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

ORDER PO-2569

Appeals PA-050150-1 and PA-050153-1

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 information relating to Bombardier's *C-Series* aircraft. As the request was general in nature, the Ministry asked the requester to clarify the request. Following discussions with the Ministry, the requester submitted a revised request for:

> The Province of Ontario's proposal with respect to Bombardier's "C" series of aircraft and Bombardier's response to the proposal, and any formal records (exclude internal documents such as email and draft records) relating to the proposal and response, excluding documentation that is within the scope of the Ministry of Finance's external consultations process as referenced in a letter from the Ministry of Finance dated April 7, 2005;
>
> Formal records relating to any form of funding or assistance with respect to the financing of the "C" series of aircraft including any funding or assistance that is to be offered to purchasers of the aircraft, excluding documentation that is within the scope of the Ministry of Finance's external consultations process as referenced in a letter from the Ministry of Finance dated April 7, 2005;
>
> Formal records relating to the Federal Government's and the Government of Quebec's funding or assistance relating to the "C" series of aircraft, excluding documentation that is within the scope of the Ministry of Finance's external consultations process as referenced in a letter from the Ministry of Finance dated April 7, 2005; and
>
> Formal records containing the keywords "Bombardier", "DeHavilland" and "aerospace" as they relate to the first three points of the request, excluding documentation that is within the scope of the Ministry of Finance's external consultations process as referenced in a letter from the Ministry of Finance dated April 7, 2005.

The requester also identified a timeframe for the requested records.

The Ministry located 18 records responsive to the request and advised the Ministry of Economic Development and Trade (MEDT) that it might have an interest in the disclosure of two of the requested records. At that time, MEDT reviewed the records and advised that as the Ministry has the greater interest in the records, MEDT would defer to the Ministry to issue a decision on the disclosure of those records. The Ministry subsequently granted access to 2 of the records and denied access to the 16 remaining records pursuant to the introductory wording in section 12(1) and the exemptions in sections 12(1)(a) (cabinet records), 15(a) (relations with other Governments), 17(1)(a),(b),(c) (third party information), 18(1)(c),(d),(e) (economic and other interests) and 18(1)(g) (proposed plans, projects or policies of an institution) of the *Act*.

In the letter in which the requester detailed his amended request, he also made a new request for information, which the Ministry processed as a separate request. The additional request was worded as follows:

> In addition to the Amended Request, please find enclosed an additional Request for Information, in respect of the documentation received from the Original Request that is within the scope of the external consultations, as referenced in the letter sent by the Ministry of Finance dated April 7, 2005 (the "Additional Request"). As discussed with you, we are filing this Additional Request to ensure that the Ministry of Finance will continue the process towards making a decision in regarding to whether or not to release these documents. We expect that the same 60 day timeframe as stipulated in the Ministry of Finance's letter dated April 7, 2005 will still apply, such that, we can expect a decision on the release of this documentation by June 6, 2005.

The Ministry located 4 records responsive to the second request and notified Industry Canada that it might have an interest in the disclosure of the records. Industry Canada responded that, in its view, portions of the records were exempt under the *Act*. The Ministry subsequently denied access to the 4 records, in their entirety, pursuant to the introductory wording of section 12(1), and the exemptions at sections 12(1)(a) (cabinet records), 15(a) (relations with other Governments), 17(1)(a),(b),(c) (third party information), 18(1)(c),(d),(e) (economic and other interests) and 18(1)(g) (proposed plans, projects or policies of an institution) of the *Act*.

The requester (now the appellant) appealed both of the Ministry's decisions respecting access and two appeals were opened. Appeal PA-050153-1 was opened to address the amended request that identified 16 responsive records, while appeal PA-050150-1 was opened to address the additional request (included at the end of the amended request letter) that identified 4 responsive records. In his letters of appeal, which are identical for both appeals, the appellant states that "there is no evidence that the Ministry sought consent of the Executive Council to release the documents pursuant to section 12(2)(b) (cabinet records) of the *Act*". As a result, section 12(2)(b) has been added as an issue in this appeal.

Mediation did not resolve either appeal. Both appeals were transferred to the adjudication stage of the appeal process.

As both appeals deal with the same subject matter and the Ministry has applied the same exemptions to the records, I decided conduct a single inquiry into both appeals concurrently. Accordingly, I issued one Notice of Inquiry for both appeals.

I began my inquiry by sending a Notice of Inquiry to the Ministry, setting out the facts and issues in the appeals. I also sent a copy of the Notice of Inquiry to two parties who might have an interest in the disclosure of the records, Bombardier and Industry Canada.

The Ministry and Bombardier provided representations. Industry Canada advised that as the majority of the records were provided to it by Bombardier and as the disclosure of the records has a greater impact on that company, Industry Canada adopts the position taken by Bombardier in its representations.

Industry Canada did make brief representations on the application of sections 15(a) and/or (b) to Records 17, 18, 19, and 20, as those records originate with it.

In the course of responding to the Notice of Inquiry, both the Ministry and Bombardier advised that a mistake was made in the original index of records and that a record had been omitted. The record identified as Record 9 in the Notice was replaced by a new record, and the record originally identified as Record 9 was actually the first page of Record 10. Accordingly, the index of records listed below has been modified to reflect that Record 9 is an 11-page PowerPoint presentation and Record 10 is now comprised of 10 pages instead of 9.

I then sent a copy of the Notice of Inquiry to the appellant, along with copies of the non-confidential representations submitted by the Ministry and Bombardier. The appellant responded with representations.

As the appellant's representations raised issues to which I felt that the Ministry and Bombardier should have an opportunity to reply, I invited reply representations. Both the Ministry and Bombardier provided submissions by way of reply.

RECORDS:

There are 20 records that remain at issue in this appeal. Sixteen of those records relate to the amended request that resulted in appeal PA-050153-1, 4 of these records relate to the second request that gave rise to appeal PA-050150-1. I have renumbered the records 1 through 20 as outlined on the chart below. Please note that the Ministry has also claimed section 15(b) for Records 18, 19, and 20 and section 18(1)(f) for Records 1, 2, 3, 19, and 20.

RECORD NUMBER	DESCRIPTION	NUMBER PAGES	WITHOLD IN PART/FULL	SECTIONS APPLIED
1	Fax cover sheet, letter and attachments (schedules A through E) from the Ministry of Economic Development and Trade to Bombardier – February 17, 2005	18 pages	Full	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d),(e),(f),(g)
2	Letter from the Ministry of Finance to Bombardier with attachments (schedules A through D) – December 15, 2004	18 pages	Full	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d),(e),(f),(g)

3	Letter from the Ministry of Finance to Bombardier – undated	2 pages	Full	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d),(e),(f)(g)
4	Email from Bombardier with attachment– February 4, 2005	5 pages	Full	15(a) 17(1)(a),(b),(c) 18(1)(c),(d),(g)
5	Letter from Bombardier to Industry Canada – January 10, 2005	1 page	Full	15(a) 17(1)(a),(b),(c)
6	Letter from Bombardier to the Ministry of Finance and the Ministry of Economic Development and Trade – January 10, 2005	1 page	Full	17(1)(a),(b),(c)
7	Meeting notes/PowerPoint presentation prepared by Bombardier – January 4, 2005	10 pages	Part Page 4 disclosed	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
8	Meeting notes/PowerPoint presentation prepared by Bombardier – November 30, 2005	46 pages	Part Pages 6, 7, 10, and 16 disclosed	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
9	PowerPoint presentation prepared by Bombardier – November 12, 2004	11 pages	Full	12(1) 12(1)(a) 17(1)(a),(b),(c) 15(a) 18(1)(c), d)
10	Meeting notes/PowerPoint presentations prepared by Bombardier – November 12, 2004	10 pages	Full	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
11	Information memorandum prepared by Bombardier – October 28, 2004	60 pages	Full	15(a) 17(1)(a),(b),(c) 18(1)(c),(d),(e)

12	Letter from Bombardier to Ministry of Enterprise, Opportunity and Innovation and Request for proposal – October 18, 2004	14 pages	Full	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
13	Meeting notes / PowerPoint presentation prepared by Bombardier – August 23, 2004	13 pages	Full	17(1)(a),(b),(c) 18(1)(c),(d)
14	Meeting notes /PowerPoint presentation prepared by Bombardier – August 23, 2004	38 pages	Part Pages 7, 10, 11, 12, 13, 14, 20, 21, 22 disclosed	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
15	Meeting notes / PowerPoint presentation prepared by Bombardier – undated	2 pages	Full	15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
16	Meeting notes/ PowerPoint slide prepared by Bombardier – undated	1 page	Full	15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
17	Letter from Bombardier to Industry Canada – October 22, 2004	7 pages	Full	12(1) 12(1)(a) 15(a) 17(1)(a),(b),(c) 18(1)(c),(d)
18	Fax cover sheet and letter from Industry Canada to Bombardier – January 28, 2005	4 pages	Full	15(a),(b) 17(1)(a),(b),(c) 18(1)(c),(d),(e),(f),(g)
19	Letter from Industry Canada to Bombardier – January 17, 2005	4 pages	Full	15(a),(b) 17(1)(a),(b),(c) 18(1)(c),(d),(e),(f),(g)
20	Letter from Industry Canada to Bombardier – December 16, 2004	2 pages	Full	15(a),(b) 17(1)(a),(b),(c) 18(1)(c),(d),(e),(f),(g)

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry submits that the exemptions at sections 17(1)(a), (b) and (c) of the *Act* apply to exempt all of the records at issue from disclosure.

Section 17(1) is a mandatory exemption that applies to exempt information belonging to a third party from disclosure. The portions of section 17(1) that are being claimed in the circumstances of this appeal read:

> A head shall refuse to disclose a record that reveals 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 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) recognizes that in the course of carrying out public responsibilities, government bodies receive information about the activities of private businesses. The exemption is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.)]. 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 section 17(1) to apply, the parties resisting disclosure, in this case the Ministry and Bombardier, 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), (c) and/or (d) of section 17(1) will occur.

The Court of Appeal for Ontario, in upholding former Assistant Commissioner Tom Mitchinson's Order P-373, discussed the application of the three-part test:

> 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 [Workers Compensation Board]. 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]

Part 1: type of information

The types of information listed in section 17(1) have been discussed in previous orders. Those that appear to be relevant in the circumstances of this appeal are the definitions of trade secrets as well as technical, commercial and/or financial information. These types of information have been described 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 PO-2010].

> *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 [Orders P-493 and 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].

I adopt these definitions for the purpose of this appeal.

Part 1: representations

The Ministry submits that all of the records at issue contain trade secrets, commercial, financial and/or technical information that belongs to a third party, specifically Bombardier. The Ministry addresses each record individually, submitting:

> Records 1, 2, and 3 are letters from the Minister of Finance and the Minister of Economic Development and Trade to Bombardier, which set out the Financial Contribution that Ontario was prepared to make in support of the *C-Series* project … Records 1 and 3 are follow-up letters to Record 2, which amend parts of the Ontario Financial Contribution proposal.
>
> Record 4 is an email dated February 4, 2005 from Bombardier to Ministry Officials … The email is marked confidential and contains financial analysis prepared by Bombardier that was supplied pursuant to a confidential request for information from Ministry officials to aid Ministry officials in structuring a financial contribution proposal.
>
> Records 5 and 6 are letters from Bombardier to the Minister of Industry Canada and the Minister of Finance of Ontario and the Minister of Economic

Development and Trade of Ontario encouraging the governments to clearly set forth their partnership proposals for the *C-Series* aircraft…

Records 7, 8, 9 and 10 are presentations by Bombardier that deal with the various aspects of the … *C-Series* aircraft and the expectations of government participation for the various aspects of the Project…

Record 11, which is the October 28, 2004 Confidential Information Memorandum relating to the *C-Series* Aircraft Program Final Assembly Site … The document contains market analysis by Bombardier along with product analysis and positioning as well as financial analysis…

Record 12, which is the October 19, 2004 letter from Bombardier to the Deputy Minister of Enterprise, Opportunity and Innovation … The document contains market analysis by Bombardier along with product analysis and positioning as well as financial analysis … [I]t contains the financial, commercial and technical information of Bombardier that was submitted to the Ministry in confidence for the purpose of the Ministry preparing a Financial Contribution proposal.

Records 13, 14, 15, and 16 consist of slide presentations by Bombardier related to the *C-Series* aircraft. These presentations contain market analysis, technical analysis and financial analysis by Bombardier as part of its business case to find the most attractive site for the final assembly of the *C-Series* aircraft. They contain strategic analysis of Bombardier related to the key factors that will inform Bombardier's decision with respect to the location of the proposed *C-Series* aircraft final assembly site. Record 14 contains a confidentiality notice that states that the document contains trade secrets, financial, commercial, scientific and technical and other commercial information of Bombardier, the disclosure of which would prejudice the competitive position of Bombardier. Record 15 contains Bombardier's criteria and analysis related to the launch of its *C-Series* aircraft program as well as its views of key milestones. Record 16 further elaborates on certain key milestones and financing options. The Ministry clearly understood these documents to be confidential and treated them consistently in such a manner as they contain the financial, commercial and technical information of Bombardier that was submitted to the Ministry in confidence for the purpose of the Ministry preparing a Financial Contribution proposal.

Record 17, a letter dated October 22, 2004, from Bombardier to the Deputy Minister of Industry Canada, outlines Bombardier's analysis of the aerospace industry and market trends and Bombardier' proposed new *C-Series* aircraft … It also contains a summary of key decision criteria. The letter contains technical, financial and commercial information of Bombardier and contains a notice on each page that the document contains trade secrets, financial, commercial, scientific, technical, or other confidential information…

> Records 18, 19 and 20 are letters dated January 29, 2005 and January 17, 2005 from the Assistant Deputy Minister of the Industry Sector at Industry Canada to Bombardier, and in the case of the last letter dated December 16, 2004, from the Minister of Industry Canada, which outlines the manner in which a Federal financial contribution would be structured in support of the submissions by Quebec and Ontario for the final assembly of the *C-Series* aircraft. The letters set out key elements of the financial and commercial and technical information provided by Bombardier in its request for proposals and provide the Federal response thereto…
>
> In summary, the Records contain detailed trade secrets, commercial, financial and technical information of Bombardier that was supplied to [Ministry] staff in confidence, including, but not limited to the names and identities of potential suppliers, financing assumptions, participation proposals, Bombardier's analysis of the market and its position vis-à-vis its competitors, Bombardier's analysis of future market directions, project development costs, the business case, the methodology for the *C-Series* project and financial information of Bombardier.
>
> Specifically, Bombardier provided information to [the Ministry] relevant to Bombardier's strategic commercial position and/or the *C-Series* Project, including payments, valuations, valuation assumptions, negotiating strategies, pricing practices and methodology … This information is technical, commercial and/or financial in nature and was used by the Ministry to analyze the project and develop a financial contribution package.

Bombardier begins its representations by explaining the nature of the records at issue. Bombardier explains that the records relate to its *C-Series* aircraft project and its private commercial initiative to encourage expression of interest for a jurisdiction to host the final assembly plant necessary to construct its new aircraft. Bombardier submits that the selection process was not a public procurement process but rather, was started by Bombardier issuing a confidential Request for Proposals to various governments, both domestic and international.

Bombardier submits that Ontario responded to that proposal but that ultimately the site chosen by Bombardier for the final assembly site was in Quebec. Therefore, Bombardier explains, the Province of Ontario did not sign a contract and did not make an investment in the *C-Series* final assembly plant. Bombardier submits, however, that the records disclose Ontario's proposal to host the final assembly plant and that they contain information of the type contemplated in section 17(1). Bombardier submits:

> The Records include trade secrets or technical information in the form of information such as methods, methodologies, and processes used in Bombardier's aerospace business that are not generally known within the aerospace industry,

have commercial value and are otherwise maintained in secret by Bombardier. By way of example:

(a) Records 7, 11, and 12, describe the *C-Series* development process and the manner in which Bombardier proceeded to identify a market gap;

(b) Record 7 describes the manner in which Bombardier intends to run the *C-Series* project. The methodology used by Bombardier to identify its suppliers and potential trade partners is never shared with competitors and is not otherwise generally known;

(c) Record 11 contains a summary of the key proprietary technology under consideration for the *C-Series* aircraft and other critical elements such as:

i. avionics systems,
ii. the fuselage structure strategy,
iii. details of the aircraft configuration,
iv. materials and manufacturing techniques;
v. technical and fabrication characteristics of the *C-Series* wing component;
vi. details on the technical solution to achieve "best-in-class" operating costs;
vii. details concerning the aircraft level testing facility and the final line assembly organization process;

(d) Record 11 further describes the methodology developed and/or to be used by Bombardier for the *C-Series* aircraft such as how Bombardier evaluated the market and the potential competitive response, how it plans to achieve its designed objectives as well as the project's key technology and risks;

(e) Records 11 and 14 show how Bombardier decided to structure partners/suppliers for specific work packages. The manner in which Bombardier has broken down work packages is a specific approach and methodology developed by Bombardier for this project alone and which, as outlined below, is not shared with competitors or publicly or even among all Bombardier employees; and

(f) The presentations made by Bombardier (Records 7, 8, 9, 10, 13, 14, 15, 16) also include or repeat various components of the information referenced above.

…

Quite apart from trade secret information, the Record also include commercial and financial information (which may overlap with trade secret information) such as:

(a) The names and identity of potential suppliers;

(b) The financing, lease or repayment information, assumptions and details;

(c) Participation proposals;

(d) Bombardier's analysis of the competitive market (both current and future) and its competitors' strengths and weaknesses (including details on the [named competitor] financing process and the Canada/Bombardier financing process);

(e) Bombardier's analysis of the manner in which the market need that it has defined will be met (i.e. the solution to fill the perceived market need);

(f) Delivery forecasts broken down by client;

(g) Project development costs and details;

(h) Project contribution requirements;

(i) The "business case" for the *C-Series* project as identified and explained in Bombardier presentations;

(j) The feedback received from key airlines and the steps that Bombardier has decided to take as a result of that feedback;

(k) The design objectives of the *C-Series* aircraft and the identification of key technology and risks; and

(l) Financial information on the *C-Series* project and Bombardier's projected contribution plans and analysis.

The appellant disagrees, and takes the position that all of the information cannot fall within the types of information contemplated by section 17(1). The appellant submits:

> By the [Ministry's] own admission in its representations, the above-reference records are in respect to the manner of Government financial support for the *C-Series* development. This is not financial information of Bombardier and is the sort of information that ought to be disclosed in furtherance of public interest, especially given the fact that the public has a direct stake in the Bombardier proposal in so much that the financial contribution for the proposal is derived from the public tax base.
>
> When determining whether the information contained in the records in question is financial information as envisaged in the wording of section 17(1)'s preamble, consideration should be made to Order P-80 … This Order dealt with a request for funding from a third party to the Ministry of Health, which facts are very similar to those in this appeal. The Adjudicator in that order decided that correspondence between the third party and the Ministry did not constitute financial information within the scope of section 17(1) as specific financial data was not included in the correspondence. As such, if it is determined that the records at issue do not contain specific reference to financial data of Bombardier, the records that are alleged to be financial information will not come within the scope of section 17(1). The same principle should be applied to records that are alleged to contain commercial or technical information pursuant to this exemption.
>
> Records 5 and 6, as described in the [Ministry's] representations, do not appear to elaborate on any specific financial information but only request that the Ontario and Federal Governments set forth their parameters for proposals for funding the *C-Series* development. The [Ministry's] description of these records appears to indicate that these records are letters that confirm the status of negotiations, and do not appear to contain financial information of Bombardier. As a result, the type of information in these records does not fall within the scope of this exemption…
>
> Records 7, 9, and 10, as described in the [Ministry's] representations, do not appear to elaborate on any specific financial information but instead, only contain Bombardier's expectations in respect to the various levels of government participation in the *C-Series* development. This is not the type of information that falls within the scope of this exemption…

Part 1: analysis and findings

All of the records at issue relate to Bombardier's *C-Series* aircraft project and Ontario's proposal issued in response to Bombardier's Request for Proposal for a jurisdiction to host the final assembly plant necessary to construct the aircraft. As described in the index above, they consist

of letters between the Ministry and Bombardier detailing proposed financing terms and conditions, letters between Bombardier and the federal government discussing possible federal/provincial partnerships in support of the *C-Series* project, PowerPoint presentations and notes from meetings between provincial and federal governments regarding the hosting of the final assembly plant. The records contain varied information, including marketing information and strategies and projections on the demand for the *C-Series* aircraft. In my view, all of this information relates to "the buying, selling or exchange of merchandise or services". Specifically, Ontario was proposing to extend its financial support in return for the economic and other benefits of hosting Bombardier's final assembly plant for the *C-Series*. Therefore, I find that all of the information contained in the records satisfies the definition of "commercial information", as that term has been defined by this office in previous orders.

Portions of some of the records also contain "financial information" as that term has been defined by this office in previous orders. They make specific references to detailed financial data related to the proposed financial support. Specifically they detail proposed funding amounts and how those amounts are to be advanced to Bombardier by the Provincial Government and/or the Federal Government. The records also detail proposed financing costs, interest rates, and royalty payments. Some of the records also include financial assumptions (including funding assumptions and targets), summaries of profit and loss accounts (which include figures detailing total revenues, gross margins, and expenses), and projected operating and development costs. Therefore, I find that portions of the records contain information that qualifies as "financial information", as contemplated by section 17(1).

Additionally, several of the records contain information that relates to various components of the aircraft. Specifically, the records detail the technical components of the aircraft, how the aircraft is to be structured and configured, the materials and manufacturing techniques that are to be used when the aircraft is assembled, the type of components that are to be used, as well as their technical characteristics and fabrication specifics. Having reviewed this information, it is my view that it has been prepared by various professionals in a variety of different fields, particularly mechanical engineering and electronics, to describe the construction, operation and maintenance of the *C-Series* aircraft. Therefore, I find that the records also contain information that qualifies as "technical information", for the purposes of section 17(1).

As I have found that all of the information contained in the records qualifies as "commercial information" and some of that information also qualifies as "financial" and/or "technical information", part one of the section 17(1) test has been established for all of the information at issue.

Part 2: supplied in confidence

In order to satisfy part two of the test, the affected party must have "supplied" the information to the Ministry in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the 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 by Bombardier to the Ministry, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected 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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is agreed upon with little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Supplied: representations

The Ministry submits that the information at issue in the records was supplied by Bombardier within the meaning of part two of the section 17(1) test. The remainder Ministry's representations on this part of the test focus on the "in confidence" portion of the term "supplied in confidence".

Bombardier also takes the position that the information at issue was "supplied". Bombardier submits:

> It is apparent from the records themselves that the documents were either specifically supplied by Bombardier to the Government (Records 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16) or that the Records include information that originated from Bombardier (Records 1, 2, 3, 17[sic], 18, 19, and 20). With respect to this latter issue, Record 2 for example, is based on upon the information provided by Bombardier in Records 11 and 12. Record 2 (page 6, paragraph 3) clearly confirm this to be the case. Records 1 and 3 are subject to the conditions set in Record 2. Similarly, Records 18, 19, and 20 (confidential letters from Industry Canada) outline Federal participation in the *C-Series* project…

The appellant submits that the information cannot be said to have been "supplied" by Bombardier, within the meaning of part two of the section 17(1) test because, based on the description of some of the records, they clearly did not originate from the Bombardier, and as a result, "the presumption must be that the information contained is not third party information". The appellant submits:

> Notwithstanding the representations from the [Ministry] and Bombardier on this point, it is the appellant's position that several of the records in question were not "supplied" to the [Ministry] as these records originated from the [Ministry] and other Government agencies…

Supplied: analysis and finding

As Ontario was not chosen for the final assembly site of the *C-Series* aircraft, no contract arose from this proposal. Therefore, the principle that 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) is not applicable in the circumstances.

I find that some of the information at issue in this appeal has been supplied by Bombardier to the Ministry within the meaning of that term while some of it has not.

As described in detail in Bombardier's representations, most of the records have been prepared by Bombardier and contain information that originates from that source. I have reviewed those records and I find that all of this information has been directly supplied to the Ministry by Bombardier within the meaning of that term. I make this finding specifically with respect to all of the information at issue in Records 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.

Records 1, 2, 3, 18, 19 and 20 originate with either the provincial or federal governments. These records contain information that specifically relates to the respective governments' proposed terms and amounts of financial assistance were Bombardier to choose Ontario as host jurisdiction for the final assembly of the *C-Series* project. I do not accept that this type of information, which clearly has been prepared by either the Government of Ontario or the Government of Canada, albeit directly in response to Bombardier's Request for Proposal, can be said to have been supplied by Bombardier within the meaning of that term in section 17(1).

The information in Records 1, 2, and 3 includes the specific figures of the proposed funding amounts for various components of the project. It also refers to the terms and conditions upon which Ontario will provide that funding, based on factors such as the financial contributions from other parties including the federal government and whether certain steps are met by Bombardier, proposed royalty payments, as well as information relating to the proposed facilities themselves. Records 18, 19 and 20 are letters from the federal government detailing the terms and conditions upon which its proposed financial contributions are based. Accordingly, I find that the information contained in Records 1, 2, 3, 18, 19 and 20 does not qualify as having been supplied by Bombardier within the meaning of section 17(1). As all three components of the

section 17(1) test must be met for the exemption to apply, these records are not exempt under section 17(1). As sections 18(1) and 15 have also been claimed for these records, I will examine the application of those exemptions to these records below.

As I have found Records 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 to have been "supplied" by Bombardier, I will now continue my analysis to determine whether it has been supplied "in confidence".

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure 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-2020].

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 institution 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 person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [Order PO-2043]

In confidence: representations

The Ministry takes the position that the information was supplied by the affected party with the reasonably held expectation that it would be treated confidentially. In support of this, the Ministry submits:

> [M]ost of the records are explicitly marked confidential and contain a detailed Notice of Proprietary and Confidential Information. The Ministry of Finance was provided with copies of these records with an expectation that the records would be held in confidence and the Ministry treated the records as confidential. The Ministry clearly understood these documents to be confidential and treated them as such by ensuring limited distribution of the records within the Ministry to only

> those persons who need to have access to the records in order to develop Ontario's response thereto. The records were kept in a secure manner.

In its representations on the "type of information", the Ministry provides further argument to support its position that the information contained in the records was supplied "in confidence":

> Records 1, 2, 3 … The letters are expressly subject to a confidentiality clause, which is set out on page 6 of Record 2 … These statements in the letter clearly evidence the intention and expectation of the Ministry that the information contained therein is confidential. The letter goes on to note that the Financial Contribution contemplated in the letter is based on the materials submitted by Bombardier. In other words, Ontario's Financial Contribution proposal is in response to the confidential request for support for the *C-Series* aircraft by Bombardier and contains confidential information received by Ontario from Bombardier … [I]t is clearly stated in Record 1 in paragraph 3 that the Ontario Financial Contribution proposal remains subject to the conditions outlined in Record 2. That would include the confidentiality provision referred to above.
>
> Record 4 is an email … from Bombardier to Ministry officials… [that] is marked confidential…
>
> Records 5 and 6 are letters from Bombardier to the Minister of Industry Canada and the Minister of Finance of Ontario and the Minister of Economic Development and Trade of Ontario encouraging the governments to clearly set forth their partnership proposals for the *C-Series* aircraft. The letters reveal the state of negotiations between the parties, which negotiations were clearly understood to be confidential by the parties. The Ministry and Bombardier had a clear understanding that the information that was supplied by Bombardier in support of its financial contribution request was confidential and that Ontario's response to that request was also to be treated in a confidential manner.
>
> Records 7, 8, and 10 are explicitly marked as confidential and Record 8 contains a Confidentiality and Proprietary Information Notice, which states that the document contains confidential financial, commercial, scientific and technical information of Bombardier. The Ministry clearly understood these documents to be confidential and treated them as such by ensuring a limited distribution of the records within the Ministry to only those persons who needed to have access to the records in order to develop Ontario's response thereto. The records were kept in a secure manner. The records setout Bombardier's market analysis, some technical specifications for the new *C-Series* aircraft…
>
> Record 11 … contains a Confidential Proprietary Information Notice…Each page of the document is marked as confidential proprietary information, which is not to

> be disclosed. The Ministry clearly understood this document to be confidential and treated it consistently in such a manner…
>
> Record 12 … contains a Confidential Proprietary Information Notice and each page of the document contains market analysis by Bombardier along with product analysis and positioning as well as financial analysis. The Ministry clearly understood this document to be confidential and treated consistently in such a manner…
>
> Records 13, 14, 15, and 16 consists of slide presentations by Bombardier related to the *C-Series* aircraft … Record 14 contains a confidentiality notice that states that the document contains trade secrets, financial, commercial, scientific and technical and other confidential information of Bombardier, the disclosure of which would prejudice the competitive position of Bombardier … The Ministry clearly understood these documents to be confidential and treated them consistently in such a manner as they contain the financial, commercial and technical information of Bombardier that was submitted to the Ministry in confidence for the purpose of the Ministry preparing a Financial Contribution proposal.
>
> Record 17, a letter … from Bombardier to the Deputy Minister of Industry Canada, … contains a notice on each page that the document contains trade secrets, financial, commercial, scientific, technical or other confidential information … The Ministry clearly understood this document to be confidential and treated it consistently in such a manner as it contains the financial, commercial and technical information of Bombardier that was provided to the Ministry in confidence for the purpose of the Ministry preparing a Financial Contribution proposal for the final assembly of the *C-Series* aircraft in Ontario.
>
> Records 18, 19, and 20 are letters ... from the Assistant Deputy Minister of the Industry Sector and Industry Canada to Bombardier, and in the case of the last letter … from the Minister of Industry Canada … Disclosing the letters would result in the disclosure of confidential financial and commercial and technical information provided by Bombardier to Canada and all the provincial governments. These letters were provided to Ontario by Industry Canada. All letters are marked confidential.

In its representations on the "type of information" contained in the records, Bombardier makes the following submissions on how the information was treated that relates to whether the information was supplied "in confidence":

> Within Bombardier, access to documents such as the records, is limited to the team or unit working on the *C-Series* aircraft and such other persons who may need to have access to the information all on a "need to know" basis. Even within

> the *C-Series* team, access to such information is limited to disclosure on a "need-to-know" basis. Bombardier's offices have controlled entry not only for the public, but also to limit access by Bombardier personnel.
>
> Within the private sector, when any commercially sensitive information is disclosed by Bombardier to potential partners, suppliers or customers, it is shared on the basis of a very clear and precise non-disclosure agreement. Such disclosure agreements require all confidential information to be maintained in confidence and not disclosed in any manner (except as required by law). Such agreements further require the very existence of the confidential information to be maintained in confidence. Disclosure of the confidential information may only be made on a "need to know" basis. When providing commercially sensitive information to a public agency, disclosure is made on the basis of a clear understanding of an expectation of confidentiality. This understanding is evidenced by repeated notices of confidentiality.

Specifically, addressing the "in confidence" component of part two of the section 17(1) test, Bombardier submits:

> The records are replete with clear references to the commercial sensitivity and confidential nature of the records. For example, Record 4 contains a confidentiality notice embedded within the email message.
>
> Records 8 and 11 contain the following [confidentiality] statement…
>
> Records 8, 11, and 12 contain very clear confidentiality notices…
>
> Records 7, 8, 10, 12, 14 provided as follows [confidentiality notice]…
>
> Record 9, however, also contains a detailed confidentiality notice…
>
> Record 10 also contains a notice in addition to the confidentiality statement included on each page of the document as referenced above…
>
> Notwithstanding the records contain clear references of confidentiality, it would otherwise have been reasonable, given the nature of the information contained in the records and the commercial transaction to which the said records pertain, to conclude that they had been submitted in an expectation that they would be received, and maintained in confidence. The atmosphere and relationship of confidentiality within which the information in the records was exchanged is clear from the records themselves. Indeed, correspondence from the federal government to Bombardier bears a "Confidential" designation (Records 18, 19, 20) as does correspondence from the Government of Ontario to Bombardier (Record 2 and by extension Records 1 and 3) which contain the same or similar

> information and a clear confidentiality provision as referenced above. No objection was taken at the time or has since been taken, to the confidentiality designation. Indeed the confidentiality designations are all consistent with the relationship of confidence governing the *C-Series* project.

The appellant disagrees, arguing that the records were not supplied "in confidence" because they were disclosed to many different institutions and agencies. The appellant submits:

> The appellant will rely on the adjudicator to determine whether the records were supplied "in confidence" due to the same limitations faced by the appellant in making submissions on this point, as discussed above. However, the appellant takes the position that as the records in question were distributed to many jurisdictions around the world and to many different government agencies within Canada, at some point the threshold between what is confidential and what is not must be crossed. The appellant takes the position that the threshold was crossed in this case and the records in question lost their confidential nature, if it ever existed.

In confidence: analysis and findings

I have reviewed the records at issue and have examined the confidentiality clauses and the "Confidential Proprietary Information Notices" that appear on the majority of the records. The confidentiality clauses and notices are general in nature and do not point to the specific information to which they refer.

Previous orders have established that the provisions of the *Act* apply to information contained in records, notwithstanding the existence of a confidentiality provision; but also that the existence of such an explicit arrangement may provide evidence of the confidentiality expectations of the parties. In Order MO-1476, former Assistant Commissioner Mitchinson stated:

> I agree with the City that the provisions of the *Act* apply in the context of requests for access to records created under the terms of its contract with the appellant, notwithstanding the existence of a confidentiality clause. However, in my view, it does not necessarily follow that the appellant did not supply the information provided under the terms of the contract in confidence. Based on the representations provided by the parties, it is clear that the confidential nature of the arrangements between them was not only explicitly addressed in the terms of the contract, but also discussed in some detail at the time the contract was executed. The City's caution to the appellant regarding the extent to which the clause would apply in the context of an access request under the *Act* is an important one that is prudently addressed in contracts of this nature. However, the confidentiality clause is explicit, and evidences a clear intention on the part of the parties that the information would be provided in confidence and treated in that manner by the City. I am satisfied that the appellant's business protocols

> support its position that information from its surveys is treated confidentially within its organization, and that the survey results were prepared for a purpose that would not involve general disclosure to the public.

In the current appeal, I also find that the existence of the confidentiality clauses and notices in the records evidences a clear intention on the part of Bombardier that all of the information was being supplied to the Ministry in confidence. It serves to demonstrate the existence of a reasonably held expectation that the Ministry was to keep it in confidence. The Ministry clearly understood this intention to keep the documents confidential. I am satisfied that it treated them as such by keeping them in a secure manner and ensuring limited distribution of the records within the Ministry to only those persons who need to have access to the records in order to develop Ontario's response thereto. Moreover, the nature of the information and the way in which Bombardier submits that it is consistently treated even in its own facilities (revealed on a "need-to-know" basis, limited physical access to Bombardier personnel) is further evidence of Bombardier's clear intention that this information remain in confidence.

Records 7, 8, 9, 10, 11, 14, and 17 all have clear Confidential Proprietary Information Notices at the beginning, as well as brief clauses at the bottom of each page reiterating the confidential nature of the information. Record 4 is specifically marked confidential. Although the letter portion of Record 12 is not marked confidential, the attached Request for Proposal that makes up the bulk of the record contains both Notices at the beginning and clauses at the bottom of each page.

I have reviewed the records that do not contain confidentiality clauses, specifically the letters contained in Records 5, 6, 12, and the PowerPoint slides which comprise Records 13, 15, and 16. I find that despite the fact that it has not been specifically identified, the nature of the information and the way in which it overlaps with information that has been specifically identified as confidential, Bombardier had a reasonably held expectation that the information was to be kept in confidence.

I do not accept the appellant's argument that because the records were also distributed to government agencies in other jurisdictions that Bombardier has lost the ability to claim that the records are confidential in nature. It is likely that, because Bombardier issued the Request for Proposal to other governments in addition to Ontario, it has disclosed some of the records to them. However, the appellant has not submitted any evidence to suggest that these records (or any of the information contained therein), have been otherwise disclosed or are available from sources to which the public has access. In my view, Bombardier has successfully demonstrated that it has taken its best efforts to communicate its intention to all parties in receipt of these records that the records are to be treated in a confidential manner.

Part 2: finding

I summary, I find the information in Records 1, 2, 3, 18, 19 and 20 does not qualify as having been "supplied in confidence" by Bombardier within the meaning of section 17(1) because it has

not been "supplied" by Bombardier. As all three components of the sections 17(1) test must be met for the exemption to apply, these records are not exempt under section 17(1). As noted above, I will determine whether these records are subject to either of the exemptions at sections 15 or 18(1) below.

I find that the all of the information in Records 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 (the records that I have found to have been "supplied" above), was supplied "in confidence" by Bombardier, to the Ministry. Therefore, part two of the section 17(1) test has been established.

Part 3: harms

To meet this part of the test, the parties resisting disclosure (in this case, the Ministry and 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].

Representations

The Ministry's representations

The Ministry's representations focus on the reasonable expectation of the occurrence of the harms listed in section 17(1)(a). It submits:

> The [Ministry] maintains that product information, valuations, market analysis, business plan forecasts, assumed market trends, operating information, etc. are the type of commercial information that clause 17(1)(a) is intended to exempt from disclosure since that type of confidential information could be used by competitors with insight into Bombardier's business, and permit accurate inferences regarding Bombardier's strategies in the market that could harm Bombardier's competitive position in the aerospace industry. Releasing the records would be prejudicial to Bombardier' relationships and negotiations with potential launch customers as well as suppliers. In addition, release of this information would harm negotiations for the design and manufacturing of additional aircraft components in Canada.
>
> Disclosure of specific financial, commercial and technical information relating to Bombardier could prejudice its current competitive position and interfere

> significantly with its contractual and other negotiations with other parties. Release of information relating to the broad corporate strategies and projected financial and commercial activities of Bombardier could reasonably be expected to significantly prejudice the company's competitive position currently and in the future on other projects as strategic plans for projects that have not been launched are important in the development of future projects.
>
> Releasing the records would provide Bombardier's competitors with key commercial information and provide Bombardier's competitors with a competitive advantage to the detriment of Bombardier as the records outline Bombardier's strategic plans and developmental thinking that underlie its future business endeavours.
>
> …
>
> In light of the foregoing considerations, the Ministry believes that records are exempt from disclosure under clause 17(1)(a) of [the *Act*] because it would undermined Bombardier's competitive position and its negotiations with the federal government, provincial governments and other governments and suppliers, 17(1)(b) because it would 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, and 17(1)(c) of [the *Act*] because it would cause undue loss to Bombardier and gains to its competitors. Furthermore, the Ministry believes that no public interest is served in giving out any of the records given the commercially sensitive nature of the information and the harms that would result from disclosure. To the contrary, public disclosure would be detrimental to the project proposal process and the to the ability of the Province to attract new investment in Ontario, which is in the public interest.

Bombardier's representations

Bombardier also takes the position that disclosure of the records at issue could reasonably be expected to result in the harms contemplated by sections 17(1)(a), (b) and (c). Bombardier submits:

> The prejudice to Bombardier's current competitive position and to ongoing negotiations lies in the current status of the *C-Series* project. Bombardier is presently in negotiations with potential launch customers (the first purchases of the *C-Series* aircraft). A competitor would be able to use the information in the records to gain the competitive intelligence to develop a counter competitive strategy to attempt to undermine not only Bombardier and the *C-Series* project but also the interest of Bombardier's suppliers with regard to their involvement in the project.

> [Ontario] was selected as one of a number of final candidates to be the host jurisdiction of the final assembly plant. Other candidates chosen were from within Canada, the United States and the United Kingdom. The information within these records was provided to Ontario in clear expectation and relationship of confidentiality. If that relationship of confidence is not respected, the ability of Bombardier to continue to work with Ontario and include Ontario in such projects is compromised. Disclosure of information such as that found in the records would have a chilling effect not only on the aerospace industry but also on all other industry sectors where highly sensitive commercial information is shared with the Ontario government when Ontario is invited to invest in economic development in the province. In such circumstances, the risk of providing the information to Ontario (information could result in a considerable net benefit to Ontario and to Ontarians) increases significantly.
>
> Finally, for the reasons set out below, provision of the records provides enormous commercial and competitive intelligence about Bombardier, its technical and financial plans, strategies (commercial and competitive), and its commercial relationships with suppliers and governments. The records relate to not only Bombardier, but also to Bombardier's commercial suppliers for *C-Series* aircraft manufacturing purposes. The information in the records reveals Bombardier's plans to execute the *C-Series* project (as well as how those plans evolved) and can be used by competitors to attempt to "reverse engineer" Bombardier's strategic thinking and the development and evolution of the *C-Series* project. The release of the records would, in the result, allow a competitor to develop counter competitive strategies to attempt to undermine Bombardier and this project.

In its submissions, Bombardier explains that to get to its current position with respect to the *C-Series* aircraft project, it has invested considerable time and money. Bombardier submits:

> In order to understand the significance of the records and the harm that would result in the event the records were disclosed, the *C-Series* development process must be put into context. Development potential, market assessment, trend analysis, analysis of the position of competitors in the market (both in the sense of target needs within the aerospace market but also positioning and placement of competitors' products and offerings) were researched, studied and analysed well prior to 2004 … The records identify and explain in detail how the *C-Series* will respond to meet the emerging market need.

Bombardier goes on to explain the steps that occur once a market is identified and development on the aircraft proceeds. They include a feasibility study which assesses details such as whether the aircraft can be built, whether there are suitable suppliers and whether customer commitment exists. Bombardier submits that once the feasibility study is complete, the project life span for the *C-Series* is "roughly twenty years or possibly longer depending on market development and need". It submits:

> Loss of the competitive edge that Bombardier has identified would mean loss of sums already invested in the development, the loss of potential customers and future profits as well as Bombardier's niche in a newly targeted market segment. This would constitute material loss for the company.

Bombardier then goes on to explain in considerable detail the competitive nature of the aerospace industry and some of the techniques that are used to gain information about competitors. It submits:

> [T]he information in the records could (and will) be used by competitors to give them direct insight into Bombardier's operations, to identify industry segments and players that Bombardier has targeted as key to the commercial development of the project and to undermine the *C-Series* aircraft with potential customers and suppliers. A competitor knowing Bombardier's commercial plans and strategies for at least the next twenty years would be in a position to undermine Bombardier competitively and to garner for itself a competitive advantage by using the information in the records to undermine the *C-Series* project.

Bombardier summarizes its more detailed representations about the possible harms as follows:

> The information in the records includes sensitive technical, commercial and financial information relating to Bombardier … in respect of participation in the *C-Series* project. The information in the records has real, and real time, value to a competitor. With the information in the records a competitor:
>
> (a) gains commercial intelligence relating to Bombardier and its current strategic initiative;
>
> (b) learns how Bombardier has structure the *C-Series* project;
>
> (c) learns how Bombardier intends to manufacture the *C-Series* aircraft and how work will be shared with suppliers;
>
> (d) learns who Bombardier's suppliers will be and in what capacity;
>
> (e) learns how Bombardier will approach its customers and how Bombardier intends to market the *C-Series* aircraft;
>
> (f) acquires detailed technical and engineering information on the *C-Series* aircraft;

(g) learns how Bombardier has structured its invitation to participants;

(h) acquires detailed information concerning Ontario's proposal to participate in the *C-Series* project and how that participation will be structure, and

(i) gains information that may be used or misused to attempt to undermine the *C-Series* project with potential launch customers.

Appellant's representations

The appellant takes the position that the submissions made by both the Ministry and Bombardier are not supported by the type of detailed and convincing evidence required to establish a set of facts and circumstances that could lead to a determination of a reasonable expectation of harm. The appellant cites both Order P-463 and P-373 as orders where the Adjudicators found that the parties had adduced insufficient evidence of harm. Specifically, the appellant relies on Order P-373 in which former Assistant Commissioner Tom Mitchinson found that "the evidence consists of generalized assertions of fact in support of what amounts to, at most, speculations of possible harm". With specific reference to the circumstances of this appeal, the appellant submits:

> The evidence provided by the [Ministry] and Bombardier similarly only contain "generalized assertions of fact" and "speculation of possible harm" which are not sufficient to satisfy the evidentiary test required for application of section 17(1) of the *Act*.
>
> Specifically, paragraphs 35-40 of the [Ministry's] representations only make vague assertions of prejudice to Bombardier without any specific reference to the records themselves to demonstrate how the information contained within could cause harm to Bombardier if disclosed. This demonstrates a lack of detailed evidence in the [Ministry's] representations as to how the specific information contained within the records in question could contribute to the specific harms alleged…
>
> In addition, the representations made by Bombardier from paragraph 31 onwards in regards to alleged harms as a result of disclosure of the records in question have serious evidentiary deficiencies. While these specific submissions go into considerable detail on the *C-Series* development, the nature of the aerospace industry and the competitive market that Bombardier operates in, the submissions fail to make the necessary link between the information in the records in question and the alleged harms. It is undisputed that harms can be incurred as a result of industrial espionage. However, there must be sufficient evidentiary basis to establish that disclosure of the records in question would amount to gains for a

competitor as would be the case in industrial espionage, sufficient to cause the general harms alleged. Bombardier's representations fail in this regard.

It is unlikely that Bombardier would have provided any information to the [Ministry] that it reasonably felt could be prejudicial to its competitive position or would result in undue loss … Disclosure should not be prevented based on the subjective sensitivities of the [Ministry] and Bombardier, especially in light of the fact that this information has been provided to a public body, an in so doing, there is an implied acknowledgement of risk on the part of Bombardier that the document may be disclosed to the public.

…

Contrary to the representations of Bombardier and the [Ministry], it is the appellant's position that there is negligible risk that similar information will no longer be supplied to the [Ministry] if disclosure of the records were ordered. First, the appellant reiterates the submissions made [above] in respect to the fact that it is unlikely that the records are as sensitive as has been suggested by the [Ministry] and Bombardier. Second, Bombardier has been engaged in several attempts over the years to secure beneficial funding from several government bodies, including Ontario, for a variety of projects. This is an essential component to its business plan going forward. It is not reasonably likely that as a result of disclosure of those records, that Bombardier would refuse to provide similar information to the Ontario Government in furtherance of funding for developments essential to the company's future. Such a course of action would be highly detrimental to the company and in light of that, an unlikely result if disclosure of the records is granted.

Orders P-1463 and P-771 … provide strong support for this line of reasoning. Order P-1463 involved a request for information pertaining to a third party seeking financial assistance and as such, had similar facts to this appeal. The Adjudicator in that order rejected the argument that there would be a risk of similar information not being provided in the future as this would be contrary to the interests of the third party. Similarly, in Order P-771, the Adjudicator rejected the Ministry's arguments that there would no longer be a continued supply of information as a result of disclosure and found that third parties would continue to have a strong incentive to provide their information to the Ministry.

A further overall consideration is the length of time that has passed since these records were created. The *C-Series* project has moved along since late 2004/early 2005 such that the degree of relevancy of the information contained within the records may be outdated, and as such, not reasonably likely to cause any harm to Bombardier. This would certainly mitigate any potential harmful effects that disclosure might have.

Part 3: Analysis and finding

Having reviewed the records in light of the representations submitted by the parties and all of the circumstances of the appeal, I accept the position of the Ministry and Bombardier that the disclosure of the records which I have found to have met the first two parts of the section 17(1) test could reasonably be expected to result in the harms listed in sections 17(1)(a), (b) and (c).

Section 17(1)(a) and (c)

I have reviewed the records that I have found to have been supplied in confidence to the Ministry by Bombardier (Records 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17) and, as submitted by the Ministry, find that they cumulatively contain information such as financial needs and expectations, market analyses, technical product information, as well as business plan strategies and forecasts. Taken as a whole, the records essentially lay out Bombardier's *C-Series* project from its inception, describe its evolution, and outline Bombardier's future plans for the project. Individually, they include detailed commercial, financial and technical details regarding portions of the project including market strategies and construction of the aircraft. In my view, disclosure of this type of information would both prejudice Bombardier's competitive position (section 17(1)(a)) and also result in undue loss for Bombardier and a correlative undue gain for its competitors (section 17(1)(c)).

The appellant argues that the Ministry and Bombardier have not provided the requisite detailed and convincing evidence to establish the harms in sections 17(1)(a) and (c) and they fail to make the necessary link between the specific information in the records in question and the alleged harms. I disagree. Although neither the Ministry nor Bombardier have linked specific records with specific harms, their representations clearly explain that should the information contained in the records fall into the hands of a competitor, it could reasonably be expected to use that information to gain a business advantage. This may include the creation of their own project for similar aircraft or taking steps to hamper Bombardier's project itself. In the circumstances of this appeal, I find that these harms are not speculative in nature. Bombardier has provided considerable background evidence and explanation to demonstrate the competitive nature of the aerospace industry, and I accept that it is so.

Specifically, given the nature of the information contained in the records, reviewed in conjunction with the representations submitted by the Ministry and Bombardier, I accept that the disclosure of the information could reasonably be expected to be used by Bombardier's competitors to gain insight into Bombardier's business, and permit them to draw accurate inferences regarding Bombardier's strategies in the market which could harm Bombardier's competitive position in the aerospace industry. As a result, in my view, disclosure of this information could reasonably be expected to prejudice Bombardier's competitive position by allowing competitors to gain competitive intelligence. I accept that this could be applied to develop a counter competitive strategy in an attempt to undermine Bombardier and the *C-Series* project.

Bombardier has also provided evidence to demonstrate that it has invested a considerable amount of time and work in developing the various different components of the *C-Series* project and, were this information disclosed, in my view, it would result in an undue loss for Bombardier and a correlative undue gain to a competitor who could use the information to develop a similar project plan with significantly less investment of time, work and money.

I do not accept the appellant's argument that by providing the type of information contained in the records to a public body, the Ministry, there is an implied acknowledgement of risk on the part of Bombardier that the information may be disclosed to the public. Based on the confidential representations of Bombardier, prior to issuing its request for proposal it was aware that the Ministries of the Ontario Government are subject to the *Act*. As noted above, it is well established that section 17(1) is designed to protect the confidential "informational assets" of businesses that provide information to government institutions by limiting the disclosure of information that could be exploited by a competitor in the marketplace.

Additionally, the appellant suggests that given the length of time that has passed since the records were created the information that they contain may no longer be relevant thereby mitigating any harm that might result from disclosure. While I accept that, in some circumstances, the length of time that passes between when certain records were created and when they are disclosed could diminish the severity of expected harms resulting from disclosure, I do not find that to be the case with respect to the information at issue in this appeal.

Despite the fact that the records are several years old, the *C-Series* project is ongoing. After a period where Bombardier had placed the project on hold, on January 31, 2007, Bombardier issued a press release confirming that its *C-Series* project is to go ahead as previously planned with a target date for entry into service of 2013. Additionally, on the face of the records it is clear that they contain information that was provided by Bombardier to both Ontario and Quebec, both finalists for the bid for the final assembly site for the aircraft. Although Ontario was not selected, Quebec was chosen as the final assembly site. Therefore, all records and information that I have found to have been supplied in confidence by Bombardier remain current and relevant information for the *C-Series* project which is going forward.

Moreover, I accept Bombardier's submission that the data that it has gathered provide the foundation for a project with a life span of 20 years or longer, depending on market development. Accordingly, even if the project were on hold, the information continues to hold significant value for Bombardier. Therefore, I do not accept that the time that has passed between the date that the records were created and today has diminished in any way the severity of the harms that may flow from disclosure.

In my view, for these reasons, the fact that the records are several years old has no impact on the harms that Bombardier could reasonably be expected to experience/suffer were the information in the records disclosed.

Accordingly, I find that the Ministry and Bombardier have provided me with sufficiently detailed evidence to show that disclosure of the information contained in the records and portions of records that that have met part one and part two of the section 17(1) test could reasonably be expected to significantly prejudice Bombardier's competitive position within the meaning of section 17(1)(a) and result in undue loss to Bombardier and correlative gain to its competitors within the meaning of section 17(1)(c).

Section 17(1)(b)

In order to meet the requirements of section 17(1)(b) of the *Act*, the Ministry and/or Bombardier must demonstrate that:

1. the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and

2. it is in the public interest that similar information continue to be supplied to the institution in this fashion.

In its representations, the Ministry expresses concern that if it cannot provide representatives of industry, such as Bombardier, assurances that records containing sensitive financial and commercial information will be kept in confidence, there will be considerable reluctance on the part of industry to approach the Government of Ontario to invest in projects in the future. It explains that Ontario's ability to attract new investments is important to Ontario's economy.

Bombardier's representations both support and give credibility to the Ministry's concerns as Bombardier states that if a relationship of confidence is not respected, its ability to continue to work with Ontario and include Ontario in such projects is compromised. It states clearly that "disclosure of information such as that found in the records would have a chilling effect not only on the aerospace industry but also on all other industry sectors where highly sensitive commercial information is shared with the Ontario Government when Ontario is invited to invest in economic development in the province". Portions of Bombardier's confidential representations further support a reasonable expectation that similar information would no longer be supplied were the information in the records at issue disclosed.

Based on these representations, I find that disclosure of the information contained in the records and portions of the records for which has met both part one and part two of the section 17(1) test**,** could reasonably be expected to result in similar information no longer being supplied to the institution. Unlike many of the third parties involved in appeals where the harm in section 17(1)(b) has not been established (including those cited by the appellant), Bombardier is a global company (though headquartered in Canada) that works on an international scale. It has offices and production facilities around the world. I accept that there are many other government institutions in a variety of jurisdictions across Canada and around the world that Bombardier or other members of the aerospace industry, can and would approach for financing in relation to

projects. This result could reasonably be expected to occur if disclosure of their sensitive commercial, financial and technical information cannot be kept in confidence by the Province of Ontario.

I also accept that it is in the public interest that similar information continue to be supplied to the Ministry and other institutions in the province of Ontario. The support of large industry players is of considerable economic interest to the province of Ontario which both directly and indirectly benefits the public.

Therefore, I find that the harms in section 17(1)(b) could reasonably be expected to occur should the information in the records or portions of records at issue be disclosed to the appellant.

In summary, I have found that all three parts of the section 17(1) test have been met for Records 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17. Accordingly, the mandatory exemption for third party commercial information at section 17(1) applies. However, whether or not these records are exempt from disclosure, is subject to my analysis below on the application of the public interest override.

As I have found that Records 1, 2, 3, 18, 19 and 20 were not supplied by Bombardier they do not meet part two of the section 17(1) test. As all three parts of the test must be met for section 17(1) to apply, Records 1, 2, 3, 18, 19, and 20 are not exempt from disclosure as third party commercial information under section 17(1). As noted above, the Ministry has also claimed sections 12(1), 15 and 18(1) also apply to these records, I will continue my analysis to determine whether any of the remaining exemptions apply to them.

ECONOMIC AND OTHER INTERESTS

The Ministry has claimed the application of some or all of sections 18(1)(c),(d),(e),(f) and (g) to all of Records 1, 2, 3, 18, 19 and 20, which remain at issue in this appeal.

The exemptions at section 18(1) specifically relate to the economic and other interests of the province of Ontario. Records 18, 19, and 20 are records that originate from the federal government. I have reviewed these records and although they do refer generally to the proposals for provincial financial contribution submitted by Quebec and Ontario and comment generally on how a combined federal/provincial financial package might be structured, the information contained within them primarily relates to the federal government and not to the province of Ontario. Without precluding that one or more of the exemptions at section 18(1)(c), (d), (e), (f), or (g) might apply to exempt the information contained in Records 18, 19, and 20 from disclosure, it is my view that the records that were supplied by the Government of Canada are best analysed under the discretionary exemption at sections 15(a) and/or (b), which deals with records that document relations with other governments, which the Ministry has claimed. I will do so below, following my discussion of section 18(1).

Accordingly, my discussion of the application of the exemptions at section 18(1) will be restricted to the information contained in Records 1, 2, and 3.

Sections 18(1)(c), (d), (e), (f), and (g) read:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable Government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this 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.

Section 18(1)(c) provides institution with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice an institution in the

competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the Government's ability to protect its legitimate economic interests [Order P-441].

To establish a valid exemption claim under section 18(1)(d), the institution must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario [Orders P-219, P-641 and P-1114].

For sections 18(c), (d) or (g) to apply, the Ministry must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the Ministry 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.)].

Representations

The Ministry claims sections 18(1)(c), (d) and (e) apply to Records 1, 2, and 3, arguing that:

> Disclosing the details of the Financial Contribution proposal of Ontario would be prejudicial to the economic interests of the Ministry or the competitive position of the Ministry as per paragraph 18(1)(c) of [the *Act*], as it would reveal to other private sector participants in both the aerospace sector as well as other sectors such as the auto sector how far Ontario is prepared to go in order to attract business to Ontario. It would undermine Ontario's ability to negotiate competitive financial contribution packages in support of businesses looking to establish or expand their business ventures in Ontario. Ontario must compete with other jurisdictions looking to attract investments in this increasingly international economy and therefore revealing parts of Ontario's business strategy and the tools Ontario is prepared to use to attract business would prejudice the economic interests of the Ministry and of Ontario. Given the past history of trade disputes and the possible retaliatory actions that can be taken against other economic sectors, the Ministry believes that disclosing these records would be prejudicial to the economic interests of Ontario.
>
> In addition, disclosing the terms of Ontario's financial contribution package for Bombardier could reasonably be expected to be injurious to the financial interest of the Government of Ontario and the ability of the Government of Ontario to manage the economy of Ontario as per paragraph 18(1)(d) of [the *Act*].
>
> The Ministry also believes that disclosing Records 1, 2, and 3 would result in the disclosure of positions, plans, procedures, criteria or instructions to be applied to future negotiations carried on or to be carried on by or on behalf of an institution

> or the Government of Ontario as per section 18(1)(e) of the *Act*. Although Ontario was not selected as the final assembly site for the *C-Series* aircraft, the Ministry understands that there are some associated projects that remain to be allocated by Bombardier … For this reason … disclosing the above-mentioned records would result in the disclosure of positions to be applied to future negotiations.

The Ministry also claims sections 18(1)(f) and (g) apply to exempt Records 1, 2, and 3 from disclosure, arguing that:

> The disclosure of Records 1, 2, and 3 would result in the disclosure of plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public (the 18(1)(f)…exemption) for the reasons stated in [portions of the representations that have been withheld due to confidentiality concerns]. In addition, it remains possible that Ontario may get some work projects relating to the *C-Series* aircraft (other than the final assembly work) and the financing outlined in those documents could be put into place in respect of those projects.
>
> Similarly, the disclosure of Records 1, 2, and 3 would result in the disclosure of information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person (the 18(1)(g)…exemption that was claimed on the records) for the reasons outlined above.
>
> In addition, the disclosure of Records 1 and 2 would cause "undue financial benefit or loss to a person" because they each included the term sheets which have information that could be used to draw inferences about the price of the aircraft. The Ministry believes that the disclosure of this information would result in a financial loss to Bombardier because the company's pricing strategy would be revealed before it had begun settling the aircraft (as far as the Province knows, Bombardier has yet to announce that it has a launch customer), or even made a final decision whether or not to proceed.

The appellant reiterates that in order to establish that any of 18(1)(c), (d) or (g) apply, the Ministry must provide detailed and convincing evidence to show a reasonable expectation of the specified result for any of these harm based exemptions to apply. The appellant submits that the Ministry has not satisfied this test because it has made only general submissions on the supposed harms that amount to unsubstantiated speculation. The appellant submits:

> It is highly unlikely that disclosure of the records in question would have the deleterious effects on the Government of Ontario as suggested in the [Ministry's] representations and envisaged by these exemptions.

Responding specifically to the Ministry's submissions the appellant submits:

> [T]he [Ministry] argues that disclosure could reveal how far Ontario is willing to go to attract business. The Government of Ontario has been long engaged in similar financial incentives to numerous industries. As such, that there is undoubtedly already a voluminous amount of information on how far Ontario is willing to go in order to attract business, in the aerospace field and other areas. Disclosure of the records would not exasperate this concern to any significant degree to warrant the level of concern or expectation of harm required to apply these exemptions.
>
> [T]he [Ministry] takes the position that would affect Ontario's chances of attracting investment and business in the future which could erode its tax base and impact the economy. This position is presumably based on argument that disclosure would damage the relationship with Bombardier such that future business details could be affected. This is an unlikely result given the fact that the business relationship with Ontario is highly beneficial to Bombardier and other third parties that would be involved in similar dealings with the Ontario government, and as such, the alleged harms outlined in the [Ministry's] representations that would be incurred should disclosure be ordered are not reasonably likely. This line of reasoning in respect to the determination of this sort of harm was applied by the Adjudicator in Order PO-2226, when considering whether to apply subsections 18(1)(c) and (d) of the *Act*. The Adjudicator in that order decided that disclosure of the information at issue would not create a "chilling effect" on future deals with Ontario and the third party, which also happened to be Bombardier in that appeal. The Adjudicator found that there was sufficient incentive for Bombardier to continue engaging the government notwithstanding disclosure of the records in question.
>
> There is no evidence that the information contained in the records will result in the information being used in a manner that is harmful to the [Ministry] or Bombardier. This is a baseless assumption that has been made by both the [Ministry] and Bombardier in their representations and without supporting evidence, this consideration should not be given any weight.
>
> In the information age, change occurs at such a rate that information quickly becomes obsolete. It is not uncommon that information that is a few months old is relegated to the sidelines as being outdated and irrelevant. The records in question are over a year old, and as a result of their age, it cannot be reasonably expected that this information would be of any serious consequence to Bombardier or the [Ministry].

Specifically addressing the possible application of sections 18(1)(e) the appellant submits:

> [T]he appellant takes the position that this exemption [section 18(1)(e)] does not apply as the negotiations at issue in respect to these records were concluded over a year ago when Bombardier made its decision to base the development of the *C-Series* in Quebec.
>
> The [Ministry's] submissions that the records in question are also in respect to future negotiations on associated projects for the *C-Series* development are unsubstantiated by the evidence provided. There has been no indication over the last year that there are any current or future negotiations in the works with Bombardier in respect to associated projects for the *C-Series* development. Given the fact that there were considerable press release in respect to the negotiations last year for the final assembly site for the *C-Series*, a negative inference should be drawn as to the lack of additional press releases provided as evidence of any future project allocations being negotiated between the Government of Ontario and Bombardier.

The appellant cites Interim Order P-163 in which former Commissioner Sidney B. Linden did not apply section 18(1)(e), due in part to the fact that the negotiations in question had concluded.

Specifically addressing the possible application of section 18(1)(f), the appellant submits that Order P-658 describes a consideration of whether a specific record is a "plan" and that the records must be reviewed carefully to ensure they contain the requisite level of detail to be characterized as such.

Analysis and finding

I have carefully reviewed the contents of Records 1, 2, and 3 and the representations submitted by the parties on the application of the section 18(1) exemptions. I conclude that the Ministry has provided me with the kind of detailed and convincing evidence required to make a finding that this information is properly exempt under section 18(1)(c) and (d).

Sections 18(1)(c) and (d)

Section 18(c) provides the Ministry with a discretionary exemption that can be claimed where disclosing information could reasonably be expected to prejudice the Ministry in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests [Order P-441].

Section 18(d) is a different discretionary exemption, available if the Ministry can demonstrate that disclosure of information contained in a record could reasonably be expected to cause injury

to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the provincial economy [Orders P-219, P-641 and P-1114].

In support of its claim that sections 18(1)(c) and (d) apply to Records 1, 2, and 3, the Ministry submits that the records describe Ontario's proposal and contain information that were it disclosed would be prejudicial to the economic interests or competitive position of the Ministry (18(1)(c)) as well as injurious to the financial interest of Ontario (18(1)(d)) if it was disclosed. I find that its disclousre would demonstrate to other private sector industries seeking financial contribution "how far Ontario is prepared to go in order to attract business to Ontario".

Considering the information contained in the records, I accept that disclosure of this information would undermine Ontario's ability to negotiate competitive financial contribution packages with respect to business ventures. I accept that disclosure of this information would not only give an indication of how much Ontario might be willing to contribute to Bombardier's competitors in the aerospace industry but that would also set a benchmark for other large industry sectors in their attempts to negotiate financial contribution packages for comparable projects. Even for projects that could not be considered comparable, in my view, knowledge of Ontario's contribution would allow other industries to make an educated guess as to what Ontario's bottom line might be for their projects. Therefore, I accept that if this type of information were available to industry players, it could reasonably be expected to prejudice the economic interests of the Ministry and would be injurious to the financial interests of the Government of Ontario, by weakening its negotiating position.

Additionally, it cannot be disputed that Ontario must compete with other jurisdictions looking to attract investments. In the current appeal, Bombardier, though based in Canada, is a global company with offices and business ventures around the world. It was submitted that for the *C-Series* final assembly site, Bombardier sought proposals from other international jurisdictions, in addition to Quebec. Disclosure of the information contained in Records 1, 2, and 3 would therefore provide these jurisdictional competitors with insight into Ontario's business strategy and the tools it is prepared to use to attract business. In my view, this would limit Ontario's ability to prepare and submit competitive bids for industry. This could reasonably be expected to result in fewer big business enterprises being attracted to Ontario, which could reasonably be expected to be injurious to economic interests of the province.

I acknowledge that, as suggested by the appellant, in many circumstances a business relationship with Ontario is highly beneficial to a third party. However, in the present circumstances I find that the disclosure of this information might have a "chilling effect" on future business ventures with industry players.

The appellant refers to Order PO-2226 in which the records at issue consisted of various complex and multi-faceted agreements for the purchase and sale of de Havilland Inc. to Bombardier Inc. and the Ontario government. In Order PO-2226 former Assistant Commissioner Tom Mitchinson found that the Ministry had provided sufficiently detailed or convincing evidence to establish a reasonable expectation of the harms in sections 18(1)(c) and

(d). Assistant Commissioner Mitchinson found that the terms of the agreements were tailored to the specific re-structuring and because subsequent similar arrangements would have a different set of issues and interests, the information in the records at issue would have limited value or relevance in subsequent negotiations. Assistant Commissioner Mitchinson also stated that he was not persuaded that the disclosure of agreements such as the ones at issue could reasonably be expected to put a chill on future dealings between the Ontario government and commercial enterprises seeking financial assistance. He stated:

> In my view, the well-established role of government in this regard, and is willingness and capacity to utilize contracts of this nature as a tool to manage the provincial economy, is sufficient incentive for the private sector to engage the Government in discussions similar to those that led to the various agreements at issue here.

In my view, Order PO-2226 can be distinguished from the current appeal. The agreements in Order PO-2226 relate to a specific circumstance, the sale and acquisition of a specific business which is a one off transaction. In my view, very little can be extrapolated and used in future negotiations in the circumstances present in Order PO-2226. In the current appeal, the records at issue relate to Bombardier's development and marketing of an aerospace project. This type of deal goes to the very crux of Bombardier's aerospace business; Bombardier's business is to develop and market such projects and secure financial support in order to make them happen. In my view, information as to how Bombardier does business with governments, including how it approaches them for funding, what it expects from them or how it goes about doing so could be extrapolated from Records 1, 2, and 3 by a competitor, for use in other proposed aerospace projects. Accordingly, I accept that the information in Records 1, 2, and 3 is of value or relevance in subsequent negotiations. I concur that the Ministry has satisfied me by providing detailed and convincing evidence to convince me that disclosure might have a chilling effect on future dealings between Ontario and Bombardier (and perhaps other industry players) which would reasonably be expected to prejudice the economic interests or the competitive position of the Ministry. I further find it reasonable to expect that disclosure would be injurious to the financial interests of the Government of Ontario and to the ability of the Government of Ontario to manage the economy of the province should the information be disclosed.

Moreover, section 18(1)(c) and (d) are harms based exemptions where the onus rests on the party asserting the exemptions to demonstrate that a reasonable expectation of harm exists. Even if the situation in the current appeal was identical to that in Order PO-2226, the fact that the former Assistant Commissioner did not receive what he found to be sufficiently detailed and convincing evidence to establish the harms, has no impact on whether in the current appeal, I have been provided with such sufficiently detailed and convincing evidence. Whether the exemptions apply is not specifically based on previous findings with respect to similar information, but rests in large part on the quality of evidence provided by the party asserting the claim.

In the circumstances of this appeal, I have carefully reviewed the contents of Records 1, 2, and 3, and the submissions made by the Ministry, and, in my view, the Ministry has provided the kind

of detailed and convincing evidence required to demonstrate that disclosure of the information could be reasonably expected to prejudice the economic interests or the competitive position of the Ministry, and to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of the province. Accordingly, I find that sections 18(1)(c) and (d) apply to the information in Records 1, 2, and 3.

As I have found that section 18(1)(c) and (d) apply to the information in Records 1, 2, and 3, it is not necessary for me to determine whether the exemptions at sections 18(1)(g), (e) or (f) apply in the circumstances of this appeal.

RELATIONS WITH OTHER GOVERNMENTS

The Ministry claims that sections 15(a) and (b) apply to exempt Records 18, 19, and 20 from disclosure.

Those sections read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another Government or its agencies by an institution;
>
> and shall not disclose any such record without the prior approval of the Executive Council.

Section 15 recognizes that the Ontario government will create and receive records in the course of its relations with other governments. Section 15(a) recognizes the value of intergovernmental contacts, and its purpose is to protect these working relationships. Similarly, the purpose of section 15(b) is to allow the Ontario government to receive information in confidence, thereby building the trust required to conduct affairs of mutual concern [Order PO-1927-I; see also Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

For either section 15(a) or (b) to apply, the Ministry 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.)].

Representations

The Ministry's representations first address the application of the exemption at section 15(b) to the records as follows:

> Record 18, Record 19, and Record 20 are letters dated January 28, 2005, January 17, 2005, and December 16, 2004 from the Assistant Deputy Minister of the Industry Sector at Industry Canada and in the case of the latter, from the Minister of Industry Canada, outlining the manner in which Federal financial contribution would be structured in support of the financial contribution provided by either Quebec or Ontario for the final assembly of the *C-Series* aircraft. The letters are all marked "Confidential" and were provided to the Ontario government in confidence and were treated as such by Ontario. The letters contain details on the proposed financial contribution of Canada and how such support would interface with the Provincial Financial Contribution for Bombardier. The letters outlined the federal government's economic development objectives related to its participation in the *C-Series* program and underlines the importance to Canada of significant Canadian industrial participation. Disclosing this information would reveal information received in confidence by the Ministry from the federal government.

Then, addressing the application of section 15(a), the Ministry submits that disclosing the information contained in the records for which the exemption has been claimed would "prejudice intergovernmental relations as the information contained in the records reveals the details of Ontario's financial contribution package in relation to the Federal financial contribution package". The Ministry submits that disclosure of this type of information would:

> undermine Ontario's position vis-à-vis the federal government and the other Provinces [as these other jurisdictions] would be unwilling to share confidential, sensitive information with Ontario on matters of joint interest if Ontario cannot assure the confidentiality of the information.

Industry Canada, the department of the federal government that prepared Records 18, 19 and 20, made brief submissions on the application of sections 15(a) and (b) to those records. Industry Canada submits:

> Yes, the discretionary exemption at section 15(a) and/or (b) apply to the records. The release of this information would prejudice the conduct of intergovernmental relations which the Government of Ontario or an institution and that this information was provided to the Ontario government in confidence by Industry Canada.
>
> To support this, any information received from the federal government by a provincial government should not be released without the consent of the federal

> government. If it became known that the Ontario government released confidential information belonging to the federal government after the federal government had provided recommendations for the information to be withheld, then not only the federal government, but any government would hesitate in sharing information with the Ontario government. This would destroy any trust, respect and openness with the Ontario government and would impact on future relations and cooperation with the Government of Ontario.
>
> Industry Canada does not give its consent to release the information and recommends that it be withheld. Our rational for withholding this information is provided for your further consideration.
>
> The release of this information would seriously harm the interests and position of the federal government as it contains negotiations tactics, factors involved in developing a particular negotiation position or plan and the mandate and fall-back positions developed by government negotiators for the purposes of bargaining in relations to labour, financial or commercial contracts…The release of the information will have a harmful and damaging effect for the Government of Canada and its internal process.
>
> The release of the information would specifically undermine the current process concerning federal assistance to Bombardier, and in addition harm would be inflected on the government by a foreign power which could launch international trade action against Canada related to any *C-Series* support and inhibit Canada's ability to defend itself against such action. The release of the information would undermine the delicate but frank discussions between Bombardier and the Government of Canada.

The appellant does not specifically address Records 18, 19, and 20 but submits generally:

> The [Ministry] argues that [disclosure of the records] will allow a reader to determine the level of federal government funding committed to the *C-Series* development. However, all of those records were either correspondence between Bombardier and the federal or Ontario governments, or were documents created by Bombardier.
>
> As such, the links between the levels of government are tenuous at best, and certainly not enough to establish the degree of intergovernmental relationship necessary for the reasonable application of section 15(a) of the *Act*. The relationship that would be more accurately portrayed as being potentially is that between the governments and Bombardier which if established, is not a basis for the application of section 15(a) of the *Act*.

The appellant goes on to submit that the Ministry did not provide the requisite "detailed and convincing" evidence to establish a "reasonable expectation of harm", but that the evidence put forward in their representations amounted to only a speculation of possible harm. The appellant also submits that he takes the position that it is unlikely that the provincial and federal governments would cease exchanging information as a result of disclosure as such exchanges are mutually beneficial to each level of government.

Analysis and findings

Having considered Records 18, 19, and 20, the representations of the parties, and the circumstances of this appeal, I accept that disclosure of these records could reasonably be expected to both prejudice the conduct of intergovernmental relations (section 15(a)) and would reveal information received in confidence from the federal government (section 15(b)).

Section 15(a): prejudice the conduct of intergovernmental relations

Although Records 18, 19, and 20 originate from Industry Canada and are addressed to Bombardier, all three records indicate that carbon copies of those letters were sent to other individuals, including an individual within the Ontario government. Moreover, the information at issue in all of the records also relates to Ontario, specifically, how the federal government envisions the structure of the joint provincial/federal financing for Bombardier. In my view, these records clearly relate to intergovernmental relations, as they describe the way in which Industry Canada (representing the federal government) proposes to collaborate with the Ontario government with the intention of providing joint financial assistance to Bombardier in relation to the *C-Series* project.

While I agree with the appellant that disclosure of the information contained in these records is unlikely to result in the provincial and federal governments ceasing to collaborate or exchange information altogether, the test is whether disclosure could reasonably expect to prejudice Ontario's intergovernmental relations. I accept that it could. In my view, the Ministry has provided sufficient evidence to establish that given the subject matter and sensitivity of the specific information at issue, were the information disclosed it would impact Ontario's ability to enter into matters of joint interest with the federal government and/or other provinces. Although it may not prevent other jurisdictions from dealing with Ontario entirely on all matters, I accept that it is reasonable to expect other jurisdictions could be hesitant, if not unwilling, to share confidential, sensitive information with Ontario on some matters if confidentiality could not be assured. This position is supported by the representations submitted by Industry Canada where it submits that disclosure would impact on future relations and cooperation with the Government of Ontario.

Accordingly, I find that disclosure of the information at issue in Records 18, 19, and 20 could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario as contemplated by section 15(a).

Section 15(b): reveal information received from another government in confidence

Although I have found that the information in Records 18, 19 and 20 is exempt under section 15(a), even if section 15(a) were found not to apply I find that disclosure of the records would reveal information received in confidence from another government by the Ministry as contemplated by section 15(b).

As discussed above in my analysis of the section 15(a) exemption, although Records 18, 19, and 20 originate with Industry Canada and were destined for Bombardier, copies all three records were be sent to an individual employed by the Ontario government. In my view, the information contained in these records was clearly received by the Ministry from another government, specifically, the Government of Canada.

As for whether that information was received in confidence, I have reviewed the records at issue and find that they are all clearly marked "confidential". I accept that such markings are not necessarily determinative of whether or not information has been received in confidence. However, given that the subject matter of these records deals with matters of mutual interest for Canada and Ontario, I find that it is possible that Ontario might be impacted by the disclosure of the information. Accordingly, I accept that the information contained in these letters was received from the federal government by the Ministry in confidence. In my view, this is exactly the type of situation for which section 15(b) applies. The application of the exemption allows the Ontario government to receive information in confidence from another level of government, thereby building the trust required to conduct affairs of mutual concern. Accordingly, I find that section 15(b) applies and subject to my discussions on the Ministry's exercise of discretion and the public interest override, Records 18, 19, and 20 are exempt from disclosure.

EXERCISE OF DISCRETION

The exemptions at sections 15 and 18(1) are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

On appeal, an Adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. I may find that the Ministry erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573]. However, I may not substitute my own discretion for that of the Ministry's.

The Ministry submits that in applying the exemptions at sections 15 and 18(1) to the records for which they were claimed, it considered a number of factors including the reasonableness of its decision, the effect of the disclosure of the records and fairness. The Ministry submits:

> In determining whether to disclose the records the Ministry balanced the [appellant's] interest in disclosure and the effect disclosure would have on the internal decision-making processes in government, the deliberative process of government policy and decision-making and relations with other levels of government and industry both within Canada and internationally. The Ministry concluded that releasing these records would inhibit the free exchange of information and advice as the information, advice, recommendations, and analysis contained in those records were exchanged with an expectation that the information contained therein would be maintained in confidence for a specific audience and for a specific purpose.
>
> The Ministry also considered whether the impact of disclosing these records on future work undertaken by public servants in developing policy proposals and developing financial contribution packages. The Ministry feels that disclosing these records would have a chilling effect on that work and would be detrimental to the candid exchange of views between public servants and industry stakeholders and government officials. It would also impact negatively on intergovernmental relations since the disclosure of records that were received with an expectation of confidentiality would undermine free and candid exchanges between governments. In light of the importance of obtaining critical analysis of policy and financial contribution proposals in order to develop the best possible policies, the Ministry is of the view that it would not be in the best interests of good government to release these records.

The appellant takes the position that the Ministry placed too much weight on the following factors when exercising its discretion under sections 15 and 18(1) of the *Act*:

(a) that disclosure would have a "chilling effect" on the future work relations and exchange of information between government officials and industry stakeholders; and

(b) that disclosure would have a "chilling effect" on the future work relations and exchange of information on an intergovernmental level.

The appellant also takes the position that the Ministry failed to take into account the following relevant considerations that would favour the exercise of discretion to disclose the information:

(a) exemptions from the right of access should be limited and specific;

(b) whether disclosure will increase public confidence in the operation of the institution;

(c) the nature of the information and the extent to which it is significant and/or sensitive to the institution, [appellant] or any affected person;

(d) the age of the information; and

(e) the historic practice of the institution with respect to similar information.

As stated above, my jurisdiction in reviewing the Ministry's decision is limited in that I cannot substitute my own opinion, but can only determine whether the Ministry erred in their exercise of discretion by finding, for example, that they have exercised their discretion in bad faith, for an improper purpose, by taking into account irrelevant considerations or by failing to take into account relevant considerations.

I have reviewed the representations of the Ministry and the appellant, and, in light of the circumstances of this appeal and the nature of the information that is at issue, I am satisfied that the Ministry has not erred in exercising its discretion to withhold it under the exemptions at sections 15 and 18(1). In my view, the Ministry did not fail to take into account the considerations raised by the appellant, did not exercise its discretion in bad faith, for an improper purpose or take into account irrelevant considerations. Accordingly, there is no basis upon which to interfere with the exercise of discretion. Therefore, I find that, given the circumstances and the nature of the information that has not been disclosed, the exercise of discretion by the Ministry to apply these exemptions was appropriate.

PUBLIC INTEREST OVERRIDE

Section 23 states:

> An exemption from disclosure of a record under sections 13, **15, 17, 18**, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

Section 23 is commonly referred to as the "public interest override" since it permits information which is otherwise exempt from disclosure under certain exemptions to be disclosed in the public interest. For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.)].

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in

some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. If a compelling public interest can be established, this interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations

The appellant submits that disclosure is in the public interest:

> It is in the public's interest that the government's intentions be revealed by disclosure of these records, given the fact that a large amount of public funds were at stake and that these funds were to be directed towards subsidizing a for-profits company's product development in possible breach of Canada's international trade obligations. Breach of Canada's international trade obligations, if established is detrimental to the government's international reputation and ability to do business on the world stage, and as a result, detrimental to the public interest.

Specifically addressing the "compelling public interest" and whether that interest outweighs the applicable exemptions, the appellant submits:

> The records pertain to information on the government's decision-making process in respect to the provision of public funding to private industry. One of the purposes of the *Act* is to "enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern" (see Order P-982…). In light of this purpose and the fact that disclosure of the records would further that purpose in this case, it is clear that there is a compelling public interest for disclosure of the records in order to enhance the accountability and transparency of government, especially since in this case a large sum of money (in the multimillions of dollar) was involved. This purpose, as described above, is consistent with recent initiatives proposed by the … federal government to increase government accountability. While the appellant accepts that there are private commercial interests involved in this appeal, the public interest in disclosure of furtherance of government accountability is paramount.
>
> In its representations [the Ministry] has made significant reference to the international trade issues that surround the *C-Series* proposal. As a result, it appears that [the Ministry] understands the relevance and gravity of these issues, which, in light of the problems that the Canadian government has encountered in

> the past in respect to the potential flouting of its international trade obligations, are highly pertinent in respect to this appeal. The appellant takes the position that there is a compelling public interest that the records be disclosed so that the course of conduct adopted by the Ontario and federal government in respect of the *C-Series* proposal be revealed. It is essential that the public be kept informed of its government's activities, especially where those activities may be in breach of its international obligations, which, if proven, could be detrimental to the government's reputation and ability to conduct business on the global stage, and in turn, detrimental to the public.

The Ministry submits in its reply representations that no compelling public interest exists in the disclosure of the records at issue:

> [The Ministry] submits that there is not a compelling public interest in disclosure of the records. There are no relevant public safety, public health, environmental or justice concerns raised by the [appellant]. This is not comparable to the subject matter of the records in Order P-1398 cited by the [appellant] which concerned the issue of Quebec independence in which the public clearly has a compelling interest. In Order P-1392, [it is established] that the dictionary definition of "compelling" meaning "rousing strong interest or attention" is the appropriate definition for the application of section 23. In this case, while the amount of possible funding may be large, the type of issue raised does not rise to that level. In the normal operations of government, Ontario provides funding to many organizations, public and private, and it cannot be said that there is a compelling public interest that should override the exemptions properly applied to the records in all such cases. The [appellant] has not presented any evidence that there is a concern by the public with respect to the accountability of the Ontario government generally or with respect to Bombardier's proposal specifically. The [appellant] is advocating a private interest in the records rather than a public interest. The [appellant's] representations consist only of generalized assertions about the public's interest in the operation of their government generally.

In its reply submissions, Bombardier argues that no compelling public interest exists in the disclosure of the records at issue:

> The appellant bases the issue of a public interest in disclosure on two grounds – that the records in question, or a portions thereof, relate to the "government's decision making process". In actuality, the vast majority of the documents do not; they are documents that outline Bombardier's strategic plan for the *C-Series* project and provide detailed financial, commercial and technical information with respect to that project. They have nothing whatsoever to do with the "government's decision-making process".

In the order referred to by the appellant, Order P-982, the issue was whether the disclosure of the records would contribute in any meaningful way to the public's understanding of the activities of government (and the conclusion drawn was that they did not). In the present case, there is no basis upon which disclosure of the records at issue would have this effect. No public monies were expended. In addition, the only benefit that would arise from disclosure of the records would be to foster and significantly advantage the private commercial interest of Bombardier's main competitor and others in the marketplace. There is no public interest whatsoever, much less a "compelling" one, in the damage that would result to the competitive landscape within the aerospace industry.

There is similarly no basis for the claim that an international trade issue would be a compelling reason to, in the public interest, override the important protections established in section 17 of the *Act*. An expenditure of money that did not occur cannot be used to base any international trade complaint. The *Agreement on Subsidies and Contervailing Measures, Annex 1 A to the Marrakesh Agreement Establishing the World Trade Organization* defines a "subsidy" as, *inter alia*, "a financial contribution". It does **not** include a proposed or contemplated financial contribution or a situation where no contribution has been made (contingent or otherwise). To the extent that there were an allegation concerning a proposed (but now defunct) investment by Ontario, Bombardier's strategic, technical, commercial and financial information is irrelevant to the issue – it is not necessary to assess the nature of the aircraft, the details of the project and determine the specifics of the project (including disclosure of Bombardier's commercial partners and internal financial calculations) – the issue, rather may be reviewed without requiring the disclosure of this strategically, competitively and commercially sensitive information. However, notwithstanding any allegation made would be unfounded, the very fact of having made even a clearly unfounded allegations will under mine Bombardier's competitiveness within the aerospace industry to the benefit of [its competitor]. It undermines Bombardier's relationships with its customers and suppliers both of whom would be concerned by any possibility of litigation – again, even if clearly unfounded as such litigation would be – given the fact that no public funds were advance. There is no **public** interest whosoever in such a result. There is, however, a private commercial interest (that of Bombardier's competitor) that could significantly be advance by undermining, or attempting to undermine, Bombardier in the delicately balanced aerospace commercial market.

Analysis and finding

As noted above, to order the disclosure of the information which I have previously found exempt under sections 15, 17(1) and 18(1), I must be persuaded that there is a compelling public interest in the disclosure of the records and, if so, that the compelling public interest clearly outweighs

the purpose of those exemptions. In my view, in the current appeal, a compelling public interest does not exist and section 23 does not apply.

The appellant argues that with respect to the records at issue in this appeal that accountability and transparency are required to enable the public to better participate in the decision-making processes of government. Specifically, the appellant argues that there is a compelling public interest in the public knowing the decision-making process behind this proposal because a large sum of money was under consideration with respect to the *C-Series* project. The appellant also alleges that there are international trade issues, possibly a breach of international obligations that surround the *C-Series* proposal and that there is a compelling public interest that the records be disclosed so that the course of conduct adopted by the provincial and federal government in respect of this proposal can be revealed to the public.

First, as addressed by Bombardier, the great majority of the records at issue in this appeal do not relate to or reveal anything about government decision-making. All of the records that I have found to meet the exemption at section 17(1) were supplied by Bombardier and describe specific aspects of the *C-Series* project from Bombardier's perspective. Having reviewed the information contained in those records carefully, in my view, its disclosure does not reveal or shed light on government decision-making with respect to the *C-Series* project. Therefore, disclosure of this information could not serve this purpose and would, therefore, contribute little to government accountability and transparency. Other than Records 1, 2, 3, 18, 19 and 20, the records also reveal nothing about the specific financial contributions that were proposed by either Ontario or Canada and do not shed any light on the amount of money and the terms and conditions upon which they were prepared to finance the project. Therefore, I find that disclosure of the information in Records 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 would not contribute in any meaningful way to the public's understanding of government decision-making in such circumstances; nor is there a compelling public in the disclosure of the information for any other reason.

Records 1, 2, 3, 18, 19 and 20 contain information that makes up the provincial and federal governments' proposals for financing in support of the *C-Series* project. I accept that it could be argued that disclosure of these records might enable one to discern decisions taken by government decision-makers. This might include information concerning the decision respecting how much the respective governments felt the project would benefit their taxpayers by revealing how much they were prepared to contribute to secure the final assembly site for the *C-Series* aircraft. I also accept that with respect to this proposal, a large amount of money was under consideration, and that in most circumstances taxpayers have an interest in how their money is being spent by their governments. However, in the circumstances of this appeal, I do not accept that there is a *compelling* public interest in the disclosure of this information.

As noted above, the word "compelling" has been defined in previous orders as "rousing strong interest or attention". Also noted above, for there to be a compelling public interest in disclosure of a record, the information must serve the purpose of informing the citizenry about the activities

of their government, adding in some way to the information the public has to make effective use of means of expressing public opinion or to make political choices [Order P-984].

In the circumstances of this appeal, the appellant has adduced no evidence to demonstrate that there is general concern by the public with respect to the amount of money that was at issue, particularly in the case of Ontario, where no money was ultimately spent since the province's proposal was rejected.

Similarly, although the appellant makes reference to possible breaches of international trade obligations he has not adduced any evidence to demonstrate either that this indeed may be the case or that the public has been generally concerned that there has been such breach. Moreover, even if that unsubstantiated claim were founded, I accept the submissions of Bombardier that as the proposal was not accepted, no breach can be said to have taken place. As such, I do not find that the appellant has established that a public interest of a *compelling* nature exists to support the disclosure of the information at issue.

In sum, I find that no compelling public interest in the disclosure of the records at issue in this appeal exists. Accordingly, the public interest override at section 23 does not apply.

ORDER:

I uphold the Ministry decision to withhold all of the records at issue.

Original signed by: April 26, 2007
Catherine Corban
Adjudicator