



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

# **ORDER PO-2384**

**Appeals PA-040184-1 and PA-040194-1**

**Ministry of Natural Resources**



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## **NATURE OF THE APPEAL:**

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) regarding a contract for helicopter services between the Ministry and an identified company (the affected party). The requester seeks access to a copy of the contract, any correspondence in reference to establishing this contract, a log or record of all hours flown by each helicopter, the amount of flying hours billed by each helicopter and the amount of payments forwarded for modifications of each helicopter. The requester also wants to know the location from which the helicopters were operated and maintained, who was responsible for the maintenance and whether the maintenance was included in the overall contract or if it was billed separately. If the billable hours were billed with a copy from the helicopter's aircraft log, the requester also seeks access to this documentation.

The Ministry identified records that were responsive to the request and wrote to the affected party under section 28 of the *Act*, requesting their views on the disclosure of this information. The affected party responded and requested that no information be released.

Notwithstanding the objection of the affected party, the Ministry decided to grant partial access to some of the responsive records. It denied access to the remaining records, in whole or in part, pursuant to sections 17(1) (third party information), 14(1)(l) (law enforcement) and 21(1) (invasion of privacy) of the *Act*.

The requester filed an appeal (appeal PA-040184-1) from the Ministry's decision to withhold part of the records.

The affected party filed an appeal (appeal PA-040194-1) from the Ministry's decision to release any information at all to the requester. The affected party relies on section 17(1) of the *Act* in support of its position that access to the records should be denied in full. It also asserts that the motivation for the request is suspect because there is ongoing litigation between the affected party and the appellant.

At the mediation of appeal number PA-040184-1, the Ministry specifically identified that it relies on the exemptions set out in sections 14(1)(l), 17(1) and 21(1)(f) in conjunction with 21(2)(e), 21(2)(f), 21(2)(h) and 21(3)(f) as grounds for denying access.

Mediation did not resolve the appeals and they moved to the adjudication stage.

To reduce duplication, because appeal number PA-040184-1 relates to the Ministry's decision to release a portion of the records which contain information relating to the affected party, and appeal number PA-040194-1 arose from the affected party's position that none of the information in the very same records should be released, they were dealt with in one Notice of Inquiry. Taken together these two appeals encompass all of the responsive records. As the same records are at issue in both appeals and similar tests under the *Act* apply, it made sense to address them at the same time, and I will dispose of both appeals in this order.

The Notice of Inquiry, setting out the issues raised in the appeals was sent to the Ministry and the affected party, initially. Both provided representations in response. A copy of the Notice of Inquiry, portions of the Ministry's representations and summarized portions of the affected party's representations were then forwarded to the appellant, who also provided representations in response. As the appellant's representations raised issues to which I determined that the Ministry and affected party should be given an opportunity to reply, I sent a letter accompanied by the representations to be addressed, to the Ministry and affected party inviting their reply representations. Both the Ministry and affected party filed reply representations.

## **PRELIMINARY MATTER**

The representations that the Ministry filed request that access to credit card numbers and the addresses of helicopter pilots be denied under section 14(1)(l) and 21(1) of the *Act*, respectively, and the representations of the affected party asserted that there is not a business entity in Canada that is authorized to distribute or release credit card numbers, addresses or personal information to unrelated third parties. In its representations, the requester stated that the credit card numbers and addresses could be blocked out. I treat this as a direction to this office that access is no longer sought to that information, and it is not necessary for me to make any determination on the applicability of sections 14(1)(l) or 21(1) to that information. The credit card numbers and addresses of helicopter pilots will be severed from any records that may be ordered disclosed.

Although the Ministry took no issue with it, the affected party also asserts that the names of the pilots and engineers and their "production/performance" should also be withheld. The affected party does not specify the applicable section(s) of the *Act* that it seeks to rely on in support of this assertion, simply stating that the release of the information would be in breach of the *Act* and the *Charter*. I will therefore assume that the affected party is seeking to invoke the application of section 21(1) of the *Act*, which is a mandatory exemption. I will address the affected party's position regarding the *Charter* at the end of this decision.

I do not agree that the information should be withheld. In my opinion the names of the pilots and engineers appear on the documentation in their professional, not personal capacity. As this is the case, I find that their names are not personal information and can not be exempt under section 21(1) [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. As a result, their names will be disclosed.

Therefore, only the application of the section 17(1) exemption remains at issue in the appeals.

## **RECORDS**

The records at issue in the appeals consist of the following:

Record 1      The affected party's tender bid dated February 22, 2002, with attachments.

Record 2      Finalized Contract dated April 17, 2002.

- Record 3 Letter to affected party dated February 21, 2003 exercising option to renew the contract for the 2003 fire season, with attachments.
- Record 4 Invoices from the affected party regarding navigation system installation.
- Record 5 Letter to affected party extending agreement to September 5, 2003.
- Record 6 Aircraft Wantlist Price Inquiries and Waivers of Quotations and attached documents with date marked May 7, 2003.
- Record 7 MNR Daily Flight Reports from May 6, 2003 to September 16, 2003.
- Record 8 Expense receipts for taxi, airport charges, accommodation and hotel charges and adjustments.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

#### **General Principles**

Sections 17(1)(a), (b) and (c) of the *Act* 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;
- (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; or
- (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;
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 paragraphs (a), (b) and/or (c) of section 17(1) will occur.

### **Part 1: Type of Information**

The affected party asserts that the information contained in the records is technical, commercial, confidential and/or proprietary. The Ministry takes the position that the record contains “commercial information” and “financial information”. The appellant asserts that none of the requested information falls within these categories.

Previous orders have defined “technical information”, “commercial information” and “financial information” as follows:

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].

*Commercial information* is 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 [P-1621].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

All of the records at issue relate to commercial arrangements for the provision of helicopter services and the type and cost of services under those arrangements. I am satisfied that the

records contain “technical information” along with “commercial information” and/or “financial information”, as defined above.

Therefore the requirements of Part 1 of the section 17(1) test have been met.

## **Part 2: supplied in confidence**

In order to satisfy Part 2 of the test, the Ministry and/or the affected party must establish that the information was "supplied" to the Ministry “in confidence”, either implicitly or explicitly.

### *Supplied*

The requirement that information be supplied to an institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as “supplied” if it was directly supplied 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). The provisions of a contract, in general, have been treated as 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].

### *The Representations of the Ministry*

The Ministry submits that the information in the affected party’s tender submission was supplied to the Ministry as part of the confidential tendering process. The Ministry acknowledges that Order MO-1735 narrowed the test for “supplied” indicating that a negotiated agreement between the parties does not qualify as “supplied”, but as regards a document entitled “pricing sheet” [found at schedule VII of the Finalized Contract] it submits that the identical page in the tender submission containing bid incentives was copied by the Ministry into the Finalized Contract. The Ministry also points out that schedule IV of the Finalized Contract contains the same information and further that the schedule also sets out the “guaranteed minimums”, the release of which would reveal the minimum revenue obtained by the affected party. Finally, the Ministry submits that the flight reports, invoices and disbursement receipts were “supplied” by the affected party after the contract was awarded.

### *The Representations of the Affected Party*

On this point, the affected party states that the confidential bidding information for the contract at issue was supplied by it to the Ministry.

### *The Representations of the Requester*

The requester states that the requested information relates to information resulting from the terms of a successful bid and resulting contract that has been in the public domain for at least two years.

### *Analysis and Finding*

If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".

As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

As set out in the section of the Finalized Contract dated April 17, 2002 entitled "Background", the tender bid that was submitted by the affected party is wholly incorporated into the contract by reference. Found at schedule VII to the contract is the version of the pricing sheet that accompanied the affected party's tender that it objects to disclosing. On the pricing sheet an option is crossed through and a handwritten asterisk appears next to another, supporting, in my view, that a negotiation process occurred. Schedule IV to the contract discusses the incentives or threshold amounts that the affected party also wishes to be withheld. In the attachments to the letter dated February 21, 2003 renewing the contract, there appear to be modifications to some of its terms.

Based upon the reasoning in the authorities set out earlier, and my review of the representations and records, I am satisfied that the information contained in the Finalized Contract dated April 17, 2002 and extensions or renewals consist of agreed upon essential terms that I consider to be the product of a negotiation process. Therefore, in the circumstances of this appeal, I do not consider that any of the information in the agreement, including the tender that is incorporated by

reference as schedule VII, or any of the information set out in the other schedules to have been “supplied” by the affected party for the purposes of this part of the test.

Although the Ministry states in its representations that the Aircraft Wantlist Price Inquiries and Waivers of Quotations and attached documents with date marked May 7, 2003 (Record 6) [Misdescribed in the Ministry’s representations as AFT Wantlist and Price Waiver of Quotations] as being an associated bid tender document, it has the date May 7, 2003 on its face, indicating it may have actually post-dated the initial bid process. The document indicates on its face that it was prepared by the Ministry, not the affected party. Although this record would reveal or permit the drawing of accurate inferences with respect to the information contained in Record 2 [which incorporates by reference the content of Record 1], as noted above, I am satisfied that this information was mutually generated and hence not “supplied” by the “affected party”.

As a result, I am not satisfied that Part 2 of the test has been met with respect to the information contained in Records 1, 2, 3, 5 and 6. Although this is sufficient to dispose of the appeal with respect to these records, I will go on to consider whether all the records at issue were supplied “in confidence”.

### *In Confidence*

In order to satisfy the “in confidence” component of Part 2, the parties resisting disclosure, in this case the Ministry and the affected party, must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2043].

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 affected party prior to being communicated to the Ministry;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

### *The Representations of the Ministry*

The Ministry acknowledges that there is no explicit indication that the records at issue were supplied in confidence. The Ministry submits that the affected party is in the best position to provide evidence regarding the reasonable expectation of confidentiality, but made the following observations:



The Ministry operates under Management Board Secretariat directives regarding the Procurement of Goods and Services which sets out what information can be provided on a tender. At the tender opening, only certain information is disclosed, giving rise to an implicit expectation of confidentiality by [the affected party] as well as other companies bidding.

As Ministry policies relating to the process set out exactly what information [is] to be disclosed, [there] could be said to be an implicit provision that other information supplied is not to be disclosed and/or is to be treated as confidential. There was therefore a reasonable expectation of confidentiality on the part of the suppliers at the time the information was supplied.

Until the award of the tender contract only five individuals in the Ministry have access to and knowledge of the tender information supplied by the bidders for this tender. They were involved in [the] managing and awarding of the tender. After the award, for operational purposes the contract and rates information are made available on a computer system to those [of] the Aviation and Forest Fire Management (AFFM) personnel who require access to perform their function, e.g. selecting and utilizing aircraft. It is not made available, for example, to line staff in AFFM or to other Ministry personnel. At the end of the year a summary is prepared for the same staff of the actual hours and utilization of the aircraft.

The ministry does not make the bid material publicly available, either over the counter or by informal request.

### *The Representations of the Affected Party*

The affected party states that the bidding information for the contract was submitted implicitly and explicitly in confidence for the purpose of allowing the Ministry to compare and evaluate the contract. It says that it was clear in the bid documents that the results of the bid process were to be released in a public forum and only those submitting a bid would receive the public opening details. However, it says, there was no statement within the bid document indicating that invoicing, financing details, proprietary/confidential information and/or contractor flight reports under the contract would ultimately be released to the public through a forum such as that permitted under the *Act*. Furthermore, the affected party submits that it is stated in the bid documents that only the companies who submitted a bid would have access to the bid results. It alleges that the appellant did not submit a bid. In its reply representations the affected party states that if the appellant chooses to bid on future Ministry contracts they are entitled to any forthcoming bid results that are made public. This, they say, has been the Ministry's bidding policy for the better part of twenty-five years and there is a distinct precedent set with respect to non-disclosure of this information.

### *The Representations of the Requester*

In its representations, amongst other things, the requester included a copy of a letter from the Ministry to the affected party that purportedly discloses information about the affected party's competitors. The requester submits that the information in this letter is similar in nature to the information the appellant has requested relating to the affected party.

The requester further submits that the bid documents of the affected party were released to the public after awarding of the contract and should not be withheld. It asserts that all of the affected parties' competitors have a copy of the bid documents and they are free to disseminate them to other members of the public, including the affected party.

The requester suggests that proprietary documents must be marked specifically as proprietary or confidential when being circulated and cannot be claimed to be inherently confidential now.

### *Analysis and Finding*

Section 23.4 of the Finalized Contract dated April 17, 2002, provides as follows:

The Contractor [the affected party] agrees that all documentation and information provided to the Crown under this Agreement is subject to disclosure under the terms of the Freedom of Information and Protection of Privacy Act. Although the Ministry can in no way be responsible for any interpretation of the provisions of this Act, if any Respondent believes any such documentation or information reveals any trade secret of the Contractor, any intellectual property right, scientific, technical, commercial, financial or labour relations information, or any similar secret, right or information belonging to the Contractor, and if the Contractor wished the Ministry to attempt to preserve confidentiality of same, the particular trade secret, property right or information should be clearly designated as "confidential".

There is no such designation on any of the records at issue.

For the purposes of this analysis, based on the evidence and legal submissions, I am not satisfied that the information in any of the records at issue has the requisite hallmarks of confidentiality required under this part of the section 17(1) test.

Neither the Ministry nor the affected party have provided sufficient evidence that would reasonably lead the affected party to consider that the information was provided in confidence, either implicitly or explicitly, or give the level of comfort that the affected party asserts it had that the terms of its agreement with the Ministry or any of the other records at issue would not be disclosed. To the contrary, the materials filed show that if confidentiality was sought to be asserted, in accordance with section 23.4 of the contract, the affected party would have had to make an effort to do so by indicating it on the document. While the lack of such a notation is not necessarily fatal to a claim of confidentiality, in the circumstances of this appeal, despite the

assertions of the affected party and the Ministry, it leads me to the conclusion that the information was not communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential. Furthermore, the failure to make any notation on Records 2 [incorporating Record 1 by reference], 4, 7 and 8 in accordance with section 23.4 of the Finalized Contract also demonstrates the absence of steps to treat the information consistently in a manner that indicates a concern for its protection from disclosure, prior to being communicated to the Ministry. Even putting the lack of a confidentiality notation aside, it has not been established that the documents flowing from the contract, such as the invoices for the navigation system installation (Record 4) and the flight (Record 7) and expense documentation (Record 8) were supplied in confidence, either explicitly or implicitly.

Accordingly, I am not satisfied that the information in any of the records at issue was supplied in confidence, either implicitly or explicitly within the meaning of section 17(1). I find, therefore, that the Ministry and the affected party have not satisfied the requirements of this part of the test for any of the records.

As all three parts of the test under section 17(1) must be met in order for the exemption to apply, I find that section 17(1) has no application to the undisclosed information and I order that it be disclosed. As a result it is unnecessary to consider Part 3 of the test.

## **Final Matter**

In its representations, the affected party asserted that the release of certain information and perhaps even the requester's use of the processes of this office is a breach of the *Charter*. In the circumstances of this case, I find that the affected party has failed to establish the foundation for an allegation of a breach of any right under the *Charter*.

## **ORDER:**

1. I order the Ministry to disclose the records to the appellant, with the credit card numbers and pilot's addresses removed by sending a copy to the appellant by **May 25, 2005**, but not earlier than **May 19, 2005**.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant in accordance with paragraph 1 above.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ April 19, 2005