

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-3688-I

Appeal PA14-569-2

Ontario Media Development Corporation

January 20, 2017

Summary: The issues in this appeal are whether records relating to ten specified grants that were awarded under the Ontario Music Fund are exempt under sections 13(1) (advice or recommendations) or 17(1) (third party information) of the *Act*. The records include materials that were submitted by third parties as part of the funding application process, as well as evaluation documents and correspondence. In this interim order, the adjudicator upholds the OMDC's decision, in part. She finds that most of the information is exempt from disclosure under section 17(1) and that all of the information for which the OMDC claimed section 13(1) is exempt. She orders the OMDC to disclose portions of two records to the appellant that were not exempt under section 17(1). In addition, the adjudicator does not uphold the OMDC's exercise of discretion under section 13(1) and orders it to re-exercise its discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13(1) and 17(1).

OVERVIEW:

[1] This interim order disposes of most of the issues raised as a result of an appeal of the Ontario Media Development Corporation's (the OMDC) decision in response to the requester's access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access all records related to 10 specified grants that were awarded as part of the 2013-14 Ontario Music Fund.

[2] Following third party notification, the OMDC issued a decision to the requester, granting partial access to the records. The OMDC withheld records, either in whole or in part, claiming the application of the mandatory exemptions in sections 17(1) (third

party information), 17(2) (tax return information) and 21(1) (personal privacy), as well as the discretionary exemptions in sections 13(1) (advice or recommendations), 14(1) (law enforcement) and 15 (relations with other governments). In addition, the OMDC advised the requester that non-responsive information was withheld from disclosure.

[3] The requester, now the appellant, appealed the OMDC's decision to this office. During the mediation of the appeal, the appellant provided the mediator with a list of records to which he seeks access. As a result, the appellant is no longer pursuing access to the records for which sections 14(1), 15, 17(2) and 21(1) were claimed. Consequently, these exemptions are no longer at issue.

[4] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought representations from the OMDC, the appellant and seven affected parties. I received representations from all of the parties, with the exception of two affected parties. Portions of some of the affected parties' representations met this office's confidentiality criteria and will, therefore, not be set out in this order. However, I did take them into consideration in making my findings.

[5] For the reasons that follow, I uphold the OMDC's decision, in part. I find that most of the information is exempt from disclosure under section 17(1) and that all of the information for which the OMDC claimed section 13(1) is exempt. I order the OMDC to disclose portions of two records to the appellant. I do not uphold the OMDC's exercise of discretion under section 13(1) and order it to re-exercise its discretion.

RECORDS:

[6] Record 1 was withheld in part and the remaining records were withheld in full. The OMDC has claimed the application of section 17(1) to all of the records and section 13(1) to portions of records 1 and 26. The records consist of:

- Record 1 – Affected parties' ID forms (applications) and the Ontario Music Fund Music Company Development Application Recommendations spreadsheet.
- Record 9 – Draft response to an affected party re: OMF items.
- Record 10 – Draft letter to an affected party re: incomplete information.
- Record 12 – Various sample proposals submitted by an affected party as part of its application.
- Record 15 – Letters of support submitted by an affected party.
- Record 16 – Research proposals submitted by an affected party.
- Record 18 – Proposed job descriptions submitted by an affected party as part of its application.
- Record 26 – Financial Analysis Chart.

- Records 38 and 42 – Emails re: ministry’s questions on JUNO Awards application.
- Record 48 – Power point presentation submitted by an affected party.
- Activities 27 and 63 – Ongoing and proposed projects of two affected parties.

ISSUES:

- A. Does the mandatory exemption in section 17(1) apply to the records?
- B. Does the discretionary exemption in section 13(1) apply to the records?
- C. Did the OMDC exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions in sections 13(1) and 17(1)?

DISCUSSION:

Background

[7] The OMDC provided background information in its representations. It states that the Ontario Music Fund (the fund) is aimed at strengthening and stimulating growth in Ontario’s music companies. The fund is designed to drive activity and investment, and to support Ontario’s music companies and organizations in expanding their economic and cultural footprints within Canada and worldwide.

[8] The fund is structured to complement other public funding programs and aims to address investment gaps during key phases of company and industry development cycles. It provides support through four program streams to music companies (including record labels, music publishers, music managers, artist entrepreneurs, music promoters, music presenters and booking agents), as well as music industry, trade, service, event and training organizations.

[9] The OMDC’s administration of the fund included reviewing and evaluating all applications submitted, providing recommendations to the fund’s jury, contracting with successful recipients of the fund, evaluating recipient’s interim and final reports, delivering payments to recipients and reporting back to the Ministry of Tourism, Culture and Sport on program results.

Issue A: Does the mandatory exemption in section 17(1) apply to the records?

[10] The OMDC is claiming the application of section 17(1)(a), (b) or (c) to all of the records. It states that all of the information for which section 17(1) has been claimed was provided to it by the applicants as part of the application process for the fund. The OMDC goes on to state:

As an overarching point to consider in assessing the OMDC's representations in this appeal, it is *necessary* for the OMDC to receive detailed proprietary information from applicants to the Fund regarding: (i) the proposed activities that they were seeking funding for; (ii) their business and financial information; (iii) their ability to carry out the proposed activities; (iv) their potential business partners; and (v) economic and outcome measures, in order for the OMDC to appropriately evaluate applications in a competitive grant program and to award public funds in a wise and appropriate manner in accordance with the Fund's objectives and guidelines established by the government.

[11] Sections 17(1)(a), (b) 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;

(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

[12] 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

[13] For section 17(1) to apply, the institution and/or 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
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

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

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

[14] The types of information listed in section 17(1) have 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.³ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁴

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.⁵

Representations

Record 1 – ID forms

[15] There are separate ID application forms for six affected parties. The OMDC submits that the application forms contain both financial and commercial information, including:

- Grant amount requested;
- Budget information for the proposal;
- Outline of the applicant's key business activities, strategic goals and initiatives, business and coalition strategies;
- Fundraising and research strategies;
- Brand, sponsorship and marketing strategies;
- Activity objectives;
- Hiring plans;

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order PO-2010.

- Ongoing business activities and its record/history for managing similar activities and the results achieved;
- Analysis/assessment of its own strengths and weaknesses in the industry;
- Information about sponsors;
- Anticipated activity outcomes and deliverables; and
- Financing plan information, including the identity of the party providing financing, the amount, the type of financing, percentage of the budget, and status of the source of financing.

[16] The affected parties submit that the application forms contain both commercial and financial information. Some of the affected parties also argue that these forms contain trade secrets, as they contain unique marketing and promotion strategies.

Record 1 – Recommendations spreadsheet

[17] The OMDC submits that although this record was authored by the OMDC, the activities contained in the Project Description column contain commercial information about the business and strategic plans/proposed plans undertaken by the affected parties, and that this information was supplied by the affected parties. The dollar amounts cited in the Amount Requested column reveal the amount of funding requested by the affected parties and, therefore, constitutes financial information.

Record 12

[18] The OMDC submits that the sample proposals contain the commercial information of an affected party, as well as its third party service providers. These proposals, it argues, reveal the identity of the third party service providers, detailed descriptions of the services offered and specific project plans. In addition, the OMDC submits that some of the proposals contain the service prices charged by the third party service providers to the affected party, which is financial information.

[19] The affected party to whom this record relates submits that it contains commercial and financial information.

Record 15

[20] The OMDC states that the letters of support contain third party business identities of an affected party, as well as descriptions of its business relationship with this affected party. The letters also reference the affected party's future business plans and objectives, which is commercial information.

Record 16

[21] The OMDC submits that this research proposal was prepared for an affected

party by a third party to compile data and to examine trends to construct an economic profile of the live music industry, and to perform an analysis of the economic impact of the live music industry on Ontario's economy. This record, it argues, contains the third party's research approach and methodology, which is its commercial information. The record also contains the third party's budget quote to the affected party, which qualifies as financial information.

[22] The affected party to whom this record relates submits that it contains commercial information provided to it by a supplier. It is a research proposal, the disclosure of which would reveal the manner in which the affected party enters into research initiatives with third-party suppliers. The affected party also advises that the final report that this research ultimately resulted in is publicly available and is featured on the affected party's website.

Record 18

[23] The OMDC submits that the job descriptions in this record were proposed only and would reveal staffing plans if an affected party had been approved for the corresponding aspects of its proposal. The OMDC submits that these job descriptions constitute labour relations information.

[24] The affected party to whom this record relates states that it reveals the manner in which it undertakes its staffing requirements. In addition, it states that the detail provided in the job descriptions reflects the methods by which it structures itself and pursues its business information, which is commercial information.

Record 26

[25] The OMDC submits that this record contains financial information, as it consists of financial analysis derived from the affected parties' financial statements, including balance sheet information, income statement information, and financial ratio information.

[26] The affected parties submit that this record contains significant budget and costing information which is financial information. This financial information was submitted by the affected parties to the OMDC in their applications (record 1) and is reproduced in this record.

Records 38 and 42

[27] The OMDC submits that these records contain financial information of an affected party, as they reveal the venue costs of a previous JUNO Awards event and the 2015 Awards event.

Record 48

[28] The OMDC submits that this Power-point presentation was submitted by an affected party as part of its application, and contains financial information consisting of

the affected party's analysis about sponsorship fees associated with the JUNO Awards.

Activities 27 and 63

[29] The OMDC submits that these records contain detailed descriptions of proposed business activities of two affected parties and that these descriptions form an integral part of their business plans. In particular, the records reveal: business strategies, track record/history for managing similar activities; results achieved in the past; self-analysis/assessment of their strengths and weaknesses in the industry; background research supporting the planned business activities; and their marketing and communication plans. These records, the OMDC argues, contain commercial information.

[30] The affected parties to whom these records relate submit that each activity sheet includes a financing plan in respect of the detailed description of the activities related thereto. In particular, the financing plan includes the confirmed and proposed sources of activity funding (source of funding, amount of funding, cash or in-kind funding, and the percentage of the budget), constituting financial information.

[31] The appellant states that some of the records may contain specific financial information, but that activities and activity objectives, for example, contain broad information and are not specific enough to be subject to section 17(1).

Analysis and findings

[32] On my review of the parties' representations and the records, I find that they contain both the commercial and financial information of the affected parties. 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.⁶ The commercial information in the records sets out detailed information about the affected parties' various current and past commercial activities and business relationships in the music industry, as well as detailed information about proposed job descriptions, research strategies, and the specific projects they would undertake if they were awarded the grants they applied for. I find that this information relates to the exchange of services, wherein the affected parties undertake to provide particular services in exchange for funding from the OMDC.

[33] I also find that many of the records contain the financial information of the affected parties, including financial information from balance sheets (including assets and liabilities), income statements, as well as the total budget, amount of funding requested and the eligible amount.

[34] Having found that the records contain both commercial and financial information, it is not necessary to determine whether they also contain trade secrets, as was argued

⁶ Order PO-2010.

by some of the affected parties. In any event, I note that the type of information at issue would not qualify as trade secrets as contemplated by section 17(1).

[35] The first part of the three-part test has been met. I will now determine whether the information at issue was supplied in confidence by the affected parties to the OMDC.

Part 2: supplied in confidence

[36] 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.⁷ 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.⁸

[37] 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. The expectation must have an objective basis.⁹

[38] 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; and
- Prepared for a purpose that would not entail disclosure.¹⁰

Representations

[39] The OMDC submits that all of the information at issue was supplied directly to it by the affected parties as part of the application process for the fund. It goes on to state that there was an explicit expectation of confidentiality with respect to this information, it does not disclose this type of information and treats it confidentially as part of its application process.

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

¹⁰ 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.

[40] The affected parties submit that the information at issue was supplied by them to the OMDC solely for the purpose of applying for funding. Some affected parties also argue that the records would reveal or permit the drawing of accurate inferences with respect to information that had been provided from other sources to the affected parties and, in turn, to the OMDC. The affected parties also submit that there was a mutual understanding with the OMDC that the information was being supplied in confidence and would be kept in confidence.

[41] The appellant states that the index of records suggests that the completion of the grant applications is an iterative process between the OMDC and each applicant. For example, there were questions and answers, feedback from OMDC staff and some assistance in crafting the grant proposals. He goes on to submit that the OMDC involvement may have included specific deliverables or goals of the proposals. The appellant argues that given the level of the OMDC's involvement in the process, the information may not be properly viewed as being supplied for the purpose of section 17(1). The appellant relies on Order PO-3157 in which information from an applicant that became incorporated into a contract ceased to be supplied, and became information which was equally owned by the government. He further states that while the records at issue do not include a contract between the OMDC and the applicants, the same principle of equal ownership may apply.

Analysis and findings

[42] On my review of the records, I find that most of the information contained in them was supplied to the OMDC by the affected parties as part of their applications to the fund. Other records, while not authored by the affected parties, were authored by OMDC staff. However, these records contain the commercial and financial information that was originally supplied to it by the affected parties in their applications to the fund.

[43] I am also satisfied that the commercial and financial information that was supplied to the OMDC by the affected parties was done with a reasonably-held belief that it would be kept in confidence. Consequently, I find that the majority of the information at issue was supplied to the OMDC in confidence, and has met the second part of the three-part test.

[44] Conversely, I find that other records, or portions thereof, were not supplied to the OMDC by the affected parties, nor do they reveal or permit the drawing of accurate inferences regarding information that was supplied by the affected parties to the OMDC. In particular, I find the information in the following records was not supplied by the affected parties:

- Record 1 – OMF Music Company Development Applicant Recommendations – columns entitled Original Recommended Amount, Revised Recommended Amount, Alternate Scenario and Overall Score. This information was compiled by the OMDC and not supplied by the affected parties.

- Record 9 – Letter to an affected party – the first page of this letter does not contain information that was supplied by the affected parties.
- Record 26 – Financial Analysis – portions of this record contain information compiled by the OMDC and does not reveal information supplied by the affected parties.
- Record 38 – Email exchange between OMDC staff – the first page of this email does not reveal information supplied by the affected parties.

[45] As a result, I find that the portions of the records described above do not meet the second part of the three-part test and are, therefore, not exempt under section 17(1). The OMDC is also claiming the application of the discretionary exemption in section 13(1) to the information in records 1 and 26, which I consider below. As no other exemptions have been claimed with respect to records 9 and 38, I order the OMDC to disclose the first page of each of records 9 and 38 to the appellant.

Part 3: harms

[46] 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.¹¹

[47] 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*.¹²

Representations

[48] The OMDC submits that disclosure of the records could cause the harms contemplated in sections 17(1)(a) and (c). It states that the Ontario music industry is small in that seven companies account for over 90 percent of revenues. The OMDC goes on to state:

Although they cooperate together through their industry associations, each is intensely competitive and they closely guard information such as their personal equity, company net worth, profits, the nature of their contracts with artists, their future artist and repertoire activities, and their future marketing intentions. The OMDC submits that it is possible that knowledgeable competitors could gain useful information about a

¹¹*Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹² Order PO-2435.

company's plans based on the information a company provided in its application to the OMDC.

[49] One of the affected parties did not provide representations to this office in response to the Notice of Inquiry, but did provide submissions to the OMDC when it was notified of the request. The OMDC states that this affected party solicits bids from Canadian cities to determine the host city for the JUNO Awards. This affected party issues a Request for Proposals (RFP) to possible bidders and evaluates each bid on a confidential basis. It does not disclose any information about the bids to the other bidders or to the public, other than the simple fact of whether a bid has been accepted or not. The OMDC argues that if future bidders were aware of how much a successful host city bid on a previous Award event, the affected party could stand to lose money as it may not be able to obtain the most favourable deal from the bidders in the bidding pool.

[50] The OMDC states that the severances in records 38 and 42 identify costs associated with negotiating with specific cities and identify the differences arising from the negotiations with these cities.

[51] Concerning record 48, the OMDC submits that it contains the complete financing for hosting the 2015 JUNO Awards, and also details the revenue and expenses for the JUNO Awards for the years 2010 through 2017. This record, it states, also contains financial information and analysis about sponsorship fees and monies expended by the broadcaster of the JUNO Awards. Disclosure of this information, the OMDC argues, would negatively affect the sponsors and their ability to raise sponsorship funds, as well as negatively affect the broadcast negotiation process.

[52] The other affected parties submit that disclosure of the information at issue is likely to cause significant harm to their competitive positions, cause undue loss and/or interfere significantly with their contractual or other negotiations with third parties, as set out in sections 17(1)(a) and (c). One affected party argues that its information is highly valuable, even today, stating:

Past strategic and financial information reveals [its] strategic objective and financial success, especially if linked with more recent and publicly available information about [its] activities. Disclosure of the planned activities of [it] will erode its ability to act on behalf of their members to promote independent music and could be used by other trade associations to [its] disadvantage.

...

Release of the information contained in the Sample Proposals would reveal the identity of [its] service providers, the particular business arrangements with service providers. From this information, competitors would gain a significant and unfair competitive advantage, which is reasonably expected to interfere with [its] future contractual negotiations.

[53] Another affected party submits that the information at issue comprehensively reflects key components of their marketing, promotion and communication strategies. Consequently, it submits, it can be reasonably expected that the release of the confidential information would result in an undue loss to it and gain to its competitors because the information reflects key organizational and business activities, strategic goals, strategic initiatives and corporate objectives. It goes on to state that it has dedicated significant time and resources to develop this type of business information, as a result of highly sophisticated analysis and long experience in the Canadian music industry. The disclosure of this information, it argues, would almost certainly be exploited by its rivals, which would likely attempt to appropriate and replicate in the operation of their own businesses. For example, a competitor could appropriate the content and sequencing of its marketing and/or fundraising strategies as set out in the records.

[54] Other affected parties state that the information at issue is plainly related to their plans to acquire and develop musical intellectual property and to promote, market and disseminate such intellectual property for the purpose of maximizing revenues from the sale thereof. The records include financial information, as well as marketing and promotion strategies across a spectrum of musical genres and across a multitude of communications platforms. The disclosure of this information, they argue, would interfere with their: contractual negotiations with artists; competitive position in signing artists; competitive position in commercializing artists' work; and competitive position in respect of government funding. Competitors could use the information to undermine their competitive position. For example, one of these affected parties states:

There is increasing competition between labels to sign established artists as well as emerging artists. It is often the case, both with established artists and prospective artists, that labels will enter into *bidding wars* in the intense competition to sign an artist to their roster. Accordingly, release of the Confidential Information could be used to [its] loss and its competitors' gain.

...

As a result, it is assuredly foreseeable that [it] would have greater difficulty signing and retaining artists given the advantage its competitors would enjoy from the release of the information.

[55] These affected parties also submit that the release of the information at issue, which reflects their method of responding to a request for proposals, could be used by competitors in making submissions for funding from Government.

[56] The appellant states that when the results of the first round of funding were announced, he was surprised to find that very little public information was provided. He further states that the OMDC limited the public disclosure to the names of the recipients and the total amount received. No further details on how the money would be spent was provided. He states:

The importance of this information for public accountability purposes has increased in the time since the initial request. The Ontario government has since provided specific data on program outcomes including claims referencing new jobs created and new investment. There is simply no ability to properly assess these claims without further data on the funded projects.

[57] Concerning the harms requirement of the test in section 17(1), the appellant submits that much of the evidence provided is speculative in nature, and that claims that the disclosure of the information relating to proposed activities would cause harm is speculative at best. In addition, the appellant submits that such a claim could only apply to records involving commercial enterprises, because not-for-profit entities (some of the affected parties) do not have a commercial competitive position to be harmed. For example, the appellant submits that the affected party involved in the JUNO Awards publicly discusses its funding sources, amounts and economic impact, but simultaneously claims that disclosure of public support through the OMF would result in harm. This position, the appellant argues, is not simply speculative, but is wrong.

Analysis and findings

[58] In order for me to find that the exemption in section 17(1) applies, the OMDC and the affected parties must establish using sufficient evidence that there is a reasonable expectation of one of the harms in sections 17(1)(a) or (c) occurring upon the disclosure of the information at issue. In respect of the harm in section 17(1)(a), I must determine whether disclosure of the record could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization.

[59] Having reviewed the parties' representations and the records at issue, I find that all of the information that I have found to be supplied in confidence, if disclosed, would result in a reasonable expectation of harm to all of the affected parties, whether for-profit companies or not, under section 17(1)(a). On my review of the records, I find that the detailed financial and commercial information contained in them would reveal the financial standing, contractual relationships, research methodology, and marketing and promotional strategies of all of the affected parties. I am satisfied that the OMDC and the affected parties have provided sufficient evidence that disclosure of this information could reasonably be expected to prejudice the affected parties' competitive position in signing and retaining artists, negotiating contracts with other third parties, applying for funding, soliciting sponsorships and, in one case, negotiating with bidders for the JUNO Awards. I am also satisfied that the parties have established a risk of harm that is well beyond the merely possible or speculative should the records be disclosed. Accordingly, I find that all of this information is exempt from disclosure under section 17(1)(a). Having made this finding, it is not necessary for me to consider the application of sections 17(1)(b) or (c) to this information.

Issue B: Does the discretionary exemption in section 13(1) apply to the records?

[60] The OMDC is claiming the application of section 13(1) to portions of the Ontario Music Fund Music Company Development Applicant Recommendations Spreadsheet, which is part of record 1, as well as to portions of record 26, which is a Financial Analysis Chart. It advised that it was no longer applying this exemption to records 9, 10, 38 and 42.

[61] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[62] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹³

[63] Advice and recommendations have distinct meanings. Recommendations refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[64] Advice or recommendations may be revealed in two ways:

- The information itself consists of advice or recommendations;
- The information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁴

[65] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Examples of the types of information that have found not to qualify as advice or recommendations include; factual background information;¹⁵ a supervisor's direction to staff on how to conduct an investigation;¹⁶ and information prepared for public dissemination.¹⁷

¹³ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.

¹⁴ Orders O-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

¹⁵ Order PO-3315.

¹⁶ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹⁷ Order PO-2677.

[66] There are exceptions to section 13(1), which are listed in section 13(2). These exceptions can be divided into two categories: objective information and specific types of records that could contain advice or recommendations.¹⁸ The first four paragraphs of section 13(2) are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

[67] The remaining exceptions in section 13(2) will not always contain advice or recommendations but when they do, section 13(2) ensures that they are not protected from disclosure by section 13(1).

[68] The word *report* appears in several parts of section 13(2). This office has defined report as a formal statement or account of the results of the collation and consideration of information. Generally, speaking, this would not include mere observations or recordings of fact.¹⁹

Representations

[69] As previously stated, the OMDC is claiming the application of this exemption to portions of record 1 which is the Ontario Music Fund Company Development Applicant Recommendations spreadsheet and to portions of record 26, which is a Financial Analysis Chart. In particular, respecting record 1, it is claiming the application of section 13(1) to the content of the columns entitled Original Recommended Amount, Revised Recommended Amount, Alternate Scenario and Overall Score (out of 100).

[70] The OMDC advises that its program staff prepared the spreadsheet for the sole purpose of providing recommendations to the Music Fund's jury. It submits that disclosure of the information in the columns would reveal both the advice and the recommendations of program staff. With respect to advice, it argues that the project description and overall score columns contain advice. The project description contains staff's analysis of the applicant's proposed project, and the overall score column contains the advice of staff in that they scored all applicants. This score, it argues, was considered by the decision-makers in arriving at their funding decisions. Both of these columns contain an evaluative component, which qualifies as advice.

[71] According to the OMDC, the remaining columns contain recommendations, in that they reveal staff's recommended funding amounts to the decision-makers. It states:

Furthermore, in deliberating funding decisions for this program, there was a process of revising awards in order to arrive at a decision (see the Revised Recommended Amount column). The revised amounts represent award amounts suggested by the program jury based on input and advice from program staff.

¹⁸ *John Doe v. Ontario (Finance)*, cited in note 12.

¹⁹ Order 24.

[72] Turning to the Financial Analysis Chart (record 26), the OMDC submits that this record contains the advice of a public servant. It was prepared by the fund's Financial Officer (an OMDC staff member) in order to assess the financial risk of applicants to the fund. The Financial Officer used the financial information supplied by the applicants in their financial statements to perform a financial analysis of the various financial ratios cited in the chart. Financial health/risk, the OMDC states, is one of the evaluation measures used by the program jury to assess applications in arriving at funding decisions. In particular, at the bottom of each page of the chart, the Financial Officer made an assessment of each applicant's financial risk for the jury's consideration.

[73] Lastly, the OMDC submits that none of the information at issue falls within the exceptions in sections 13(2) or (3).

[74] The appellant's representations do not address the application of section 13(1).

Analysis and findings

[75] Regarding record 1, I am satisfied that the information contained in the remaining portions at issue are exempt under section 13(1), subject to my finding regarding the OMDC's exercise of discretion. In particular, I find that the columns entitled Original Recommended Amount, Revised Recommended Amount and Alternate Scenario qualify for exemption under section 13(1) as recommendations, because they consist of dollar amounts that were explicitly recommended by OMDC staff to the fund jury, which is the decision-maker. I also find that the information in the column named Overall Score (out of 100) qualifies as advice given by OMDC staff to the fund jury. The overall score is a consideration that the fund jury would take into account in making its decision, and that this consideration is not simply factual, but has an evaluative component to it.

[76] Turning to record 26, I find the remaining portions at issue are also exempt under section 13(1), subject to my review of the OMDC's exercise of discretion. They consist of financial analyses conducted by OMDC staff and advice regarding the financial viability of the affected parties, based on the analyses. This financial analysis of each affected party, which has an evaluative component to it, is a consideration to be taken into account by the fund jury and, therefore, qualifies as advice for the purpose of section 13(1).

Issue C: Did the OMDC exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[77] The section 13(1) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[78] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[79] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ This office may not, however, substitute its own discretion for that of the institution.²¹

[80] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant.²² These considerations include:

- The purposes of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific;
- The wording of the exemption and the interests it seeks to protect;
- Whether the requester has a sympathetic or compelling need to receive the information;
- Whether the requester is an individual or an organization;
- Whether disclosure will increase public confidence in the operation of the institution;
- The nature of the information and the extent to which it is significant and/or sensitive to the institution or affected party;
- The age of the information; and
- The historic practice of the institution with respect to similar information.

Representations

[81] The OMDC submits that it exercised its discretion in good faith, and in doing so, took all relevant factors into account and did not take any irrelevant factors into account.

[82] Concerning the recommendations spreadsheet (part of record 1), the OMDC states that it severed information under section 13(1), taking into account the purpose of the exemption, which is to preserve an effective and neutral public service by permitting public servants to provide full, free and frank advice and recommendations

²⁰ Order MO-1573.

²¹ See section 54(2).

²² Orders P-344 and MO-1573.

to decision-makers. The OMDC submits that program staff must be free to objectively evaluate the applications for funding and to recommend the amount of funding to the decision-makers, which may vary from the final amount of funding ultimately approved.

[83] With respect to record 26, the OMDC states that one of the factors that it took into consideration is that the information that qualified for the exemption in section 13(1) was intertwined with information that also qualified for exemption under section 17(1). For example, the OMDC advises that the entire financial analysis chart contains the confidential financial information of the affected parties, and it would have been an impossible task to provide access to the financial analysis conducted by OMDC staff and their assessment of risk level without also revealing the affected parties' financial information. In addition, the OMDC argues that providing access to the analysis and advice would reveal the affected parties' financial health based on the four financial measures identified in the record (current ratio, asset liability ratio, profit margin and return on assets).

[84] The OMDC also argued that where there is a finite amount of funding, such as this program, the recommended amount of funding for applicants will invariably be less than the amount requested. It goes on to state:

The OMDC was cognizant of a misperception that could arise from providing access to the *Recommended* columns of the spreadsheet. Where an applicant received an amount less than what it requested, which is typically the case, there could be a perception by the public or by an applicant's competitors that its application was of poor quality and this could negatively impact the applicant's competitive position in its industry.

[85] The appellant submits that the OMDC erred in severing entire records and large portions of other records where more selective severing or full disclosure would be appropriate.

Analysis and findings

[86] I have carefully considered the representations of the OMDC and the appellant regarding the OMDC's exercise of discretion. While I agree with the OMDC that it properly considered the purpose of the exemption in section 13(1) in exercising its discretion, on the whole I am not satisfied that it properly exercised its discretion. In particular, I have no evidence before me from the OMDC that it took into account one of the purposes of the *Act*, which is that information should be available to the public. In addition, I find that the OMDC's concern that the public or a competitor might misinterpret the information withheld under section 13(1) against the applicant(s) is not a proper consideration in exercising discretion under the *Act*. I further find that the OMDC has not provided sufficient evidence that it took into consideration whether disclosure will increase public confidence in the operation of the institution (as opposed to the affected parties). For these reasons, I do not uphold the OMDC's exercise of discretion and I order it to re-exercise its discretion, taking these factors into consideration.

Issue D: Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemptions in sections 13(1) and 17(1)?

[87] The appellant submits that in the event that section 17(1) applies to exempt the records from disclosure, the public interest override in section 23 applies.²³ The appellant submits that there is a strong public interest in the disclosure of the information related specifically to project objectives, activities and impact. The appellant advises that the funding decisions have attracted considerable media and public attention with coverage in global media outlets such as Billboard, as well as numerous Canadian media publications. He states:

The funding choices and lack of public information has raised questions about the transparency of the program, its impact, and the ability to effectively audit outcomes. For example, large international companies received far larger awards than Canadian companies. Access to more information about funded programs would provide the public with a better understanding of how millions in taxpayer dollars are being spent and allow for a better assessment of the program itself.

[88] Lastly, the appellant states that the Minister of Tourism, Culture and Sport claimed that the fund created 2,000 jobs and more than 24 million dollars in revenue. He argues that without access to the specifics of the funded programs, it is difficult for the public to assess the validity of the Minister's claims.

[89] To order disclosure of the information which I have previously found exempt under either section 13(1) or 17(1), I must be persuaded that there is a compelling public interest in the disclosure of the records. Further, if there is a compelling public interest, that compelling public interest must clearly outweigh the purpose of those exemptions. In my view, in the current appeal, this threshold has not been met and section 23 does not apply.

[90] From the appellant's argument, I can extrapolate that he takes the position that there is a compelling public interest in the disclosure of the information in order to better understand of how millions in taxpayer dollars are being spent and allow for a better assessment of the program itself.

[91] In considering whether there is a public interest in disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act's* central purpose of shedding light on the operations of government. Previous orders of this office have stated that in order to find a compelling public interest in disclosure, the information in a record must serve the purpose of informing or enlightening the

²³ Section 23 provides that an exemption from disclosure of a record under section 17 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. I also note that the appellant raised this exemption for the first time during the inquiry stage of the appeals process.

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 or to make political choices.²⁴

[92] While I find that there may be a public interest in the OMDC's management of the fund, it is not of a compelling nature. I have also found that the type of information that was withheld under section 17(1) is third party commercial and financial information, the disclosure of which would not assist in public scrutiny of public funds, or shed further light on the operations of the OMDC (and the fund). The amount of funding provided to each recipient has already been publicly disclosed. Similarly, I find that even if there was a compelling public interest in the advice and recommendations given by the OMDC to the jury fund, in these circumstances it does not outweigh the purpose of the exemption in section 13(1), which is to permit public servants to provide full, free and frank advice or recommendations to decision makers.

[93] I find that disclosure of the records in these circumstances would not address the concerns put forward by the appellant. Accordingly, I find that there is no compelling public interest in the disclosure of the information I have found to be exempt under section 17(1) of the *Act* and, therefore, section 23 of the *Act* does not apply in this instance.

[94] In sum, I uphold the OMDC's decision, in part. I find that most of the information is exempt from disclosure under section 17(1) and that all of the information for which the OMDC claimed section 13(1) is exempt. I order the OMDC to disclose portions of two records to the appellant. I do not uphold the OMDC's exercise of discretion and order it to re-exercise its discretion as set out in Order provision 3.

ORDER:

1. I order the OMDC to disclose the first page of records 9 and 38 to the appellant by **February 27, 2017** but not before **February 21, 2017**.
2. I reserve the right to require the OMDC to provide this office with copies of the records it discloses to the appellant.
3. I order the OMDC to re-exercise its discretion within 30 days of this order and to provide the appellant and this office with a written explanation of its re-exercise of discretion. I remain seized of the appeal.

Original signed by: _____
Cathy Hamilton
Adjudicator

January 20, 2017

²⁴ Orders P-984 and PO-2556.