

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3157

Appeal PA12-57

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: Order MO-1706

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 agreement (Record 1), relying on sections 17(1)(a) and (c) (third party information) to withhold portions of it. The ministry also provided the requester with a complete copy of a supporting document, the guarantee and postponement of claim provided by the affected party (Record 2).

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

[5] Mediation did not result in a resolution of the issues and 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.

[6] During my inquiry, the ministry received consent from the affected party to additional disclosure. It issued a revised decision disclosing additional information previously withheld under the section 17(1) exemption. The requester continues to seek access to the remaining withheld portions.

RECORD:

[7] The information at issue in this appeal consists of the severed portions of pages 1-1 (Cumulative Job Target), 1-3 (Project Related Jobs and Project Costs), 1-5 (Project Investment Commitment and Project Financing), 1-8 (Disbursement of Grant), 1-13 (Employees), 1-16 (Default and Enforcement), 1-24 (Schedule "A" Project Description and Milestones), 1-26 (Training), 1-28 (Project Investment Commitment Budget) and 1-29 (Project Job Commitment Budget) in an agreement between Ontario and the affected party, dated August 1, 2011.

ISSUES:

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

[8] 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

[9] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions¹. 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.²

[10] 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) section 17(1) will occur.

Representations

[11] The affected party is a financial services provider. The ministry entered into a conditional grant agreement with it to support its business plan to expand specialized

¹ *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*").

² Orders PO-1805, PO2018, PO-2184, MO-1706.

funds services it offered to Canadian fund managers. The grant was conditional on the affected party meeting certain investment and job commitments, as well as complying with reporting obligations and covenants.

[12] 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.

[13] 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.

[14] 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.

[15] 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.

[16] The affected party submitted a business plan to the ministry in May 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.

[17] 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.

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

[19] The ministry submits that the severed portions 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.

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

[21] 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.

[22] 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 was merely reviewed and approved by the ministry and inserted into the finalized agreement without any negotiation.

[23] The ministry contrasts the information taken from the business plan submission with negotiated provisions in the record, 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).

[24] 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 *Acf*] 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.

[25] 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, its expected costs and its business plans. The ministry notes that the affected party is a relatively small business entity and disclosing the information at issue may jeopardize its competitive position and its ability to attract new clients.

[26] The ministry submits that the release of the information could also allow inferences to be made about the affected party's profitability and its position in the market place. The ministry states that the disclosure could influence how the affected party is perceived by current and potential customers and how other businesses in the financial services industry interact with it. The ministry states that the affected party is not a public company and information regarding its costs and profitability would not otherwise be known.

[27] 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.

[28] 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. The ministry submits that information relating to the affected party's hiring practices, financing, costs and business direction are central to its operations and disclosure of this information can reasonably be expected to benefit, and cause undue gain to, the affected party's competitors.

[29] In its representations, the affected party states that it fully endorses the ministry's submission. The affected party also provided me with extracts from the original 5-year budget and project plan charts submitted to the ministry with its business proposal to show that this information was directly incorporated into the grant agreement between itself and the ministry. In particular, the affected party states that the budget and project plan charts demonstrate the calculations leading to figures used in the grant agreement, specifically:

- the salaries of the different levels of employees;
- the number of staff hired by the affected party in relation to the number of clients serviced;
- the ratio of supervisory staff to fund accountants;
- specific milestones setting out the forecast dates of reaching specific goals relevant to the affected party's progression in the next 5 years; and
- details of all other ineligible running costs of the affected party

[30] The affected party submits that disclosure of the above information would place it at a discernible competitive disadvantage. It submits that, in order to remain competitive in the marketplace, it is important that the amount spent on training and the associated salary levels remain confidential. The affected party submits that if the salary levels of its employees are disclosed in conjunction with the other information at issue in this appeal, competitors would be able to draw its employees away by offering better compensation.

[31] 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 affected party and the ministry have not provided detailed or convincing evidence as to how disclosure of the information at issue would cause the harms described in sections 17(1)(a) and (c). He submits that the affected party has not demonstrated how disclosure of the information would help any other competitor or interested party or how disclosure would have a negative impact on its ability to attract or retain clients or positively impact the ability of competitors to attract clients away from the affected party.

[32] 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

Part 1: Type of Information

[33] 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 is commercial or financial information. The information relates to the affected party's sale of its financial services, including its current and proposed hiring practices, project costs and investments, project timelines and training practices and costs.

Part 2: Supplied in Confidence

[34] 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 parties³.

[35] 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 party⁴.

[36] 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.

[37] 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 products⁵.

[38] I accept the ministry’s submission that most of the information at issue is taken directly 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 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).⁶

³ Order MO-1706.

⁴ Orders PO-2020 and PO-2043.

⁵ 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.).

⁶ MO-1706. This approach was approved in *Boeing*, above at note 2.

[39] 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.

[40] 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 establishment of a fund administration office, 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.

[41] 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.

[42] 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, was not "supplied" within the meaning of section 17(1). I also find the information severed from pages 1-8 (Disbursement of Grant) and 1-16 (Default and Enforcement) was not supplied. This information reflects negotiable terms covering conditions of disbursements of the grant and events understood to amount to default and does not, with any specificity, reveal details of the affected party's business plans .

[43] Although I accept the submission that the information severed from page 1-26 was part of the affected party's budget submission to the ministry, it is apparent from the wording of these provisions that they reflect negotiable commitments. I find they do not qualify as supplied information.

[44] I accept the submission that the information severed from pages 1-5 (with the exception of Project Investment Commitment and Project Costs), 1-13, 1-24 and the year-to-year investment commitment budget and job commitment budget on pages 1-28 and 1-29 (with the exception of the cumulative totals) is supplied information. 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.

[45] Based on the submissions, I am satisfied that the above information was supplied with a reasonable expectation that the ministry would maintain its confidentiality, subject to potential disclosure of the *Act*.

Part 3: Harms

[46] 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.

[47] 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.⁷

[48] 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 “considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur.”

[49] 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.

[50] I find that the ministry and affected party have provided me with detailed and convincing evidence to establish a reasonable expectation of harm under section 17(1) from the disclosure of the information remaining at issue on pages 1-5, 1-13, part of 1-24 1-28 and 1-29 of the agreement. 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 current and proposed hiring practices and its confidential business plans. The affected party is a relatively small business entity and disclosing the information at issue may jeopardize its competitive position. The risk of harm is “considerably above a mere possibility”.

⁷ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

The exception to these findings is the Project Description on page 1-24, which has been the subject of public announcements about this ministry grant.

[51] In the circumstances, I find that sections 17(1)(a) and (c) of the *Act* apply to exempt some of the information withheld from pages 1-5, 1-13, 1-24, 1-28 and 1-29 of the record.

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

[52] 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.

[53] 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.

[54] 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 government⁸. 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 choices⁹.

[55] Any public interest in *non*-disclosure that may exist must also be considered¹⁰. 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 apply¹¹. 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

[56] 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

⁸ Orders P-984, PO-2607.

⁹ Orders P-984, PO-2556.

¹⁰ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

¹¹ Orders PO-2072-F and PO-2098-R.

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

[57] 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

[58] The only information I have found exempt from disclosure are portions of five pages of the agreement. 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.

[59] 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.

[60] In conclusion, I find that the undisclosed information on pages 1-5 (with the exception of Project Investment Commitment and Project Costs), 1-13, 1-24 (with the exception of the Project Description), 1-28 and 1-29 (with the exception of cumulative totals) 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 the information by providing the appellant with a copy of the record by **March 5, 2013** but not before **February 27, 2013**. A highlighted copy of the relevant pages 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 exemption in section 17(1).
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 record disclosed to the appellant pursuant to Provision 1, upon my request.

January 28, 2013

Sherry Liang
Senior Adjudicator