

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3449

Appeal PA14-160

Ministry of Economic Development, Employment and Infrastructure

January 15, 2015

**Summary:** The ministry received a request for access to a specified agreement between it and a named party. The ministry notified an affected party, who objected to disclosure of portions of the record on the basis of the exemption at section 17(1) (third party information) of the *Act*. The ministry stated that it intended to withhold some portions of the record from the requester, but to disclose other parts of the record. The affected party appealed the ministry's decision to disclose three specific portions of the record. This order determines that the three portions of the record remaining at issue do not qualify for exemption under section 17(1) and orders that they be disclosed.

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

**Orders and Investigation Reports Considered:** Orders PO-3032 and PO-3185.

### OVERVIEW:

[1] The Ministry of Economic Development, Employment and Infrastructure (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any agreements with a named company announced on a particular date.

[2] Upon receiving the request, and pursuant to section 28 of the *Act*, the ministry notified a party whose interests may be affected by disclosure (the third party) of the request. In response, the third party identified for the ministry the portions of the agreement which it consented to disclosing, and the portions which it wished to have redacted based on the exemption in section 17(1) (third party information) of the *Act*. After reviewing the third party's response, the ministry indicated that it was prepared to withhold some portions of the agreement the third party objected to disclosing, but not other portions of the agreement.

[3] The third party appealed the ministry's decision to disclose certain portions of the agreement.

[4] During mediation, the third party appellant agreed that certain information could be released to the requester, but not other information. The ministry then issued a supplementary decision in which it advised the original requester that access was granted to portions of the record, but that portions were being withheld on the basis of the exemptions in sections 17 and 18 (economic interests of the institution) of the *Act*. An index of records and partial access to the records was provided with the decision.

[5] Also during mediation, the original requester confirmed that he was not appealing the ministry's decision to withhold certain information, but that he was pursuing access to the portions of pages 39 and 40 which the ministry was prepared to disclose, but which the third party had appealed. This information consists of the first two sentences of the second paragraph on page 39, the last paragraph on page 39 and the first paragraph on page 40.

[6] Mediation did not resolve this appeal, and the file was moved to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. Because the third party appellant is the only party objecting to disclosure of the relevant portions of pages 39 and 40, I sent a Notice of Inquiry identifying the facts and issues in this appeal to the third party, initially. I received representations from the third party and, after reviewing them, decided that it was not necessary to seek submissions from the other parties.

[7] In this order, I find that the portions of the record that are at issue do not qualify for exemption under section 17(1) and I order that they be disclosed.

## **RECORDS:**

[8] The portions of the record remaining at issue consist of the following information: the first two sentences of the second paragraph on page 39, the last paragraph on page 39 and the first paragraph on page 40.

## **DISCUSSION:**

[9] The sole issue to be decided in this appeal is whether the portions of the record remaining at issue qualify for exemption under the mandatory exemption in section 17(1) of the *Act*, which states:

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
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[10] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>1</sup> 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.<sup>2</sup>

[11] For section 17(1) to apply, the institution and/or the third 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

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<sup>1</sup> *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*”).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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) and/or (c) of section 17(1) will occur.

***Parts 1 and 2: "type of Information" and "supplied in confidence"***

[12] The third party provided representations in support of its position that the information at issue in this appeal is "commercial" information for the purpose of section 17(1). It also submits that the information was supplied by it in confidence to the ministry. However, because of my finding under the third part of the test, below, it is not necessary for me to determine whether the first two parts of the test have or have not been met.

***Part 3: Harms***

[13] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.<sup>3</sup>

[14] 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.<sup>4</sup>

[15] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).<sup>5</sup>

[16] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.<sup>6</sup>

[17] In its brief representations on the harms in section 17(1), the third party refers to the competitive nature of the industry in which it is involved. It also refers to its position in that industry, and that it is a target of industry competition. With respect to the harms set out in section 17(1), the third party appears to be relying on the

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

<sup>4</sup> Order PO-2020.

<sup>5</sup> Order PO-2435.

<sup>6</sup> Order PO-2435.

exemptions in section 17(1)(a) (prejudice to competitive position) and (c) (undue loss or gain). It identifies its concern that the disclosure of the information at issue will reveal sensitive and confidential information regarding specific aspects of its internal commercial business and corporate strategies. It also states that disclosure of this information would be used by its competitors to its disadvantage.

[18] I have considered the third party's representations and the specific information at issue in this appeal, contained in the three brief portions of the agreement. In the circumstances, I find that I have not been provided with sufficiently "detailed and convincing" evidence that disclosure of these portions of the record could reasonably be expected to give rise to the harms outlined in section 17(1) of the *Act*. I find that the information at issue is broad and general in nature. I also note that some of the withheld portions (particularly in the second severance) make general references to more specific information in the record, but note that this specific information is not proposed to be disclosed and is not at issue in this appeal. I also note that some of the information at issue (particularly in the third severance) refers to actions taken by the third party which appear to be publicly known.

[19] Although the third party refers to the competitive nature of its industry and makes general references to possible types of harms from disclosure of the information, it provides no further support for its assertions that the harms in part three of the test have been met; nor has it provided evidence to support its claim that disclosure of the records would result in any of the harms set out in sections 17(1)(a) to (c). In previous orders,<sup>7</sup> this office has rejected similar "bald assertions" of harm without specific explanation or evidence as being insufficient to meet part three of the section 17(1) test. Given the nature of the information at issue, I find that the statements made by the third party in its representations, without any additional information, do not support a finding of a reasonable expectation of harm if the information is disclosed. Furthermore, I find that the harms described in section 17(1) are not self-evident from the records.

[20] As a result, I find that part three of the test for the application of section 17(1) has not been met.

[21] Having found that part three of the test has not been met, I find that the information at issue is not exempt under section 17(1) and will order that it be disclosed to the appellant.

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<sup>7</sup> See, for example, Orders PO-3032 and PO-3185.

**ORDER:**

I uphold the decision by the ministry to disclose the portions of the records at issue to the original requester, and order the ministry to disclose the information at issue to the original requester by **February 20, 2015** but not before **February 13, 2015**.

Original Signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ January 15, 2015