Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3640

Appeal PA14-333

Ministry of Tourism, Culture and Sport

July 27, 2016

Summary: The Ontario Music Fund, created in 2013 as a three-year program, provided $15 million per year to support the music sector in Ontario, enhance live music and create opportunities for local emerging artists. The initiative was made permanent in the 2015 Ontario budget.

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* to the Ministry of Tourism, Culture and Sport for correspondence the ministry received from external parties shortly after the initiative was announced. The ministry granted the appellant with partial access to the records claiming that disclosure of some of portions would constitute an unjustified invasion of personal privacy under section 21(1). The ministry also takes the position that the remaining withheld information contains third party information and qualifies for exemption under section 17(1). The appellant appealed the ministry's decision to this office. In this order, the adjudicator orders the ministry to disclose the portions of 3 records, which do not qualify for exemption under section 17(1). The remaining portions of the records were not ordered disclosed as these records contain information not sought by the appellant. The appeal is allowed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) definition of "personal information" and 17(1)(a), (b) and (c).

Orders and Investigation Reports Considered: PO-2010.

OVERVIEW:

[1] A law firm (the appellant) submitted the following request under the *Freedom of*

Information and Protection of Privacy Act (the *Act*) to the Ministry of Tourism, Culture and Sport (the ministry):

> I am requesting all correspondence received from external parties between May 1, 2013 and October 28, 2013, on the subject of financial support for the music industry by the Ontario government. For greater clarity, this includes any correspondence sent directly to the Minister of Tourism, Culture and Sport.

[2] The ministry notified a large number of companies, associations and other entities in the music industry (the third parties or affected parties) about the request as required by the notification provisions under section 28. The majority of the third parties did not object to disclosure but eight did. The ministry subsequently issued an access decision granting partial access to one record and withholding access to the remaining seven records in full. The ministry claims that disclosure of some of the withheld portions of the records would constitute an unjustified invasion of personal privacy under section 21(1). With respect to the remaining withheld information, the ministry submits that these portions contain third party information and were exempt under section 17(1).

[3] The appellant appealed the ministry's decision to this office and a mediator was assigned to the file. During mediation, the appellant confirmed that it was no longer pursuing access to the contact information of individuals withheld in the records under section 21(1). Accordingly, this information was removed from the scope of the appeal.

[4] No further mediation was possible and the file was transferred to adjudication where an adjudicator conducts an inquiry under the *Act*. During the inquiry, an additional third party was identified and contacted by this office. The representations of the ministry, the appellant and the third parties' were shared in accordance to this office's confidentiality criteria.

[5] In this order, I order the ministry to disclose the portions of 3 records which I found do not qualify for exemption under section 17(1). The remaining portions of the records were removed from the scope of the appeal as I found that they contained "financial and/or commercial information" as described in section 17(1) and the appellant indicated that it was not pursuing access to this type of information.

PRELIMINARY ISSUE:

[6] In its representations, the appellant states that "no confidential commercial or financial information is actually sought with this appeal. To the extent that any such information is contained in the records, it is expected that this information would be redacted".

[7] In order to determine whether the third party information exemption under section 17(1) applies to the records, it is necessary to decide whether the information

at issue constitutes "commercial or financial information." I review this issue below, and find that certain records or portions of records contain "commercial or financial information", specifically portions of Records 1 and 13 and Records 39, 54 and 64 in their entirety. In light of the appellant's statement that it is not pursuing access to this type of information, I have removed these records from the scope of this appeal.

[8] In addition, the appellant provided a copy of an email and its attachment identified in the Mediator's Report as a record remaining at issue with its representations.[1] As the appellant already has a copy of this record, I will not review issues regarding access to this record in this order.

RECORDS:

[9] The 7 records at issue in this appeal are described in the index of records below:

Description and Record # Assigned by Ministry	Date	No. of pages	Disclosed?
Record 1 – Email	May 3, 2013	2	Partial
Record 6 – Email and attachment	September12, 2013	4	Denied in full
Record 13 – Email and attachment	September 13, 2013	2	Denied in full
Record 32 – Email	September 3, 2013	2	Denied in full
Record 39 - Email	September 13, 2013	2	Denied in full
Record 54 - Email	September 4, 2013	2	Denied in full
Record 64 - Email	September 5, 2013	1	Denied in full

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1)?

B. Does the mandatory exemption at section 17(1) apply to the records?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[10] To qualify as personal information, the information must be about the individual

[1] This record is identified as Record 10 in the Index of Records prepared by the ministry. The ministry confirmed with this office that the appellant did not obtain a copy of this record from it, but from another ministry.

in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[2]

[11] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[3]

[12] The ministry takes the position that the portions of the records which contain the home address and personal email addresses of the third parties contains their "personal information" as defined in section 2(1). During mediation, the appellant confirmed that it is not seeking access to this information and it was removed from the scope of this appeal. However, some of the third parties take the position that their name and contact information associated with their business constitutes their "personal information". For instance, one third party took the position that his or her name and email address was "private" on the basis that they are a "private person" and that their company is a "privately held corporation".

[13] Sections 2(3) and (4) specifically provides that information identifying the affected party's name and contact information relating to their business does not qualify as "personal information". These sections state:

> 2(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> 2(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[14] Having regard to the above, I find that no portion of the records at issue contain "personal information". In making my decision, I considered whether there was anything in the records which would reveal something of a personal nature about the individuals who authored the emails and/or letters and concluded that there was not, as the information in the records relate to their business or knowledge about the music industry.

[15] Accordingly, I find that the mandatory personal privacy provisions under section 21(1) have no application to the information remaining at issue in this appeal.

B. Does the mandatory exemption at section 17(1) apply to the records?

[16] The ministry and the third parties take the position that the records qualify for exemption under sections 17(1)(a), (b) and /or (c). These sections state:

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

> 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;

[17] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

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

[18] The third parties claim that the records contain commercial and/or financial information. This type of information listed in section 17(1) 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

[4] *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 Co.*].
[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> application to both large and small enterprises.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

[19] The ministry takes the position that the third parties are in a better position to argue whether the records contain "commercial and/or financial information". However, the ministry provided the following background to explain the nature of the information at issue:

> The Ontario Music Fund [OMF or Fund] is a Ministry grant program and business development initiative that was developed to support the music industry. It was first announced by the Ministry of Tourism, Culture and Sport on May 1, 2013 and was confirmed in the 2013 Ontario Budget released the following day.
>
> The Fund was designed to help create jobs, build on opportunities for industry growth, and to better align with current industry trends and priorities. It was also intended to advance the Ontario government's Live Music Strategy to position Ontario as a leading place to record and perform music.
>
> The Ministry proposed to the music industry and to the public that funding would be made available to Ontario-based music companies. By way of example, such companies could have included: Canadian-owned/controlled record companies (the "independents"), foreign-owned, Ontario-based record companies (the "majors"), music associations … music promoters and artist management forms, and music publishers.
>
> …
>
> After the Budget was released, Ministry staff needed to coordinate the program development activities necessary to design and implement the program in a form that met its objectives, responded to music industry realities, and adhered to government directives and best practices for program delivery.
>
> A key element of the program's development was the need for the Ministry to conduct extensive consultations with a diverse range of Ontario companies, trade organizations, rights collectives, artists and live music

[6] Order PO-2010.
[7] Order P-1621.
[8] Order PO-2010.

> industries (collectively, music industry stakeholders). There was no past precedent for a music program of this scope. As a business development program focussed on increased artist and repertoire activities, sales and marketing, international promotion, new business models and expansion of human resources, it was necessary to ask music industry stakeholders to provide advice and guidance to the Ministry about financial and management issues that are not typically disclosed to other stakeholders or to the pubic. Consultations included receiving information from stakeholders about their business plans, cost structures, profitability and tax status, typical artist deals and recoupment, and information about their assets and liabilities.
>
> Once consultations were completed, the Ministry finalized the details and scope of the program.
>
> Consultations were conducted through two avenues: (1) music industry stakeholder meetings; and (2) a website invitation for public comment.

[20] The third parties submit that the records contain commercial and/or financial information. In support of their positions, they state that the information relates to:

- their financial dealings and practices;
- confidential information about their client lists, budgets, competitive positions;
- the existence of confidential contractual relationships;
- specific financial deals and proposed future financial projects; and
- confidential industry knowledge about licensing and costs structures.

[21] The appellant raised questions as to whether the records contain financial and/or commercial information given the circumstances of this appeal. The appellant states that "… the records consist of stakeholder positions regarding the allocation of funding under the [Fund]. These are lobbying letters, in support of commercial interests, opposing other commercial interests". The appellant submits that the exemption at section 17(1) should not be used to "withhold comments on public policy issues".

[22] In support of its position, the appellant refers to Order PO-2010. In that order, this office found that comments solicited from the public regarding the Ministry of Natural Resources' process for reviewing and approving underwater logging permit applications did not contain the type of information protected under section 17(1). In that order, the adjudicator stated:

> These comments raise general issues about the process and the underwater logging industry, and make suggestions for improvement, but reveal no detail about the [party's] operation or any information which

> could reasonably be described as a trade secret or scientific, technical, commercial, financial or labour relations information.

[23] The appellant submits that Order PO-2010 establishes that section 17(1) cannot be used to withhold comments on public policy issues. The appellant also argues that a stakeholder position is not an "informational asset" nor is it information which "could be exploited by a competitor in the marketplace".

Analysis and Decision

[24] Having regard to the representations of the parties and the records themselves, I am satisfied that some of records contain financial and/or commercial information but find that some of the records do not contain this type of information.

[25] To begin, I agree and adopt the reasoning in Order PO-2010, referenced by the appellant. It appears that, in response to Government's announcement of its $45 million commitment, the ministry received information and advice regarding the potential impact of the OMF. Some of the advice obtained, included opinions about how the ministry should allocate the funds. In my view, comments about the music industry in Canada contained in the records, even if they are made by industry insiders, cannot be said to contain "commercial and/or financial information" about their business.

[26] However, most of the information in the records amounts to informal applications for monies before the ministry finalized the details and scope of the program. In some instances, these informal applications or requests for meetings to discuss the availability of funds for the third party's business or clients were accompanied with information identifying how long they have been in business, number of employees, number of clients/ artists or the amount of monies needed to pursue identified business goals. These portions of the records do not contain comments about the OMF's proposed eligibility criteria or allocation of funds. In my view, these portions of the records contain financial and/or commercial information as described in section 17(1) and is found in the withheld portions of Record 1 and Records 39, 54 and 64 in their entirety.

[27] With respect to the remaining records, Records 6, 13 and 32, I find that portions of Record 13 contain financial and/or commercial information about the third party's business. However, I am satisfied that this information can be reasonably severed from the remaining portions of the record which contain comments and/or advice about the music industry.

[28] Given the appellant's statement that it does not seek access to any financial and/or commercial information a third party provided a ministry about its business, I have removed portions of Records 1 and 13 and Records 39, 54 and 64 in their entirety from the scope of this appeal. As a result, these records will not be discussed further in this order.

[29] With respect to the portions of the records which discuss issues related to the

music industry and/or allocation of the OMF, I find that this information cannot be said to be about the third parties' businesses. In addition, I find that these records do not fall within any of the categories of information this office has found protected under section 17(1). Accordingly, I find that the first part of the third-part test in section 17(1) has not been met for these portions of Record 6 and Records 13 and 32 in their entirety.

[30] As the exemption at section 17(1) can only apply if all three parts of the test are met it is not necessary that I also determine whether the second and third parts of the test have also been met. However, for the sake of completeness, I will go on to determine whether the parties resisting disclosure have established that the second and third parts of the test in section 17(1) have been met.

Part 2: supplied in confidence

Supplied

[31] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[9]

[32] 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.[10]

In confidence

[33] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[11]

[34] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access

[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[12]

[35] The ministry and the third parties take the position that the information contained in the emails and letters were supplied to the ministry by the third parties in confidence. In its representations, the ministry states:

> The Ministry submits that there was an explicit expectation of confidentiality with respect to the third parties' submissions. In the consultation meetings, they were invited to provide subsequent submissions and Ministry staff indicated to them in those meetings that their commercially sensitive information and business plans would be treated confidentially by the Ministry.

[36] The third parties submit that:

- there was no indication that "… any letter sent to any minister or government official would become a public document";
- they participated in the consultative process "under the assumption that the information [provided] is for that purpose only, and otherwise kept confidential"; and
- their correspondence to the ministry was provided "implicitly in confidence."

[37] The appellant submits that no objective expectation of confidentiality existed when the third parties provided their comments to the ministry. The appellant argues that the ministry's assurances of confidentiality pertain only to any commercially sensitive information provided during the consultations. Accordingly, the third parties can not extend the ministry's assurances to the entirety of their comments. The appellant goes on to state:

> If commercial stakeholders submit to a government agency that their competitors should be ineligible for a new government grant program, presumably because it will either leave more funds available for the stakeholder or because it will provide a competitive advantage over the ineligible competitors, the stakeholders should not be encouraged by a government agency that such self-serving representations will be treated as confidential. This is an overbroad reading of the s.17(1) exemption, and if allowed, could allow shielding of *any* lobbying by a commercial interest that could impact another commercial interest.

[38] There appears to be no dispute that the records were supplied to the ministry by the third parties. However, based on the evidence provided to me I find that there was no reasonable expectation of confidentiality, explicit or implicit, at the time the

[12] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

information in question was provided to the ministry.

[39] The information remaining at issue does not relate to specific financial and/or commercial matters arising from the third parties' businesses. In my view, the assurances of confidentiality the ministry advises it provided to parties invited to participate in consultations would apply only to sensitive commercial information or plans relating to the participant's business only. In their submissions, the third parties take the position that their expectation of confidentiality was implicit. Though one of the records contains a request that its distribution is limited to the six Members of Parliament addressed in the letter, I was not provided with evidence demonstrating that this letter was not circulated beyond the original addressees. Without disclosing the contents of the letter, it appears that at some point this letter was in fact circulated to others. I note that the other records do not contain:

- any requests for the ministry to not distribute the email and/or letter; or
- a header or footer identifying the information contained in the email and/or letter as "Confidential" or "Private".

[40] I also note that I was not provided with any evidence that the website invitation for public comment set up by the ministry provided potential participants with any assurances of confidentiality.

[41] In my view, there is insufficient evidence demonstrating that the affected party's expectations of confidentiality were based on reasonable and objective grounds. The third parties were invited to participate in a consultative process with a public body. In the circumstances, I find that it is not reasonable to expect that the information at issue provided to the ministry or addressed to a government official would be kept confidential if it did not contain confidential information about the third party's business or their personal matters.

[42] Accordingly, I find that the second part of the third part test has not been met. Again for the sake of completeness, I will now determine whether the third parties' adduced sufficient evidence to demonstrate that the third part of the test in section 17(1) has been met.

Part 3: harms

[43] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[13]

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[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[44] 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 the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[14]

[45] The ministry and the third parties take the position that disclosure of the information at issue would give rise to the harms contemplated in sections 17(1)(a), (b) and/or (c).

Sections 17(1)(a) and (c): prejudice to competitive position or undue loss/gain

[46] In support of its position that disclosure of the information at issue would prejudice the third parties' competitive position or result in an undue loss, the ministry states:

> … some of the affected parties in their submissions opposed the Ministry including certain types of music companies as eligible applicants for the Fund and they provided information and arguments in those submissions as to why these type of music companies should be excluded from the Fund. It is necessary for these affected parties to do business with the companies that they argued should be excluded. An example would be where an affected party seeks or needs to continue a distribution deal with a major record label. If the affected third parties' submissions are disclosed in this appeal, the Ministry submits it would be prejudicial to their future negotiations and business relationship with the music companies that they argued in their submissions should be excluded from the Fund.

[47] The third parties submit that disclosure of the information at issue would:

- cause significant harm to their competitive position or interfere significantly with contractual or other negotiations with third parties;
- jeopardize or negatively impact future negotiations;
- have a "real and detrimental impact" on their competitive position;
- harm existing business relationships;
- expose their business to pecuniary harm; and
- cause harm to relationships with individuals and companies they do business with on a daily basis.

[14] Order PO-2435.

[48] The appellant provided the following in response:

> The Ministry speculates that if the objectors' submissions are disclosed, "it would be prejudicial to their future negotiations and business relations" with the companies for which they oppose eligibility. In other words, the objectors have argued that their competitors should not be eligible for the Fund, and these competitors may take offense if the objectors' submissions were disclosed.
>
> This is likely to be the case in **any** competitive industry where commercial entities lobby a government agency on allocation of government funding. The notion that any submission in such a case cannot be disclosed where competitors may disagree, because the competitors might treat them less favourably in future business dealings, cannot be a principled basis for overriding the important objectives of the [*Act*]. Furthermore, it sets a precedent where companies can lobby government agencies for exclusion of competitors for government funding, safe in the knowledge that their lobbying is above the Act and shielded from public scrutiny. [Emphasis in Original]

[49] I have reviewed the submissions of the parties along with the records and find that I have not been provided with sufficient evidence to demonstrate that the risk of harm is well beyond the merely possible or speculative. The parties resisting disclosure submit that disclosure of the information at issue would prejudice their competitive position or result in an undue loss. However, I was not provided with sufficiently detailed evidence explaining how music companies could use the information at issue to interfere with specific negotiations or contractual relationships. In addition, I was not provided with sufficiently detailed evidence explaining how disclosure could reasonably be expected to harm existing business relationships given the inherent competition in the music industry. Instead, the affected parties made general assertions that their competitive positions would be jeopardized if the records at issue are disclosed.

[50] Even if I found that the first and second parts of the test in section 17(1) was met, which I did not, I find that the parties resisting disclosure failed to adduce sufficient evidence to demonstrate that the harms contemplated in sections 17(1)(a) and (c) exist in the circumstances of this appeal.

[51] Given my findings above, it is not necessary that I also determine whether the harms contemplated in section 17(1)(b) exist in the circumstances of the appeal.

Summary

[52] As stated above, for the exemption at section 17(1) to apply, all three parts of the three-part test must be met. I find that part one of the test was not met as the information at issue could not be described as containing "financial and/or commercial information" as described in section 17(1). I also find that there was insufficient evidence demonstrating that the information at issue was "supplied in confidence" to

the ministry, thus failing part two of the test. Finally, I find that the third parties failed to adduce sufficient evidence to establish that disclosure of the information at issue could reasonably be expected to give rise to the harms contemplated in sections 17(1)(a) and (c). As a result, find that the part three of the test was not met.

[53] Accordingly, I find that the information remaining at issue in Records 6, 13 and 32 does not qualify for the mandatory exemption under section 17(1). As a result, I will order the ministry to disclose these portions of the records to the appellant.

ORDER:

1. I order the ministry to disclose the portions of Records 6, 13 and 32 remaining at issue that do not qualify for exemption under section 17(1) by **September 1, 2016** but not before **August 29, 2016**. For the sake of clarity, in the copy of the records enclosed with the order sent to the ministry, I have highlighted the portions of the Records 6 and 13 which **should not** be disclosed to the appellant.

2. In order to verify compliance with order provisions 1 and 2, I reserve the right to require a copy of the records disclosed by the ministry to be provided to me.

Original Signed By: July 27, 2016
Jennifer James
Adjudicator