

THE THIRD PARTY INFORMATION EXEMPTIONS

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by

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Historical context for the third party information exemption

The two public sector statutes, the *Freedom of Information and Protection of Privacy Act* (FIPPA), enacted in 1988, and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA), was passed in 1991). Each of these pieces of legislation has two main purposes, as outlined in section 1:

- (1) to give a right of access to records held by public bodies (Ministries, provincial government agencies, municipalities, school boards, police forces, community colleges, and universities (“freedom of information” or FOI)
- (2) protecting the privacy of personal information in the hands of public bodies by allowing individuals access to their own information while protecting against inappropriate collection, use and disclosure of the personal information of others

The *Acts* contain a number of exemptions which either give the institution receiving the request the discretion to disclose or not disclose requested information (discretionary exemptions like sections 14, 18, 19 and 49(a) and (b)) or mandatory exemptions which prohibit the disclosure of certain kinds of information; section 12 (Cabinet records), section 21(1) (personal information of individuals other than the requester) and section 17(1) (third party information). This breakout session is designed to give some clarity to the often-cloudy application of the section 17(1) exemption to information that is about entities which do business with government.

How does the IPC determine whether the section 17(1) exemption applies?

Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party who are resisting the disclosure of the information 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.

What types of information are covered by the section 17(1) exemption?

The types of information listed in section 17(1) have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and

- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

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 [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

Was the information “supplied” to the institution by the third party?

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

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 [Orders PO-2018, MO-1706].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

In Order PO-2435, Assistant Commissioner Brian Beamish adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be “supplied”. In that order, Assistant Commissioner Beamish rejected the Ministry’s position that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish observed that the government’s option of accepting or rejecting a consultant’s bid is a “form of negotiation”:

The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

It is also important to note that the per diem does not represent a fixed underlying cost, but rather it is the amount being charged by the contracting party for providing a particular individual's services.

Exceptions to the general rule favouring disclosure of the terms of a contract

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

In Order 01-20, British Columbia Information and Privacy Commissioner David Loukidelis explained his view of the "inferred disclosure" exception to the general rule favouring the disclosure of the terms of a negotiated contract as follows:

If the disclosure of information in a contract with a public body would permit an accurate inference to be made of underlying confidential information supplied by the contractor to the public body – such as the contractor's non-negotiated costs for materials, labour or administration – that inferred disclosure of information can be protected [...].

Commissioner Loukidelis' ruling in Order 01-20 was also the subject of discussion in a subsequent decision of Madam Justice Ross of the Supreme Court of British Columbia. In *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848, at paragraphs 72 to 79 of the decision, Madame

Justice Ross explained with respect to the ruling at first instance that was being challenged:

Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b) [section 17(1) of the *Ontario Act*]. To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied". It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.

In other words, information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).

Was the information “supplied” in confidence?

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Part 3: Harms

To meet part 3 of the test, the Ministry and the affected parties, as the parties resisting disclosure, must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In Order PO-2435, Assistant Commissioner Brian Beamish commented on the need for “detailed and convincing” evidence and the burden of proof which falls on the parties to an appeal who are resisting disclosure:

Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide “detailed and convincing” evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson’s Order P-373 stated:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words “**detailed and convincing**” do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the

evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The burden of proof in section 17(1)

The critical piece of information that is almost always lacking in the submissions received from both institutions and the third parties to whom the information relates is a complete explanation of how the disclosure of the information under consideration can reasonably be expected to result in the kind of harms to its competitive position or an undue loss or gain to the third party. In almost all cases, the parties simply state that they will suffer some unspecified harm to their financial interests if the information is disclosed but do not go on to explain how that harm might reasonably be expected to occur. What is lacking is submissions that link the disclosure of the information in the record to the harms being claimed.

Parties making submissions on the application of this exemption need to understand that what may appear to be self-evident to them is not necessarily so clear to the adjudicator who reviews the institution's decision. We don't know your industry like you do and don't appreciate the impact that the disclosure of certain kinds of information might have on their business. This needs to be explained to the adjudicator. Just by saying that disclosure will result in harm to one's competitive position or an undue loss or gain does not make it so. The parties making these assertions must back them up with evidence and submissions that address these questions straight on.

The onus of proving an assertion in law lies on the party making the assertion. A party who is relying on section 17(1) must provide representations that demonstrate a reasonable likelihood that the disclosure of the information will lead to one or other of the harms in section 17(1) coming to pass. The party making the assertion must explain why and how the harm being alleged will occur should the information be disclosed.

Section 17(2): tax information

Section 17(2) states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

Section 17(2) does not prevent the taxpayer to which the tax liability accrues from obtaining this information upon request [Order PO-1059-I].

Section 17(3): exception to the exemption

Section 17(3) states:

A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.