

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3711-F

Appeal PA14-569-2

Ontario Media Development Corporation

March 21, 2017

Summary: The appellant made a request to the Ontario Media Development Corporation (the OMDC) relating to ten specified grants that were awarded under the Ontario Music Fund. The records included materials that were submitted by third parties as part of the funding application process, as well as evaluation documents and correspondence. In Order PO-3688-I, the adjudicator upheld the OMDC's decision, in part. She found that most of the information was exempt from disclosure under section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) and that all of the information for which the OMDC claimed section 13(1) was exempt. She ordered the OMDC to disclose portions of two records to the appellant that were not exempt under section 17(1). In addition, the adjudicator did not uphold the OMDC's exercise of discretion under section 13(1). The OMDC was ordered to re-exercise its discretion and to provide the appellant and this office with representations on that issue. This is the final order, disposing of the remaining issue in the appeal, the OMDC's exercise of discretion, which is upheld.

OVERVIEW:

[1] This is the final order in this appeal. It addresses the re-exercise of discretion by the Ontario Media Development Corporation (OMDC), disposing of the final issue raised in response to an appeal of an access decision relating to ten specified grants that were awarded under the 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 exemption in section 17(1) (third party

information), as well as the discretionary exemption in section 13(1) (advice or recommendations). The OMDC also claimed other exemptions that were resolved during the mediation of the appeal.

[3] On January 20, 2017, I issued Interim Order PO-3688-I, upholding the OMDC's decision, in part. However, in that order, I also commented on the OMDC's exercise of discretion:

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.

[4] Accordingly, I included Order Provision 3, which contained the following term related to the exercise of discretion:

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.

[5] The OMDC subsequently complied with Order Provision 3 by providing the appellant and this office with the results of its re-exercise of discretion. Staff of this office contacted the appellant to seek his view regarding the OMDC's re-exercise of discretion, but he did not respond. For the reasons that follow, I uphold the OMDC's re-exercise of discretion and dismiss the appeal.

DISCUSSION:

[6] The section 13(1) exemption is discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the OMDC must exercise its discretion in deciding whether or not to disclose it. The OMDC claimed the application of section 13(1) to Record 1 (Recommendation Sheet) and Record 23 (Financial Analysis Chart).

[7] The Commissioner may find that an 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.

[8] The OMDC states that it recognizes that in exercising its discretion under section 13(1), disclosure must be balanced against various factors including whether disclosure would increase public confidence in the operation of the institution and the goal of making information available to the public, subject only to limited exceptions. It goes on to state that it understands that one of the principal purposes of the *Act* is to provide broad public access to records and to promote transparency and openness and that exemptions from the right of access should be limited and specific.

[9] Turning to Record 1, the OMDC submits that it reviewed the record and, in particular, the four columns at issue. The information in the columns represent deliberations between the program staff and the jury where recommendations and other evaluative factors were considered, culminating in a decision by the jury as to whether a grant would be awarded. The final decisions on the amounts awarded were then published on the OMDC's website. The OMDC submits that since the amount of funding awarded to each applicant was made public, the disclosure of this information satisfied any possible public interest in the matter, including the principles of openness and transparency regarding the fund. It argues that the disclosure of the deliberations leading to the final decisions would not enhance the principles of openness and transparency regarding the fund.

[10] Further, the OMDC states that while the information contained in the four columns listed in Record 1 formed part of the basis for decision-making, other evaluative factors were also taken into consideration before a final decision on an award was determined. Therefore, it submits, disclosing the information in the columns would not enhance public scrutiny or contribute meaningfully to the information already in the public domain. Given these factors, the OMDC argues that it has re-exercised its discretion, continuing to find in favour of non-disclosure of the information contained in the four columns of Record 1.

[11] The OMDC further notes that it has also reviewed the Project Description section of the record and has decided to disclose parts of the project descriptions to the appellant, due to the passage of time since the record was created.

[12] Concerning Record 26, the OMDC states that the information contained in this record is financial information that was supplied in confidence by third parties and is exempt under section 17(1). However, the OMDC also claimed the application of section 13(1) to some of the information in this record. The OMDC submits that it has re-exercised its discretion with respect to the information that was found to be exempt under section 13(1) and has decided to disclose the following portions of the record to the appellant:

- The description of what is being analyzed, i.e., balance sheet, income statement, financial ratio and revenue profitability trend;

- The explanations for current ratio, asset liability ratio, profit margin and return on assets categories for risk analysis; and
- Part of the solvency dashboard, which provides the nature and categories of assessment.

[13] The OMDC argues that disclosing the above-listed information would increase public confidence in it and its administration of the fund by demonstrating the categories of assessment and financial factors that it took into account during the evaluative process.

[14] Lastly, the OMDC submits that consistent with the principles of the *Act*, it has disclosed as much information in the records as is reasonably possible, without disclosing information that would reveal the analysis, evaluation and advice provided to government by OMDC staff.

[15] I find that, in re-exercising its discretion, the OMDC took into account relevant considerations and weighed them both for and against the disclosure of the information at issue and did not take into account irrelevant considerations. In my view, the OMDC's representations reveal that it considered the appellant's position and circumstances, balanced against the purpose of section 13(1), which is to allow the provision of free and frank advice from staff to decision-makers. I have also taken into consideration the fact that the OMDC has disclosed further information to the appellant as a result of re-exercising its discretion. Under all the circumstances, therefore, I am satisfied that the OMDC has appropriately re-exercised its discretion under section 13(1) and I uphold this re-exercise of discretion to apply the exemption in section 13(1) to the records I did not order disclosed in Interim Order PO-3688-I.

ORDER:

I uphold the OMDC's exercise of discretion and dismiss the appeal.

Original Signed By: _____
Cathy Hamilton
Adjudicator

_____ March 21, 2017