

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3303

Appeal PA13-115

Ministry of Agriculture, Food and Rural Affairs

February 3, 2014

Summary: The requester sought access to certain correspondence passing between the Ontario Farm Products Marketing Commission and an identified individual. The ministry decided to grant access to the records with the exception of certain personal information which they contain, and notified two parties whose interests may be affected by the disclosure of the records. One of these parties appealed its decision to grant access to the records on the basis that it was exempt under section 17(1). In this order, the adjudicator finds that the records are not exempt under section 17(1) as the information was not supplied within the meaning of that term in the exemption.

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

OVERVIEW:

[1] The Ministry of Agriculture, Food and Rural Affairs (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

I seek copies of all correspondence since Nov. 1, 2012 between the Ontario Farm Products Marketing Commission (the OFPMC) and [a named individual].

[2] The ministry notified two parties whose interests may be affected by the disclosure of the information contained in the responsive records pursuant to section 28 of the *Act*. After reviewing their representations, the ministry issued a decision to the requester and the other two parties advising that it had decided to deny access to a portion of two records on the basis that they contain personal information that is exempt under section 21(1) of the *Act*. It also decided that the remaining information ought to be released to the requester.

[3] One of the parties who received notification under section 28 (now the appellant), appealed the ministry's decision to disclose any of the information relating to it that may be contained in four of the records identified as responsive to the request.

[4] During mediation, the appellant indicated that it is objecting to the disclosure of a particular letter, which it identified as Record 2, and to any other correspondence with the OFPMC relating to its investigation because its disclosure would negatively affect its interests, relying on the mandatory third party information exemption in section 17(1) of the *Act*. The appellant also maintains that the records contain personal information which was collected during the OFPMC's investigation and that access to them should be denied under section 21(1) because the personal information they contain falls within the ambit of the presumptions in sections 21(3)(b) and 21(3)(g) of the *Act*.

[5] In order to clarify the records at issue in this appeal, the ministry provided the appellant with an index describing the four records that relate to the appellant in which it clarified its decision to deny access to the personal information contained in two of the records, pursuant to section 21(1) of the *Act*.

[6] Also during mediation, the requester advised that he is not seeking access to any personal information relating to the appellant or the other party who received notification under section 28 to which the ministry has denied access. However, the requester clarified that he continues to seek access to the balance of the information in the records and maintains that there exists a public interest in disclosure, as contemplated by section 23 of the *Act*.

[7] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the party resisting disclosure of the records, in this case the appellant, initially. The appellant made extensive representations about the application of the personal privacy exemption to the personal information contained in two of the records. As noted above, however, the requester has indicated that he is not seeking access to such information. As a result, I will not be addressing the appellant's submissions regarding the possible application of section 21(1) to the records as the personal information they contain is not at issue.

[8] The appellant raised the issue of whether one of the records at issue was the subject of a confidentiality directive by the Chair of the OFPMC and I will address the possible ramifications of this as a preliminary issue in this order.

[9] In this order, I uphold the ministry's decision to disclose the records to the requester, with the exception of the personal information which they contain.

RECORDS:

[10] The records remaining at issue consist of portions of four letters sent to and from the OFPMC. Information in the records that qualifies as "personal information" has been removed from the scope of the request.

DISCUSSION:

Preliminary Issue:

What is the effect of the direction from the Chair of the Ontario Farm Marketing Products Commission dated December 13, 2012 respecting the confidentiality of any submissions made to it?

[11] In a letter dated December 13, 2012 to the parties to a proceeding before it, the Chair of the OFMPC requested that they "maintain the confidentiality of your submissions" and "subject to any legal requirements for disclosure, and that you treat the submissions of the other parties in the same confidential manner." The letter also asks the parties to "refrain from disclosing them to other persons unless required to do so by law." In the appeal before me, one of the responsive records is the submission of one of the parties to the proceeding before the OFMPC.

[12] The submission in question is a four-page letter sent by counsel for another egg producer (the petitioner) addressing the threshold issue of whether the OFPMC ought to proceed with an investigation into certain serious allegations about the appellant's business practices. I note that this letter was copied to a number of other parties, including counsel for the Ontario Egg Producers, the appellant's counsel, the petitioner and another individual who was involved in the complaint, a former employee of the appellant.

[13] The appellant's counsel argues that the effect of the Chair's ruling was to prevent the public disclosure of the information submitted to the OFPMC by all of the parties to the proceeding until its investigation was concluded and the issues raised by the original complainant and counsel for the petitioner were addressed. Counsel submits that by disclosing the submissions, the confidentiality intended to cover the OFPMC's process would be destroyed.

[14] The Chair's instruction or direction to the parties to the proceeding requested that they not publicly disclose their submissions, or those of the other parties, until the OFPMC's determination is made to proceed or not proceed with an investigation of the allegations.

[15] In its representations, the appellant indicates that "the [OFPMC] determined that it would not proceed with the inquiry sought with respect to the Appellant", though it is "currently actively involved in an investigation regarding the governance structure of the Ontario Egg Producers arising from the Petitions filed [by the petitioner and the former employee of the appellant]."

[16] It is evident, based on the information provided by the appellant, the proceedings before the OFPMC that relate to the allegations of wrongdoing by the appellant are now completed. The direction provided by the Chair to the parties to that proceeding are now, accordingly, of no effect since the matter is no longer current. As a result, I find that the Chair's direction requesting that the parties not publicly disclose the submissions is no longer in effect and I need not consider it further.

Are the records exempt from disclosure under section 17(1) of the *Act*?

[17] The sole issue for determination in this appeal is whether the records are exempt under the mandatory exemption in section 17(1) of the *Act*, which reads, in part:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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

[19] For section 17(1) to apply, the party resisting disclosure, in this case the appellant, 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.

Part 1: type of information

[20] The appellant takes the position that the records contain commercial information within the meaning of that term in section 17(1), which has been discussed in prior orders:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

[21] The appellant argues that because the records relate to certain allegations made about its business practices by other individuals, they are concerned with the appellant’s commercial and marketing activities. Based on my review of the records themselves, I find that the documents identified by the appellant as Records 1, 3, 4 and 5 do not contain any information relating to its business activities; nor do they relate to the buying, selling or exchange of merchandise or services. Rather, these records

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.).

² Orders PO-1805, PO-2018, PO-2184, MO-1706.

address certain logistical problems encountered in presenting one party's submission to the OFPMC and the discussion around the confidentiality of those submissions, which I addressed above. As all three parts of the test under section 17(1) must be satisfied in order for a record to qualify for exemption, I find that Records 1, 3, 4 and 5 are not exempt under section 17(1). As no other exemptions have been claimed to apply to them, and no other mandatory exemptions apply, I will order that they be disclosed to the requester.

[22] Record 2 is the actual submission made by the petitioner's counsel, dated December 3, 2012 in which its allegations about the appellant's practices are referred to and an investigation by the OFPMC is requested. I find that this record contains information that qualifies as "commercial information" as it discusses the multitude of legal proceedings under way between the parties, including the appellant, and requests that the OFPMC undertake an investigation into its activities. As a result, I conclude that the first part of the test under section 17(1) has been satisfied.

Part 2: supplied in confidence

Supplied

[23] 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 to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

[24] The information at issue in Record 2 was provided to the OFPMC by counsel for the petitioner, and not by the appellant. Accordingly, I find that the information which qualifies as "commercial information" was not "supplied" directly to the institution by the appellant, nor would its disclosure reveal any information that originated with the appellant. The appellant acknowledges in its representations that the information was supplied to the OFPMC by the petitioner as part of its request for an investigation by that agency.

[25] Because the second part of the test under section 17(1) has not been satisfied by the appellant with respect to Record 2, it does not qualify for exemption under that section. As was the case with Records 1, 3, 4 and 5, no other exemptions have been claimed to apply to Record 2 and no mandatory exemptions apply to it. I will, accordingly, order that it be disclosed to the requester as well, with the severance of any personal information that is contained in the records.

ORDER:

1. I order the ministry to disclose the records at issue, with the severance of any personal information, to the appellant by providing him with a copy by **March 11, 2014** but not before **March 6, 2014**.
2. I reserve the right to require the ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Order Provision 1.

Original Signed by: _____
Donald Hale
Adjudicator

February 3, 2014 _____