. After consulting with various parties that could have an interest in some of the records, the Ministry provided the requester with access to 61 records. Many of the disclosed records consist of submissions made by third party stakeholders who have an interest in the issue of viatical insurance. The Ministry denied access to five records on the basis that they qualify for exemption under section 17(1) (third party commercial information); and two other records on the basis of section 21 (invasion of privacy).

The requester (now the appellant) appealed the Ministry's decision.

During the intake stage of the appeal the Ministry provided the appellant with an index describing all 68 records. At the completion of mediation the appeal was narrowed to two records (Records 14 and 21), and the only exemption remaining at issue is section 17(1).

Further mediation was not successful and the appeal was transferred to the adjudication stage. I began my inquiry by sending a Notice of Inquiry to the Ministry and the two organizations who submitted Records 14 and 21 to FSCO (the affected parties). The Ministry and the affected party who submitted Record 14 provided representations in response to the Notice. The affected party who submitted Record 21 withdrew its objection to disclosure. As a result, the Ministry changed its position on section 17(1) and agreed to disclose Record 21 to the appellant.

I decided that it was not necessary for me to solicit representations from the appellant before issuing my order.

RECORD:

The one record that remains at issue, Record 14, is a submission by the remaining affected party to FSCO on the issue of viatical insurance identified in the appellant's request.

DISCUSSION:

THIRD PARTY INFORMATION

General principles

Section 17(1) states, in part:

> 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;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace (Orders PO-1805, PO-2018, PO-2184, MO-1706).

For section 17(1) to apply, 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 paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: type of information

The Ministry and the affected party both claim that Record 14 contains "commercial information".

The Ministry submits that the record outlines the affected party's position on how the viatical industry should be regulated and, in the Ministry's view, this is of commercial value to the affected party because viatical settlements have a direct bearing on the business interests of companies such as the affected party.

The affected party submits that the issue of viatical settlements concerns its industry "in a fundamental way", and because of that, has an impact on the affected party's "primary business interests".

"Commercial information" has been defined in previous orders as information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order PO-2010). The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information (Order P-1621).

I do not accept the positions put forward by the Ministry and the affected party. Record 14 is a 5-page letter submitted by the affected party in response to a draft consultation document provided to a number of interested stakeholders by FSCO on the issue of a proposed regulatory system for viatical settlements. It offers views and comments from the perspective of the affected party's industry but, in my view, it does not contain "commercial information" as that term has been defined and applied by this office. No information in the record relates to any specific merchandise or service sold by the affected party or bought by FSCO, the Ministry or any other person. No "informational assets" are described in the record, nor could any be inferred through the disclosure of the information contained in Record 14. In fact, the record does not appear to contain any information individually associated with the affected party. Rather, it reflects the affected party's views of how viatical settlements would impact the insurance industry as a whole, and its recommendations for the operation of the regulatory system under discussion by FSCO at that time.

I find that Record 14 does not contain "commercial information" or any of the other types of information listed in section 17(1), and therefore part 1 of the exemption test has not been established.

As stated earlier, all three parts of the section 17(1) test must be established in order for a record to qualify for exemption. Failure to satisfy part 1 alone means that Record 14 does not qualify. However, because the parties have provided representations on part 3 I have decided to address it as well.

Part 3: harms

General principles

To meet this part of the test, the Ministry and/or the affected party 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus (Order PO-2020).

Section 17(1)(a): prejudice to competitive position

The Ministry submits that disclosing Record 14 would significantly prejudice the affected party's competitive position "by publicizing its position about viatical settlements in a volatile market where that knowledge may be used by their competitors in their marketing strategies". The Ministry goes on to argue that knowledge of the affected party's views on the topic "will hinder [the affected party's] ability to be flexible in the future when dealing with viatical issues and will interfere significantly with the contractual or other negotiations of [the affected party]".

The affected party makes similar submissions, arguing that disclosure of its current position on the issue of vaiticals "may significantly interfere with our later flexibility in dealing with viatical issues as they arise. This might also interfere with the contractual or other negotiations of [the affected party] in effectively 'binding' us to a single position on the issue."

Based on these representations and my review of the record, I am not persuaded that disclosing Record 14 could reasonably be expected to significantly prejudice the competitive position of the affected party or to interfere significantly with any future contractual or other negotiations the affected party may be involved in. In my view, the evidence and argument put forward by the two parties is speculative and not supported by my review of the content of the record, a significant portion of which is an outline of previously published information. I do not have the necessary detailed and convincing evidence required to support the harms component of section 17(1)(a).

Section 17(1)(b): similar information no longer supplied

The affected party states that disclosing the record:

> … may result in us refusing to supply similar information in future. While we take pride in our cooperative attitude and our willingness to assist in formulating important matters of public policy as concern our industry, were we no longer to

> be afforded the courtesy of dealing in confidence, we may reconsider giving our assistance in future situations.

The Ministry similarly submits that disclosing the record "may also result in interested parties with valuable first-hand knowledge and experience declining to provide valuable comments to FSCO and other government agencies in future consultation processes".

Again, I find that the section 17(1)(b) harm has not been established. Consultation with stakeholders is a well-established practice throughout government, and the parties have not persuaded me that this process would be negatively impacted by the disclosure of Record 14. As outlined above, no "informational assets" of the affected party are contained in this record, and it is significant to note that the appellant has already been provided with similar submissions with the consent of a number of other stakeholders, which suggests that the Ministry's speculation about future participation in consultation processes may not be valid.

Accordingly, I find that I do not have the detailed and convincing evidence required to support the harms component of section 17(1)(b).

Section 17(1)(c): undue loss or gain

The affected party's representations do not deal with the section 17(1)(c) harms.

The Ministry's submissions contain what amounts to various speculations on how others might view the affected party's position on viaticals and the impact this could have on the business interests of the affected party.

I find that these representations are not the type of detailed and convincing evidence required to support the harms component of section 17(1)(c), particularly in the absence of evidence or argument from the affected party who is in the better position to identify any undue loss or gain associated with the disclosure of Record 14.

In summary, I find that parts 1 and 3 of the section 17(1) test have not been established for Record 14. Because all three parts must be established in order for the exemption to apply, I find that it does not, therefore Record 14 should be disclosed to the appellant.

ORDER:

1. I do not uphold the Ministry's decision.

2. I order the Ministry to disclose Record 14 to the appellant by **March 5, 2004** but not before **February 27, 2004**.

3. In order to verify compliance, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant pursuant to Provision 2, upon request.

Original signed by: January 30, 2004
Tom Mitchinson
Assistant Commissioner