

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3782

Appeal PA15-2

Ministry of Tourism, Culture and Sport

October 27, 2017

Summary: The appellant submitted a request to the Ministry of Tourism, Culture and Sport (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a number of documents relating to a festival that received funding from the 2014 Celebrate Ontario Program.

The ministry issued a decision granting the appellant partial access to the responsive records. The ministry relied on the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy).

In this order, the adjudicator upholds the ministry's decision under section 21(1) concerning the educational and employment related information in the records. She also finds that the names and titles at issue in the records are subject to the exception in section 2(3) and orders this information disclosed.

The adjudicator does not uphold the ministry's decision under section 17(1), and orders disclosure of the audited financial statements and budget and operating expenses related to the application for funding.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 2(3), 21(1), 21(3)(d), 17(1)(a) and (b).

Orders and Investigation Reports Considered: Order P-1095.

OVERVIEW:

[1] The appellant submitted a request to the Ministry of Tourism, Culture and Sport (the ministry) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to a number of documents relating to a festival that received \$243,000.00 in funding from the 2014 Celebrate Ontario Program (the Program) administered by the ministry.

[2] The ministry located numerous records responsive to the appellant's request and issued a fee estimate and interim access decision to the appellant. In accordance with section 28 of the *Act*, the ministry notified an individual whose interests could be affected by disclosure of the records to seek the individual's position on disclosure. The ministry subsequently issued a decision granting the appellant partial access to the records. The ministry relied on the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) to withhold parts of the records.

[3] The appellant appealed the ministry's decision to the Office of the Information and Privacy Commissioner (the IPC). During mediation of the appeal, the appellant confirmed that she was not pursuing access to certain names, phone numbers, mailing and email addresses of individuals contained in the withheld information. Accordingly, that information is no longer at issue in this appeal.

[4] The appellant also asserted that there is a public interest in disclosure of the withheld information and, as a result, the possible application of the public interest override in section 23 of the *Act* was added as an issue in the appeal.

[5] Also during mediation, three individuals, who held executive positions on the Festival Management Committee (the Committee), were notified of the appeal and their consent to disclosure of their information contained in the records was sought. One of these individuals consented to disclosure of some information, which the ministry disclosed to the appellant. The ministry also issued a subsequent decision disclosing to the appellant the record it had previously withheld under section 22(a). Accordingly, section 22(a) is no longer at issue in this appeal.

[6] As a mediated resolution of the appeal was not possible, it was moved to the adjudication stage of the appeal process for a written inquiry under the *Act*.

[7] The adjudicator formerly assigned to this file began the inquiry by inviting the representations of the ministry and the individuals who did not consent to disclosure of their information. These individuals did not provide representations.

[8] The ministry provided representations which it agreed to share with the other parties in the appeal. Representations were then sought from the appellant and the Committee. To assist these parties, she provided them with a copy of the ministry's complete representations. Neither party provided representations in response.

[9] The file was then assigned to me to conclude the inquiry.

[10] In this order, I uphold the ministry's decision under section 21(1) concerning the educational and employment related information in the records. I also find that the names and titles of individuals at issue in the records are subject to section 2(3) and are not considered personal information and I order this information disclosed.

[11] In addition, I do not uphold the ministry's decision under section 17(1), as such, I order disclosure of the Committee's audited financial statements and budget and operating expenses related to its application for funding.

RECORDS:

[12] The records at issue in this appeal are the following:

Withheld under section 21

- Record 1 (2013 Grants Ontario Application Form) – portions of page 6
- Record 6 (supporting documents) – portions of pages 13 and 37
- Record 7 (2014 Grants Ontario Application Form) – portions of page 6

Withheld under section 17(1)

- Record 1 (2013 Grants Ontario Application Form) – pages 21-29 (financial statement), pages 33-42 (financial statement), portions of pages 47 and 48 (budget)
- Record 6 (supporting documents) – portions of pages 1, 2, 14-22, 24-36, and 37-43 and pages 44-49
- Record 8 (Additional Information Package) – portions of pages 1, 2 and 4
- Record 9 (Audited Financial Statement dated August 31, 2013) – pages 4-13
- Record 11 (2014 Agreement) – portions of pages 20 and 21
- Record 14 (Email, post-event report) – portions of pages 3 and 4

ISSUES:

- A. Do Records 1 (page 6), 6 (pages 13 and 37) and 7 (page 6) contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

- B. Does the mandatory personal privacy exemption at section 21(1) apply to the withheld information in page 6 of Record 1, pages 13 and 37 of Record 6 and page 6 of Record 7
- C. Does the mandatory third party information exemption at section 17(1) apply to withheld information in Records 1, 6, 8, 9, 11 and 14?

DISCUSSION:

Background of the Celebrate Ontario Program and the Role of the Ministry

[13] The ministry states that it administers the Program, which is a transfer payment program. The ministry states that the program's objective is to help new or existing Ontario tourism festivals and events to enhance their programs, activities and services leading to long-term improvements, attract additional tourists to Ontario, and stimulate increased tourism visitor spending.

[14] The ministry also states that the funding available under the Program is limited and applicants need to compete for the available funding through an application process.

[15] The ministry further states that its administration of the Program includes reviewing and evaluating all applications against established criteria in order to determine applicants' abilities to deliver on the following results:

- (1) demonstrate increase in attendance and extended geographic reach;
- (2) demonstrate increase in tourist visitation and tourism receipts; and
- (3) demonstrate improvements in quality of tourism festivals and events and stronger organizations.

A. Do Records 1 (page 6), 6 (pages 13 and 37) and 7 (page 6) contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[18] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(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.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their

¹ Order 11.

dwelling and the contact information for the individual relates to that dwelling.

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

[20] 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

[21] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[22] The ministry states that page 6 of Record 1 is part of the Committee's 2013 grant application form to the Program, where the Committee lists the identities and a biographical description of their key management team.

[23] The ministry states that page 6 of Record 7 is part of the Committee's 2014 grant application form to the Program and contains the identical information as page 6 of Record 1.

[24] The ministry states that it recognizes that the names of the individuals and their corresponding titles do not constitute personal information in accordance with the exception in section 2(3). However, it submits that their biographical information contains both educational and employment history and falls within the meaning of personal information under paragraph (b) of the definition of personal information in section 2(1).

[25] The ministry describes page 13 of Record 6 as a timesheet for all of the named cashiers and gate personnel who worked the 2013 Toronto Caribbean Carnival (the Carnival) and states that the severed information reveals each individual's total hours, hourly rate and total remuneration received for time worked. It describes page 37 of Record 6 as a similar record, namely, a spreadsheet that reveals the remuneration received by each of the named event management personnel working the 2013 Carnival.

[26] The ministry submits that the information at issue in Record 6 is the workers' and event managers' personal information because the name of each worker/event

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

manager is identified on pages 13 and 37 and the severed information constitutes their income/financial information. It states that:

...the remuneration amounts and how they were calculated is analogous to salary information and the IPC has held in past cases that specific salary figures and remuneration paid to individuals constitutes their personal information. Moreover, the IPC has held in the past that the number of hours worked by an employee constitutes his/her personal information.

Analysis/Findings

[27] Based on my review of the information at issue, I agree with the ministry that the names and titles of the individuals in Records 1 and 7 are not personal information as they come within section 2(3), set out above. As this is not personal information, the mandatory personal privacy exemption in section 21(1) cannot apply to this information and I will order the names and titles disclosed.

[28] The remaining information at issue is the personal information of the individuals listed in the records, as it is their employment and educational history within the meaning of paragraph (b) of the definition of personal information in section 2(1) of the *Act*. I will consider whether section 21(1) applies to this information.⁵

B. Does the mandatory personal privacy exemption at section 21(1) apply to the withheld information in page 6 of Record 1, pages 13 and 37 of Record 6 and page 6 of Record 7?

[29] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[30] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[31] If the information fits within any of paragraphs (a) to (e) of section 21(1), or paragraphs (a) to (d) of section 21(4), it is not exempt from disclosure under section 21. The information at issue does not fit within these paragraphs.

[32] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

⁵ The records do not contain the personal information of the appellant. Therefore, the discretionary personal privacy exemption in section 38(b) does not apply.

[33] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[34] The ministry submits that a presumption of an unjustified invasion of personal privacy applies to the biographical information in Records 1 and 7 by reason of section 21(3)(d) because the information relates to these individuals' employment and educational histories.

[35] The ministry also submits that a presumption of an unjustified invasion of personal privacy applies to the remuneration information in Record 6 by reason of section 21 (3)(f) because the information reveals the income of the named individuals. It submits that the IPC has held in past cases that references to an individual's specific salary falls within this presumption and that specific remuneration amounts are analogous to specific salary information.

[36] The ministry further submits that none of the paragraphs (a) to (d) of section 21(4) apply to the biographical information or to the remuneration information in the records.

Analysis/Findings

[37] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁶

[38] The ministry relies on section 21(3)(d), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

relates to employment or educational history;

[39] As noted above, the individuals listed in the records names and professional titles do not constitute "employment history".⁷ This information has already been disclosed to the appellant.

[40] Information contained in resumes⁸ and work histories⁹ falls within the scope of section 21(3)(d).

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁷ Order P-216.

⁸ Orders M-7, M-319 and M-1084.

⁹ Orders M-1084 and MO-1257.

[41] I find that the employment and educational history at issue in Records 1 and 7 is subject to the presumption in section 21(3)(d). It is biographical information revealing their work histories.

[42] As section 21(3)(d) applies to the employment and educational history at issue in Records 1 and 7 apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.¹⁰ In this case, these sections do not apply.

[43] As well, once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).¹¹

[44] The ministry also relies on a presumption in section 21(3) for the information at issue in Record 6. In particular, it relies on section 21(3)(f), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

[45] To qualify under this section, information about an asset must be specific and must reveal, for example, its dollar value or size.¹²

[46] Lump sum payments that are separate from an individual's salary have consistently been found not to fall within section 21(3)(f).¹³

[47] At issue in Record 6 are the Committee employees':

- total hours worked in combination with hourly rate, and
- amount of remuneration paid.

[48] This information does not reveal salaries but reveals lump sum payments of the individuals listed therein. Therefore, the information at issue in Record 6 is not subject to the presumption in section 21(3)(f).

¹⁰ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

¹¹ *John Doe v. Ontario (Information and Privacy Commissioner)*, cited above.

¹² Order PO-2011.

¹³ Orders M-173, MO-1184, MO-1469, MO-2174 and MO-2318.

[49] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹⁴ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.¹⁵

[50] In the absence of representations from the appellant, I find that none of the factors and/or circumstances favouring disclosure in section 21(2) are present. Therefore, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies to the information at issue in Record 6.

[51] Therefore, I find that the mandatory personal privacy exemption in section 21(1) applies to the information for which it has been claimed in Records 1, 6 and 7.

C. Does the mandatory third party information exemption at section 17(1) apply to withheld information in Records 1, 6, 8, 9, 11 and 14?

[52] The ministry relies on sections 17(1)(a) and (b). These sections read:

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;

[53] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹⁶ 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.¹⁷

¹⁴ Order P-239.

¹⁵ Orders PO-2267 and PO-2733.

¹⁶ *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.*).

¹⁷ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[54] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
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.

[55] By way of background to the section 17(1) exemption claim, the ministry states that the information at issue was provided to it by the Committee either as part of the application process to the Program, or as part of the Program's report-back obligations that all recipients of the Program were required to adhere to.

[56] The ministry further states that in order to appropriately evaluate applications in a competitive grant program and to award public funds, it needs to receive detailed proprietary information from applicants to the Program regarding:

- (i) their financial information;
- (ii) their ability to carry out the proposed festival/event;
- (iii) their proposed/confirmed business partners or sponsors; and
- (iv) their economic and outcome measures.

[57] To illustrate, the ministry refers to the Program's funding formula and eligibility requirements,¹⁸ which are based on an applicant's cash operating expenses from the previous year, therefore, an applicant must submit financial statements as part of its application and subsequently provide its costs for review.

Part 1: type of information

[58] The ministry states that the records contain the financial information of the Committee because the information at issue relates to money and its use or distribution and contains or refers to specific data.

[59] The ministry states that Record 1 is the Committee's 2013 grant application form to the Program and that this record contains audited financial statements and budget

¹⁸ The ministry states that the Program's funding formula and eligibility requirements are explained at page 1 of Record 8: the "Celebrate Ontario 2014 Additional Information Package".

details of the Carnival.

[60] The ministry states that Record 6 contains a number of invoices submitted by the Committee to it for the Carnival in 2013 which received funding under the Program and includes a list of the Committee's rental and service costs, costs incurred for police and security officers, tickets, printing, fence and tent rentals and supplies.

[61] The ministry also states that Record 6 includes a Memorandum of Agreement that contains specific references to financial matters agreed to by the parties to this agreement.

[62] The ministry states that Record 8 is part of the Committee's 2014 grant application package to the Program and contains the Committee's specific budget costs broken down by category for the 2014 Carnival.

[63] The ministry states that Record 9 is the audited financial statements of the Committee for the year ended August 31, 2013.

[64] The ministry states that Record 11 is a copy of the 2014 transfer payment agreement entered into between the ministry and the Committee for funding received under the 2014 Program for the 2014 Carnival and includes the Committee's itemized cash operating budget information for various expense categories for the 2014 Carnival.

[65] The ministry states that the information at issue in Record 14 is an exact duplicate of the financial information at issue in Record 11.

Analysis/Findings re part1

[66] The type of information listed by the ministry in its representations, namely financial information, is set out in section 17(1) and has been discussed in prior orders:

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.¹⁹

[67] I agree with the ministry that the information at issue is financial information as it refers to information relating to money and its use or distribution and contains specific data. This information includes cost accounting methods, profit and loss data, and overhead and operating costs. Therefore, part 1 of the test under section 17(1) has been met.

¹⁹ Order PO-2010.

Part 2: supplied in confidence

Supplied

[68] The ministry states that the financial information contained in the records at issue was supplied directly to it by the Committee as part of its application to the Program or as part of the report-back obligations under the Program.

[69] With respect to the financial information contained in the Budget Schedule of the ministry's 2014 transfer payment agreement with the Committee in Record 11, as replicated in Record 14, the ministry states that it was cognizant of the general rule that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). However, it submits that the severed financial information in these two records falls within the "immutability" exception to this general rule because such information was supplied by the Committee to the ministry and was not susceptible to negotiation between the parties.

[70] The ministry states that this costing information was provided to it as part of the Committee's application and represents the Committee's underlying fixed costs for putting on the Carnival. It states that this costing information was not negotiated as part of the preparation of the transfer payment agreement and did not change from what was supplied to the ministry at the time the application was made to the Program.

[71] To illustrate, the ministry points out that the cost dollar figures in Table 1 of Record 11 (and in Record 14) are exactly the same as the cost dollar figures supplied to it by the Committee as part of the Program's "Additional Information Package", which can be found at page 2 of Record 8. It states that this form was submitted to as part of the Committee's application to the Program.

[72] The ministry states that it does not engage in negotiations with applicants to the Program regarding their stated costs of putting on their festivals/events as these are underlying fixed costs of their festivals/events. It also states that the budget for the purpose of the transfer payment agreement is based on the ministry providing funding to the recipient based on a prescribed percentage of the recipient's total event cash operating budget for the festival/event up to a maximum level of funding prescribed under the Program.

Analysis/Findings re supplied

[73] 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.²⁰

²⁰ Order MO-1706.

[74] 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.²¹

[75] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.²²

[76] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.²³ The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.²⁴

[77] I find that the information at issue in the records was supplied to the ministry by the Committee. The Committee is a not-for-profit incorporated entity with a mandate to manage festivals. At the time of the records' creation, the Committee was tasked with producing the Carnival. The board of the Committee included stakeholder representatives from various musical and performing artists' associations, and members of the artistic and general community.²⁵

[78] The information at issue consists of:

- the Committee's audited financial statements and budget documents,
- the amounts charged to the Committee in invoices it received from other third parties, submitted to the ministry to show the operating expenses incurred by the Committee, and
- the Committee's Budget Schedule to the transfer payment agreement showing the Committee's itemized cash operating budget costing information for various expense categories.

²¹ Orders PO-2020 and PO-2043.

²² This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

²³ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

²⁴ *Miller Transit*, above at para. 34.

²⁵ From the disclosed portions of the records.

[79] I agree with the ministry that this information was provided to it by the Committee either as part of the application process to the Program, or as part of the Program's report-back obligations. I find that all of the information at issue was supplied to the ministry by the Committee.

[80] In making this determination, I have taken into consideration that one record, Record 11, is an agreement between the ministry and the Committee. At issue in this record are the Committee's budgeted operating costs in the attached schedule. This information reveals the Committee's underlying non-negotiable fixed costs for putting on the Carnival. The funding provided by the ministry to the Committee for the Carnival is based on a percentage of these costs. I agree with the ministry that these costs listed in the transfer payment agreement schedule consist of immutable information.

[81] As the information at issue was supplied to the ministry, I will now consider whether it was supplied in confidence.

In confidence

[82] The ministry states that although the Program application form did not specifically address the subject of confidentiality of the applicant's information supplied to it, the application form did expressly inform the applicant that any information provided to the ministry in connection with its application may be subject to disclosure in accordance with the requirements of *FIPPA*.

[83] The ministry submits that the implicit meaning of this *FIPPA* statement is that the ministry would not voluntarily disclose the applicant's information except when required to do so pursuant to the disclosure requirements under *FIPPA* in the context of an access request or pursuant to an Order of the IPC.

[84] The ministry states that the application form goes on to state what information of the applicant will be made available to the public: names and addresses of applicants that received grants under the Program; the amount of the grant awards; and the purpose for which the grants were awarded. It further submits that the meaning of this statement is that the ministry would not disclose the applicant's other types of information supplied to it through the application process.

[85] The ministry also states that the Program's staff did not disclose the information at issue and treated it confidentially as part of the application process.

Analysis/Findings re in confidence

[86] In order to satisfy the "in confidence" component of part 2, 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.²⁶

[87] 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
- prepared for a purpose that would not entail disclosure.²⁷

[88] Based on my review of the information at issue in the records and the ministry's detailed representations, I find that the information at issue in the records was supplied by the Committee in confidence, as it was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- treated consistently by the Committee 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.

[89] Therefore, part 2 of the test has been met under section 17(1).

Part 3: harms

[90] 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.²⁸

²⁶ Order PO-2020.

²⁷ 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.

²⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[91] 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*.²⁹

[92] In applying section 17(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).³⁰

Section 17(1)(a): prejudice to competitive position

[93] The ministry states that it took note that disclosure of an applicant's proprietary information could put the applicant at a competitive disadvantage for the delivery of its festival/event. Moreover, the ministry had a concern that that disclosure of an applicant's financial information might encourage other organizations or Program applicants to request such information from the ministry through access requests.

[94] Lastly, the ministry states that disclosure of an applicant's financial information could have a negative impact on potential partnerships and sponsorships should its sponsors not wish to disclose their involvement at the time the application is made to the ministry. Lack of assurances of confidentiality by the ministry may deter potential partners/sponsors from providing contributions altogether, which could negatively impact the overall viability for the festival/event.

Analysis/Findings re section 17(1)(a)

[95] As noted above, the information at issue consists of:

- the Committee's audited financial statements and budget documents,
- the amounts charged to the Committee in invoices it received from other third parties, submitted to the ministry to show the operating expenses incurred by the Committee, and
- the Committee's Budget Schedule to the transfer payment agreement showing the Committee's itemized cash operating budget costing information for various expense categories.

[96] None of this information concerns a sponsor of the Carnival, therefore, I do not accept the ministry's arguments about harm to sponsors.

[97] Furthermore, even if the information at issue, the financial statements, budgets,

²⁹ Order PO-2435.

³⁰ Order PO-2435.

and expenses of the Committee, is disclosed in this appeal, this does not mean that the same information would be disclosed in response to another access request.

[98] At issue in this appeal is the financial information used by the Committee to support its funding application for the Carnival, not the fact that the Committee applied for funding. Access to the records at issue was sought in this appeal after the Carnival took place, not at the time of the application. Therefore, I do not accept the ministry's argument that disclosure would reveal "partners/sponsors" involvement at the time the application is made to the ministry.

[99] Therefore, I find that disclosure of the information at issue in the records could not reasonably be expected to significantly prejudice the competitive position of a sponsor or partner as submitted by the ministry.

[100] As well, in the absence of representations from the Committee, I have insufficient evidence to support a finding that disclosure could reasonably be expected to interfere significantly with the contractual or other negotiations of a person, group of persons or organization. In fact, the ministry specifically states that it does not engage in negotiations with applicants to the Program regarding their stated costs of putting on their festivals/events and that the funding it provides is based on a prescribed percentage of the recipient's total event cash operating budget for the festival/event.

[101] Accordingly, I find that section 17(1)(a) does not apply to exempt the information at issue in the records.

Section 17(1)(b): similar information no longer supplied

[102] The ministry states that it is necessary for it to receive detailed proprietary information from applicants to the Program in order for it to evaluate applications in a competitive grant program and to appropriately award public funds in accordance with the Program's objectives and guidelines.

[103] The ministry submits that if confidentiality assurances cannot be provided, applicants will have to carefully weigh the advantages of receiving funding from the Program against the risks that their confidential proprietary information will be disclosed. Consequently, the ministry submits that there is a genuine risk that potential applicants to the Program in the future would either decline to apply to the Program, or if they did apply, they may refuse to disclose some or all of their proprietary information.

[104] The ministry states that the corresponding harm is that this would dilute the effectiveness of the Program in that ministry staff would not be able to evaluate and assess applications properly. It states that:

Financial information is critical to the Program at the intake stage in order to assess applicants against the eligibility criteria and to determine the

appropriate funding category under the Program, given the nature of the Program's funding formula described earlier. Furthermore, this financial information is needed for the report-back requirements of the Program in order to confirm that the expenses reported by recipients did in fact occur and that such expenses can be deemed as eligible expenses under the Program's rules. This financial information is necessary in order for the ministry to assess and process the final funding instalment to the recipient. Without this financial information evidence, Program staff cannot accurately assess the success of the festival/event and there would be an increased risk to the ministry that the funding initially provided to a recipient by the ministry was not used properly or in accordance with the budgeted costs in the transfer payment agreement.

Moreover, should potential or qualified applicants decide not to apply to the Program at all, such a reduction in the applicant pool would be contrary to the policy objective of the Program which is to help new or existing Ontario tourism festivals and events to enhance their programs, activities and services that would lead to long-term improvements, attract additional tourists to Ontario, and to stimulate increased tourism visitor spending. Although the Program is a competitive program, it is desirable that it be available to as many applicants in the province as possible in order to promote and maximize the economic benefits of the Program.

Analysis/Findings re section 17(1)(b)

[105] In Order P-1095, the Ministry of Health (MOH) received a request for information about its dealings with a number of funded projects. In that order, in finding that section 17(1)(b) did not apply, the adjudicator stated that:

As I noted above, [MOH] indicates that in order to be eligible for funding, the consumer/survivor groups were required to complete and submit the forms in Record Category 1 to the [MOH]. This included providing their banking information. As it is in their interest to continue to receive funding for [MOH] sponsored initiatives and programs, I do not find it reasonable to expect that the affected parties would no longer provide this information to the [MOH]. Accordingly, I find that disclosure of this information could not reasonably be expected to result in the harms described in section 17(1)(b) of the *Act*.

[106] Similarly, in this appeal, I find that section 17(1)(b) does not apply. The information at issue is the Committee's audited financial statements, its proposed budget and actual expenses incurred to put on the Carnival. It is required to provide this information to obtain funding from the ministry. The ministry provides funding based on a prescribed percentage of the financial information it receives from applicants. It is in the interest of applicants for funding from the ministry to provide this

information in order to receive funding.

[107] I find that in the circumstances of this appeal, disclosure of the information at issue in the records, could not result in similar information no longer being supplied to the ministry.

[108] Therefore, I find that section 17(1)(b) does not apply.

[109] As neither sections 17(1)(a) or (b) apply and no other mandatory exemptions apply, I will order disclosure of the information at issue in the records for which section 17(1) has been claimed.

ORDER:

1. I order the ministry to disclose the names and titles of the individuals listed on page 6 in each of Records 1 and 7 to the appellant by **December 4, 2017** but not before **November 27, 2017**. For ease of reference, I have provided the ministry with a copy of these pages highlighting the information to be disclosed.
2. I uphold the ministry's decision to withhold access to the information at issue on pages 13 and 37 of Record 6 and the remaining information at issue on page 6 of Records 1 and 7.
3. I order the ministry to disclose the information that it has withheld under section 17(1) to the appellant by **December 4, 2017** but not before **November 27, 2017**.

Original Signed by: _____

Diane Smith
Adjudicator

October 27, 2017 _____