



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

ORDER PO-2289

Appeal PA-020283-1

Ontario Realty Corporation



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NATURE OF THE APPEAL:

The requester made a request to the Ontario Realty Corporation (the ORC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to two specific properties in Toronto. Among other things, the requester sought information about a lease between two provincial tribunals (the Ontario Municipal Board and the Board of Negotiation) and a private corporation, as well as a contract to provide janitorial services.

The ORC issued a decision to the requester, granting partial access to the records. The ORC transferred a portion of the request (relating to janitorial services) to the Ministry of the Attorney General. The ORC denied access to the remaining information, relying on sections 18(1)(a) and (c) (economic and other interests of Ontario).

The requester (now the appellant) appealed the ORC's decision to deny access to the remaining information.

Mediation did not resolve this appeal, and the file was transferred to adjudication. This office sent a Notice of Inquiry to the ORC, initially, outlining the facts and issues and inviting the ORC to make written representations. The ORC submitted representations in response to the Notice. In addition, this office sent a Notice of Inquiry to the landlord and invited it to make representations on the possible application of the mandatory exemption at section 17(1) (third party information). The landlord provided representations on this issue. This office then sent a Notice of Inquiry to the appellant, together with a copy of the representations of the ORC and the landlord. This office invited the appellant to make representations on sections 18(1)(a) and (c) only. The appellant did not make any representations directly in response to the Notice; he did, however, provide this office with a number of documents earlier in the inquiry, which I will treat as his representations for the purpose of this appeal.

In this appeal I must decide whether sections 17(1), 18(1)(a) and 18(1)(c) apply to the information at issue.

RECORD:

The record remaining at issue is a lease agreement dated November 1, 1993 between Her Majesty the Queen in right of Ontario as represented by the Chair of the Management Board of Cabinet (the tenant) and a private corporation (the landlord). The undisclosed portions of pages 2, 3, 7, 8 and 16 remain at issue. Specifically, this information consists of base operating costs, base tax, base rent, annual rent and parking amounts payable by the tenant under the lease.

BRIEF CONCLUSION:

The information at issue is not exempt, and the ORC must disclose it.

DISCUSSION:

BACKGROUND

In its representations, the ORC provides the following information about its role and responsibilities in leasing properties, which is helpful in understanding the issues in this appeal:

The ORC acts as agent on behalf of Her Majesty the Queen in Right of Ontario, as represented by the Chair of the Management Board of Cabinet. The ORC is the mandatory service provider for the provision of services regarding real property for the Ministries.

The ORC has responsibility to retain brokers or issue calls for proposal and to negotiate the terms of leases of property owned by third parties when additional space is required by a government ministry and there are no suitable government-owned properties available.

...

Offers to lease property are evaluated based upon price as well as other factors such as the suitability of the space offered for lease. Negotiations with prospective landlords are carried out by Leasing Management of the ORC. ... With certain exceptions, all transactions for leases are carried out at "market value" ...

... any public offerings which give notice that a government-owned facility is being offered for lease are made available to the public for leases after January, 1995. Requests for documents other than public offerings are considered for disclosure on a case by case basis in relation to the requirements and exemptions under the *Act*. However, the ORC keeps the financial terms contained in its leases confidential (whether the ORC is Landlord or, as in this case, Her Majesty is the tenant) in order to protect the ORC's position in future lease negotiations.

THIRD PARTY INFORMATION

This office sought representations from the ORC and the landlord on the possible application of section 17(1). Because section 17(1) is a mandatory exemption, I will review whether it applies to the information at issue.

Sections 17(1)(a), (b) and (c) 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; ...

General principles

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 the 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 a record to qualify for exemption under sections 17(1)(a), (b) or (c), the parties resisting disclosure 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 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 paragraph (a), (b) or (c) of section 17(1) will occur.

Part 2: Supplied in confidence

I have decided to begin by examining whether the information meets Part 2 of the section 17(1) test. Part 2 has two components: first, the information at issue must have been “supplied” to an institution; and secondly, it must have been supplied “in confidence.”

Supplied

The “supplied” requirement reflects the purpose in section 17(1) of protecting the informational assets of third parties (here, the landlord) (Order MO-1706).

Information may qualify as being “supplied” if it was directly provided to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). Generally speaking, this office has treated the provisions of a contract as being mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

In its representations, the landlord submits that the information at issue “was supplied to the [ORC] explicitly in confidence.” The landlord provides further representations in support of its position that the information is confidential, but not with respect to whether it was “supplied” within the meaning of section 17(1).

The ORC does not make representations on section 17(1).

I find that the information at issue was not “supplied” to the ORC for the purpose of section 17(1): it was not provided directly from the landlord to the ORC, and its disclosure would not reveal or permit the drawing of accurate inferences with respect to information supplied by the landlord. Rather, information of this nature (operating costs, taxes, rents and parking charges) typically forms part of a lease following negotiations between the parties, and reflects terms to which the parties together have agreed. I have not been provided with sufficient evidence to be persuaded otherwise in this case.

The information therefore does not meet Part 2 of the section 17(1) test. Because of my conclusion in this regard, it is not necessary for me to examine whether it meets Parts 1 or 3. The information does not qualify for exemption under section 17(1).

ECONOMIC AND OTHER INTERESTS OF ONTARIO

The ORC relies on sections 18(1)(a) and (c), which read:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

General principles

The purpose of section 18 is to protect certain economic interests of institutions. The following passage from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) describes the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions ... should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute ... Government-sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited ... (pp. 318-319)

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)).

Section 18(1)(a)

The purpose of section 18(1)(a) is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information (see Order M-654).

For section 18(1)(a) to apply, the institution (here, the ORC) must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; and
2. belongs to the Government of Ontario or an institution; and
3. has monetary value or potential monetary value.

Part 2: belongs to

I have decided to begin my section 18(1)(a) analysis by reviewing whether the ORC has met Part 2 of the test.

The term "belongs to" refers to "ownership," and it means more than the right simply to possess, use or dispose of information, or to control access to the physical record in which the information is contained. For information to "belong to" them, the institution or the Government

of Ontario must have some proprietary interest in the information, either in a traditional intellectual property sense (such as copyright, trade mark, patent or industrial design) or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information include trade secrets, business-to-business mailing lists (Order P-636), customer or supplier lists, price lists or other types of confidential business information. In each of these examples, the information has an inherent monetary value resulting from the organization's expenditure of money or its application of skill and effort in developing it. In addition, if the information is consistently treated in a confidential manner and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting it from misappropriation by others (See Order PO-1805 and Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.)).

The ORC submits:

[The information] "belongs" to the ORC as it is information which is of a confidential nature and is used in confidential negotiations after a confidential bidding process. There is no proprietary right in such information in the traditional intellectual property sense. However, there is a substantial interest in protecting the information from use by a third party ... the prices in the Lease fall within the recognized category of confidential price lists or other types of confidential business information.

The ORC also makes certain confidential representations that I am not at liberty to disclose in this order.

The appellant provides detailed representations, including a number of exhibits, in support of his appeal. I have considered his representations under both sections 18(1)(a) and 18(1)(c). Among other things, the appellant submits that the lease is ten years old and that the information he seeks is "commercially obsolete." He submits that government funds are "public assets" belonging to the citizens of Ontario and that taxpayers have the right to question how this money is spent. He also points to a clause in the lease stipulating that the landlord consents to the tenant's release of the lease and any information it contains.

I find that the ORC has not provided sufficient evidence to establish that the information at issue "belongs to" the ORC or the Government of Ontario for the purpose of section 18(1)(a). First, the ORC acknowledges that it has no proprietary right in the information "in the traditional intellectual property sense." Secondly, in my view the information does not qualify as any of the types of information in which the law recognizes a need for protection from misappropriation. In and of itself, the information has no inherent monetary value deriving from any expenditure of money or application of skill and effort on the part of the ORC, or from not being generally known. Rather, it is simply a factual statement of monetary amounts to be paid or received under the lease.

Thus, the information does not meet Part 2 of the section 18(1)(a) test. Again, because of my finding in this regard, it is not necessary for me to examine whether it meet Parts 1 or 3. Because the information does not meet Part 2, it does not qualify for exemption under section 18(1)(a).

Section 18(1)(c)

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with public-sector or private-sector entities, and it gives institutions the discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions (Order P-1190).

The section 18(1)(c) exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. It requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position (Order PO-2014-I).

The ORC submits:

... disclosure of the pricing information in the Lease can reasonably be expected to harm the economic interests or competitive position of the ORC or to harm the financial interests of the Government of Ontario.

... one of the main responsibilities of the ORC is the leasing of property from third parties where additional space is required for the Government of Ontario. The ORC is obliged to ensure a competitive process and cost-effective solutions in the leasing of property. It can be seen that it is in the financial interests of the ORC and the Government and in the public interest for the ORC to be able to keep pricing matters confidential to ensure their competitive position in the market and obtain the best pricing available.

Based on the materials before me, I am not persuaded that disclosing the information at issue could reasonably be expected to prejudice the ORC's economic interests or competitive position. The ORC has not provided the "detailed and convincing" evidence required to demonstrate that the harms it alleges are not merely speculative. The lease containing the information at issue has already been executed, as opposed to being the subject of any ongoing negotiations. In addition, the age of the lease (which was executed in 1993) tends to refute any claims of prejudice to any future negotiations or renegotiations (see also Order PO-2226).

Accordingly, I find that the information does not qualify for exemption under section 18(1)(c), and I will order the ORC to disclose it.

ORDER:

1. I order the ORC to disclose the information at issue to the appellant by **July 14, 2004** but not before **July 9, 2004**.
2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the ORC to provide me with a copy of the information that is disclosed to the appellant.

Original Signed by: _____
Shirley Senoff
Adjudicator

_____ June 8, 2004