

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3158

Appeal PA12-58

Ministry of Economic Development and Innovation

January 28, 2013

Summary: The ministry received a request under the *Act* for a copy of a funding agreement between the government and a named party (the affected party), and supporting documents. Following notification to the affected party, the ministry granted partial access to the agreement, relying on sections 17(1)(a) and (c) (third party information) to withhold portions of the record. The requester appealed the ministry's decision. During the inquiry, the ministry issued a revised decision, disclosing additional information previously withheld, with the consent of the affected party. This order finds that section 17(1) applies to some of the information about employees and year-to-year implementation of the project, and the public interest override does not apply to this information. The remaining withheld information, including total project investment and job commitments, is not exempt under section 17(1) and is ordered disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a) and (c)

Orders and Investigation Reports Considered: Orders MO-1706, PO-3149

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23

OVERVIEW:

[1] The Strategic Jobs and Investments Fund (the SJIF) is a program created by the Ministry of Economic Development and Innovation (the ministry) to provide strategic investments to businesses with leading projects in four priority sectors: clean/green technologies, financial services, information and communications technologies, and life sciences.

[2] This appeal concerns a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry for a copy of the SJIF funding agreement between the government and a named company (the affected party) and any supporting documents.

[3] The ministry notified the affected party of the request, and following receipt of its submissions, decided to grant partial access to the responsive records, relying on sections 17(1)(a) and (c) (third party information) and 21(1) (personal privacy) to withhold portions of them.

[4] The requester, now the appellant, appealed the ministry's decision.

[5] Mediation did not result in a resolution of the issues. The appellant clarified in mediation that he is not seeking access to portions of the records withheld pursuant to section 21(1) and that exemption is therefore no longer at issue in this appeal. The ministry issued a letter to the appellant advising him that it is also relying on section 17(2) (tax return information) to withhold one of the records.

[6] The appeal moved to the adjudication stage of the process. As part of my inquiry, I requested and received submissions from the appellant, the ministry and the affected party.

RECORDS:

[7] The information at issue in this appeal consists of the severed portions of an agreement between Ontario and the affected party dated February 18, 2011 (Record 1) and, specifically, information withheld from the following pages:

- 1-1 (Cumulative Job Target),
- 1-3 (Project Costs),
- 1-5 (Project Investment Commitment and Project Financing),
- 1-6 (Cumulative Job Target) and advance payment amount,
- 1-7 (Eligible Costs incurred)
- 1-8 (Disbursement of Grant),
- 1-11 (Absence of Litigation),
- 1-13 (Employees),

- 1-15 (Notice of Litigation)
- 1-16 and 17 (Default and Enforcement),
- 1-24 (Schedule "A" Project Description and Milestones),
- 1-28 (Project Investment Commitment Budget),
- 1-29 (Cumulative Job Target Chart),
- 1-30 and 31 (Schedule "C" Drawdown Certificate),
- 1-32 and 33 (Schedule "C-1" Schedule of Paid Eligible Costs),
- 1-34 to 36 (Schedule "C-2" Actual Expenditures and Project Cumulative Job Target Status charts)

[8] Also at issue are the following four supporting documents:

- Record 2: Certificate of Insurance and Confirmation (withheld in full)
- Record 3: Confirmation of Project Financing and attachments consisting of Corporation Notices of Assessment (withheld in full)
- Record 4: Drawdown Certificate "Schedule C" (withheld in part)
- Record 5: Legal opinion dated September 9, 2011 and attachments (withheld in full)

[9] As a preliminary matter, I discovered during my review of the records that part of Record 5 was not provided to this office. I requested the missing portion, which consists of pages 5-27 to 5-53. The ministry also amended its index to correct this omission. This apparently inadvertent omission did not affect the inquiry process as the ministry's representations accurately described Record 5 in any event.

ISSUES:

A. Does the mandatory exemption at section 17 apply to the records?

[10] I will deal firstly with section 17(2).

Section 17(2)

[11] Section 17(2) states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

[12] Section 17(2) is an amendment to the *Act*, and came into force on January 1, 1990. The purpose behind the enactment of section 17(2) was to correct the anomaly whereby information provided by an individual taxpayer was protected from disclosure by the operation of the presumption in section 21(3)(e) while similar information relating to other entities, such as partnerships and corporations, received no such

protection.¹ The words "obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax" in section 17(2) are similar to those in section 21(3)(e), reflecting that intent.

[13] The ministry submits that section 17(2) applies to Record 3 in its entirety. The ministry submits that the record contains specific information derived from the affected party's tax assessments and tax returns in respect of certain tax credits that the affected party received over the last two years. The ministry states that Record 3 includes copies of the affected party's actual notices of assessment issued by the Canada Revenue Agency.

[14] Neither the affected party nor the appellant specifically address this exemption.

[15] I find Record 3 exempt under section 17(2). The record consists of a letter to the ministry that identifies the tax credits the affected party received in the previous two years as well as Notices of Assessments from the Canada Revenue Agency. I find that this information is exempt under section 17(2) as the information identifying the amounts of tax credits would reveal information that is obtained on a tax return. Furthermore, the actual Notices of Assessment from the Canada Revenue Agency clearly contain information protected by section 17(2).

[16] Because of my conclusion, it is unnecessary to also consider whether section 17(1) applies to Record 3.

Section 17(1)

[17] Sections 17(1)(a) and (c) state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency

[18] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.²

¹ See Order PO-2059-I.

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct). leave to appeal dismissed, Doc. M32858 (C.A.) ("*Boeing*").

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.³

[19] For section 17(1) to apply, the institution and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial financial or labour relations information; and
2. the information must have been supplied to the 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) and/or (c) of section 17(1) will occur.

Representations

[20] The affected party is a video game developer. The ministry entered into a conditional grant agreement with it to support its business plan to expand production of its 3D game engine and to transition into a business that published its own video games. The amount of the grant, which was disclosed, was to a maximum of \$2,500,000. The grant was conditional on the affected party meeting certain investment and job commitments, as well as complying with reporting obligations and covenants.

[21] The SJIF program is described in the ministry's representations and the SJIF Program Guidelines. To be eligible for an investment under the SJIF, a proponent must submit a business plan. The ministry provides proponents with a number of templates to use when submitting their business plans. One of the elements of the business plan is a "project description" which describes in detail the intended project including the jobs to be created, investments made, economic and environmental benefits to Ontario, product and process innovation, and alignment with the SJIF criteria.

[22] Proponents must also complete five charts which provide detail on project milestones, sources of financing, project costs, job targets and security that would be available to secure an SJIF loan. They must also submit other documents such as audited financial statements and a five-year forecast of revenues, expenses and cash flows.

³ Orders PO-1805, PO2018, PO-2184, MO-1706.

[23] As described in the Program Guidelines, the ministry and/or third party agents hired by the ministry review the completed business plan to verify that:

- there is a viable project plan, budget, market assessment and evidence of ongoing sustainability;
- there are requisite organizational and managerial capabilities and financial capacity to achieve the stated objects of the project; and
- the SJIF program objectives and criteria are met.

[24] If the ministry conditionally approves the business plan submission, a letter of offer is negotiated with the proponent setting out principle business terms for the agreement, including accountability mechanisms as a condition of the ministry's financial support.

[25] The affected party submitted a business plan to the ministry in early 2011. The ministry hired an accounting firm to perform financial due diligence on the proposal and also hired a third party consultant to review the technical aspects of the proposal. The ministry submits that the third party consultants were not hired to and did not provide recommendations about changing the business aspects of the submission but, instead, provided their advice about its financial and technical feasibility.

[26] Following these reviews, the ministry agreed to fund the business plan if appropriate funding terms could be agreed to. The two parties then negotiated a letter of offer setting out key elements of how the ministry would provide the conditional grant, such as events of default, clawback formulas if the affected party did not meet the job and investment targets set out in its submission, and reporting obligations.

[27] The SJIF agreement, the record at issue, is based on the business plan and the letter of offer.

[28] Following the signing of the agreement, and in accordance with the agreement, the affected party requested a first disbursement under the grant, providing a drawdown certificate (Record 4), certificate of insurance (Record 2), and an opinion from counsel for the affected party (Record 5) (as well as Record 3, which I need not consider here).

[29] The ministry indicated specifically that it would not be making representations regarding the severed portions of pages 1-6, 1-11, 1-15, 1-17, 1-32, 1-33, 1-35 1-36 in Record 1, or Record 4.

[30] With respect to other severances and records, the ministry submits that they contain "commercial" or "financial" information provided in confidence to the ministry as part of the affected party's business plan proposal. It submits that disclosure of this

information would cause the harms to the affected party set out in sections 17(1)(a) and (c) as well as undermine the effectiveness of the SJIF program.

[31] With its submissions, the ministry includes a chart showing the relationship between the severed information in Record 1 and information found in the affected party's business plan submission.

[32] The ministry submits that the information contained in the affected party's business plan submission was independently determined by the affected party, based on its understanding of its business practices, its business goals and its economic circumstances. It submits that the submission is akin to a submission to many kinds of funding bodies in which a person develops a project and describes it to a funding body and then the funder decides whether to provide financial support but does not seek to alter the nature of the project proposed.

[33] The ministry submits that its review did not seek to alter the affected party's business fundamentals and focused on whether the business plan met the requirements of the SJIF program, whether the affected party provided sufficient detail to enable the ministry to properly review the submission and whether the project was likely to succeed, as informed by the ministry's third-party due diligence providers. As such, the ministry states that the severed information in Record 1 was merely reviewed and approved by the ministry and inserted into the finalized agreement without any negotiation.

[34] The ministry contrasts the information taken from the business plan submission with negotiated provisions in Record 1, such as the positive and negative covenants and default and enforcement procedures. The ministry has not sought to exempt these provisions under section 17(1).

[35] The ministry states that Records 2, 3 and 5 were provided to it by the affected party as part of a request for the disbursement of a portion of the grant. These documents were produced by entities other than the ministry and contain information related to the affected party's internal business operations. It states that Record 2 contains information relating to the affected party's insurance practices, and Record 5 contains information on its corporate policies, incorporation matters, capital and share structures, by-laws and corporate practices and procedures.

[36] With regard to the requirement that the information be supplied in confidence, the ministry submits that it keeps all submissions made under the SJIF program in confidence, in keeping with the sensitive and non-public nature of much of the information provided as part of the proposals. In addition, the ministry submits that the third party service providers that the ministry used to assist in reviewing the affected party's business plan were also subject to confidentiality provisions. The ministry refers to section 11.3 of the agreement which states,

Except as otherwise provided in this Agreement, subject to [the *Act*] and except as it may be legally required to disclose, Ontario shall use its best efforts to maintain the confidentiality of information received from the Recipient and shall provide the Recipient with notice of any request from a third party for information received from the Recipient.

[37] Referring to section 17(1)(a) of the *Act*, the ministry submits that the release of the information at issue would provide the affected party's competitors with details of its current and proposed hiring practices, status of its prototypes for certain digital media games, its business plans and the expected costs of these plans and corporate structure. The ministry states that making this information public would assist the affected party's competitors in understanding the company's proprietary game development and intellectual property strategy, release schedule, and allow for better targeting of customers and potential customers including game development publishing partners.

[38] Disclosure, it is submitted, would also allow inferences to be made about the affected party's profitability, tax credits and refunds earned and its position in the marketplace. The ministry states that the affected party is not a public company and information regarding its costs and profitability would not otherwise be known.

[39] Further, the ministry submits that the release of the information would interfere significantly with the negotiations between the affected party and its game development publishers, customers and potential customers.

[40] The ministry refers to Order PO-2734, in which the IPC held that disclosing details of certain insurers' financial position, company marketing strategies and assumptions would prejudice the position of the insurers relative to their competitors. The ministry states that this office held that, in the context of the competitive insurance industry, disclosure of the information relating to marketing plans and costs would be harmful to the company whose data is disclosed.

[41] With regard to section 17(1)(c), the ministry submits that the disclosure of the severed portions of the agreement would result in undue loss to the affected party, as well as undue gain to the affected party's competitors and potential customers, because it would enable its competitors to more fully understand the affected party's financial outlook, thereby altering how they interact and compete with the affected party.

[42] The affected party submits that it asked for redaction only of portions that contained sensitive corporation information. It states that disclosure of this information could damage its future business plans.

[43] The appellant does not address the first two parts of the test under section 17(1), focusing on the evidence of harm. The appellant submits that the ministry has

failed to prove that any harm would come from disclosure of the relevant records. He states that disclosure of the contract and job targets does not in itself create harm. Further, he submits that the ministry does not prove how knowing an overall job target can tell competitors about the stage of a product, the types of employees hired or their specialty, or how knowing this information would cause harm to the affected party. He disagrees that the information would disclose the company's financial outlook, future hiring practice, status of prototypes, intellectual property, or its position in the marketplace.

[44] The appellant's main position is that the public good is served by disclosure of jobs plans such as the one in this appeal. I will deal with the arguments about the public interest in disclosure later in this order.

Analysis

[45] As a preliminary matter, I note that the ministry specifically indicated that its representations do not cover the severed portions of pages 1-6, 1-11, 1-15, 1-17, 1-32, 1-33, 1-35 1-36 in Record 1, or Record 4. The affected party's representations were very brief and did not address these records. I find that the application of the section 17(1) has been established for these portions of the records. Even if some of them contain the type of information covered by section 17(1), and was supplied in confidence, I have no evidence that disclosure of any of it could reasonably be expected to lead to the harms described in that section. I will therefore order these portions to be disclosed and need not discuss them further.

Part 1: Type of Information

[46] This office has stated that "commercial information" is information that relates solely to the buying, selling or exchange of merchandise or services. In addition, this office has stated that "financial information" refers to information relating to money and its use or distribution and must contain or refer to specific data. I am satisfied that the information withheld by the ministry from Records 1, 2 and 5 is commercial or financial information. The information in Record 1 relates to the affected party's plans regarding expansion of a product area and intended transition to a self-publishing entity, including its current and proposed hiring practices, project costs and investments, project timelines and sources of financing. Record 2 contains details of the affected party's commercial insurance.

[47] The first part of Record 5, the legal opinion, contains commercial information as it addresses Article 5 of the agreement requiring a legal opinion confirming the corporate status of the affected party, its power and authority to enter into the agreement and other topics. The attachments to Record 5 also qualify as commercial information. They collectively describe the affected party's corporate structure, status,

officers and directors, share structure and procedures of the corporation, and related matters.

Part 2: Supplied in Confidence

[48] The requirement that it be shown that information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.⁴

[49] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate references with respect to information supplied by a third party.⁵

[50] The contents of a contract involving an institution will not normally qualify as having been supplied for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.

[51] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated information supplied by the affected party to the institution. The “immutability” exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.⁶

[52] I accept the ministry’s submission that most of the information at issue is taken directly from or derived from the affected party’s business plan submission. That, however, is not determinative of whether the information was “supplied” within the meaning of section 17(1). As indicated above, this office has stated,

... the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was “supplied” within the meaning of section 10(1) [the municipal equivalent to section 17(1)]. The terms of a contract have been found not to meet the criterion

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ Orders MO-1706, PO-2384, PO-2435 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).⁷

[53] Thus, in the usual course, agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied", even if the "negotiation" amounts to acceptance of the terms proposed by the third party: see Orders PO-2384 and PO-2497.

[54] In this case, I find that the essential bargain between the ministry and the affected party is the ministry's commitment to provide a grant under the SJIF, conditional on the affected party's commitment to invest in the project described in its business plan, and create jobs as a result. Once the government accepted the affected party's business plan submission, with its investment and job creation targets, those elements became part of the bargain agreed to between them. As incorporated into the funding agreement, these investment and job creation targets are not the "informational assets" of the affected party, but agreed-upon essential terms of the agreement.

[55] The ministry has submitted that in its review of the business plan, it does not seek to alter the business fundamentals. I accept that the ministry's role as funder does not encompass the type of input that, for example, a potential business partner may have. But it is indisputable that the ministry's funding was subject to the affected party's commitment to meet the key elements of its business plan. Once these elements became incorporated into the conditional grant agreement, it would be incorrect to characterize those terms as "belonging" to the affected party in the sense protected by section 17(1). This information "belongs" as much to the ministry as to the affected party.

[56] Further, on the material before me, it is apparent that some of the severed information was specifically negotiated. An example of this is the amount the ministry and the affected party agreed to as a court judgment significant enough to constitute an event of default under the agreement (page 1-17).

[57] Based on the above principles, I find that the information severed from pages 1-1, 1-3, and the amounts specified as Project Investment Commitment and Project Costs on page 1-5 of Record 1, were not "supplied" within the meaning of section 17(1). I also find that the information severed from pages 1-6 (Cumulative Job Target and Conditions of First Disbursement), 1-7 and 1-8 (Disbursement of Grant), 1-11 (Absence of Litigation), 1-15 (Litigation), 1-16 and 1-17 (Default and Enforcement) and 1-30 was not supplied. This information reflects terms which were either part of the essential bargain between the parties, albeit unchanged from the affected party's business plan,

⁷ Order MO-1706. This approach was approved in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, above at note 2.

or negotiated specifically to take account of the affected party's project and circumstances.

[58] I accept the submission that information severed from pages 1-5 (with the exception of Project Investment Commitment and Project Costs) and 1-13, 1-24 and the five year investment commitment budget and job commitment budget on pages 1-28 and 1-29 (with the exception of the total eligible costs figure on page 1-28 and total job target on page 1-29, which are part of the essential conditions of funding) was supplied. The detailed information about the affected party's year-to-year business plan, revealing its current and projected activities, hiring patterns, timetable for the various stages of the project, budget and sources of financing, is immutable in the sense that it is fixed and non-negotiable.

[59] Records 2 and 5 were supplied to the ministry. They do not form part of the agreement and are documents sent to the ministry following execution of the agreement providing information or assurances about the affected party.

[60] Based on the submissions, I am satisfied that the affected party provided the above information to the ministry with a reasonable expectation that the ministry would maintain its confidentiality, subject to potential disclosure under the *Act*. It appears that some of this information was subsequently the subject of public announcements about the ministry grant, but I will address the impact of this in the discussion of "harms" below.

Part 3: Harms

[61] As I have found that some of the withheld information does not qualify as having been "supplied" within the meaning of section 17(1), that information is not exempt. The following discussion considers whether the information remaining at issue satisfies the third part of the three-part test for exemption.

[62] This office has issued many decisions describing the nature of evidence required to satisfy this part of the test under section 17(1). Generally this office has stated that the institution and/or the third party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.⁸

[63] Recently, in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23, the Supreme Court of Canada undertook a thorough examination of the third party information exemption under the federal access to information law. In that decision, the Court concluded that a third party claiming an exemption under the federal equivalent to section 17(1) of the *Act* must show that the risk of harm is

⁸ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

"considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur."

[64] Although it is not clear that there is any meaningful difference between the principles expressed in *Merck Frosst* and those in prior IPC decision, I find that applying either set of principles, my conclusion will be the same in this appeal.

[65] In this case, the affected party made only the briefest of representations on the issues. I have noted in other decisions (see Order PO-3149) that the absence of representations from the party in the best position to provide them may result in a lack of adequate evidence on the issue of harm. In this case, however, I am satisfied that the ministry's representations address the circumstances of this affected party and are not simply broad and generalized assertions of harm.

[66] I find that the ministry has provided me with detailed and convincing evidence to establish a reasonable expectation of harm from the disclosure of the information remaining at issue on pages 1-5, 1-24, 1-28 and 1-29 of Record 1, with exceptions as noted below. Some of the information on these pages reveals the affected party's sources of financing as well as details about its business plans year-over-year for five years. This information is not publicly available and I agree that disclosure would provide the affected party's competitors with details of its year-by-year proposed hiring strategies, budget, product development and business strategies. I find that the risk of harm is "considerably above a mere possibility".

[67] In this case, however, I find that disclosure of the Project Description on page 1-24, and information about the affected party's level of employment at the time of the agreement (on page 1-13) could not reasonably be expected to lead to the harms described in section 17(1). This information became known through public announcements about the ministry funding given to the affected party.

[68] In the circumstances, I find that sections 17(1)(a) and (c) of the *Act* apply to exempt the information withheld from these pages of the agreement in Record 1.

[69] I find, however, based on the representations, that no party has provided sufficient evidence of harm under section 17(1) in relation to the disclosure of Records 2 and 5. The ministry's representations do not convince me that there is a reasonable expectation of harm from the disclosure of Records 2 and 5. Record 2, a Certificate of Insurance, does not provide the kind of insight into the affected party's current and proposed business strategies that could reasonably lead to harm to its competitive position or undue loss or gain.

[70] Record 5, the legal opinion, provides a number of standard recitals that, again, do not disclose details of business strategies that could lead to harm to the affected party. The attachments describe the affected party's corporate structure but I do not

see how this information could be used to harm its competitive position particularly as some of it, in particular the Articles of Amalgamation, is publicly available in any event.

B. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 17 exemption?

[71] Section 23 of the *Act* 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.

[72] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[73] 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 operation of government.⁹ 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 or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion to make political choices.¹⁰

[74] Any public interest in *non*-disclosure that may exist must also be considered.¹¹ If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered “compelling” and the override will not apply.¹² Further, the existence of a compelling public interest is not sufficient on its own to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claimed in the circumstances of the appeal.

Representations

[75] In this case, the appellant submits that Ontarians are owed disclosure of the records at issue. The appellant submits that the public deserves to know how effectively their money is spent, whether government initiatives are achieving their stated goals, and whether the money was spent as directed. He states that it is also in the best interest of the business climate of the province for there to be full and

⁹ Orders P-984, PO-2607.

¹⁰ Orders P-984, PO-2556.

¹¹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

¹² Orders PO-2072-F and PO-2098-R.

forthright disclosure as it gives businesses the knowledge that programs are executed fairly and efficiently.

[76] The ministry's reply representations address the public interest override by submitting that it has already disclosed the vast majority of this agreement. It states that the portions of the agreement that the ministry has released set out "safeguards and assurances" including mandatory repayment terms, conditions of disbursement, reporting obligations, representations and warranties and affirmative and negative covenants. Further, the ministry states that the released portions of the agreement provide information that describes the project, the amount of the grant provided and what constitutes eligible costs for disbursements. The ministry submits that, to the extent there is a public interest in revealing more of the affected party's confidential commercial information, it does not clearly outweigh the purpose of the exemption of section 17.

Analysis

[77] Combining the ministry's previous disclosure with the result of this order, almost all of the details of the agreement have been or will be disclosed through this request and appeals process, including the amount of the grant, conditions of disbursement, the amount the affected party has committed to spending, and the number of jobs intended to be created. Other information already disclosed includes the clawback and default provisions of the agreement.

[78] Given the considerable amount of information the appellant will be provided about this project, even if there were a public interest in disclosure of the remaining information, I am not convinced that it clearly outweighs the purpose of the section 17(1) exemption.

[79] In conclusion, I find that some of the undisclosed information on pages 1-5, 1-24, 1-28 and 1-29 is exempt under section 17(1) of the *Act* and the public interest override does not apply. The remaining undisclosed information is not exempt under section 17(1) and I will order it disclosed.

ORDER:

1. I order the ministry to disclose additional portions of Record 1, and the entirety of Records 2, 4 and 5 (except for portions withheld under section 21(1)) by providing the appellant with a copy of the records by **March 5, 2013**, but not before **February 27, 2013**. A highlighted copy of the relevant pages of Record 1 identifying the information to be withheld is enclosed with the ministry's copy of the order. To be clear, I have highlighted the information to be **withheld**.

2. I uphold the ministry's decision relating to the remaining information at issue which I have found exempt under the mandatory exemptions in section 17(1) or 17(2).
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, upon my request.

January 28, 2013

Sherry Liang
Senior Adjudicator