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Practice *Direction*

Guidelines for parties whose commercial or business information is at issue in an appeal

Background

Government institutions collect commercial or business information as part of their role in providing services to the public. For example, people give information about their business when they fill out an application for a program or service, such as registering a corporation or applying for a grant. People also provide information to the government when they bid on a government tender.

People sometimes want access to government records that contain a business entity's scientific, technical, commercial, financial or labour relations information, or trade secret. Under the *Act*, we refer to that business entity as an "affected person," or "third party," and that type of information as "third party information."

If someone wants access to information held by an institution, he or she makes a request under the *Act*. A request may be for information of a named third party, or it may be general in nature but encompass specific third party information (e.g., a request for all tenders for a particular project).

The institution that receives the request then determines whether this information can be disclosed.

Here are answers to questions most frequently asked about appeals where third party information is at issue:

Why would someone want access to my information?

There could be many reasons why someone might want access to your information held by an institution. Here are some examples:

1. You were the successful bidder on a government tender, and someone wants to see the structure of the bid;
2. You received a government grant, and someone wants to find out the details or the amount of funding;
3. You and the institution are engaged in a joint business venture. Someone wants to see a copy of the agreement setting out the terms of the business deal.

Why didn't the institution notify me when the access request was first made?

If the institution that received the request decides not to disclose a third party's information, the third party usually will not be contacted.

What is an appeal?

A requester can ask the IPC to review an institution's decision not to disclose information in response to an access request under the *Act*. This is referred to as an appeal.

What happens once the IPC receives an appeal?

If it is not possible to settle the appeal through mediation, the Adjudicator sends a Notice of Inquiry to one or more parties. The Notice of Inquiry summarizes the background of the appeal, describes the records at issue, sets out the issues to be decided, and invites the party or parties to submit representations in writing. Once all necessary representations are received, they are considered by the Adjudicator, and an order is issued which disposes of some or all of the issues.

What are representations?

Representations are arguments and/or evidence presented to the Adjudicator to persuade him or her to resolve the appeal in a particular way.

Why did the IPC ask me to make representations?

The IPC may ask a third party to submit representations when it appears that the records at issue may contain the third party's commercial, financial, scientific, technical or labour relations information, or trade secret.

The *Act* gives a third party the right to comment on whether this information should be disclosed.

How do I make representations?

You may make representations by providing a written response to the issues raised in the Notice of Inquiry, responding to some or all of the issues as you see fit. If you feel that the information should *not* be disclosed and that the exemption applies, this is your opportunity to provide the Adjudicator with specific reasons why you believe so.

Why should I make representations?

With respect to third party information, the institution (where it has denied access) and the third party share the responsibility for establishing why the information should not be disclosed. In appeals involving this type of information, it is important that the Adjudicator hear from the third party for two reasons: (1) the institution is not obliged to provide representations to support its decision not to disclose the information; and (2) the third party is in the best position to describe the effects that disclosure could have on their interests.

What kinds of information should be included?

The Notice of Inquiry will set out the issues to be addressed. For example, you might be asked to explain why you take the position that the information in the records was supplied to the institution in confidence, or to present arguments or evidence to show why disclosure of the information could reasonably be expected to result in one of the harms specified in the *Act*.

When are representations due?

A party is generally given 21 days to submit representations to the Adjudicator. The exact due date is specified in the Notice of Inquiry.

What might happen if I do not submit representations?

If you do not make representations, the Adjudicator will proceed to determine the issues in their absence. By making representations, you may improve the chances of obtaining a favourable result in the appeal.

What if I agree that the information at issue can be disclosed?

Where this is the case, you should simply indicate in your representations that you consent to disclosure of the information. If you consent only to partial disclosure, it is necessary to identify for the Adjudicator the specific portions of the record that you agree may be disclosed.

Will my representations be shared with any other party?

The Adjudicator may share your representations with the other party or parties to the appeal, unless there are overriding confidentiality concerns. If you would like any portions of your representations withheld, you must explain in detail the reasons for your request. Please see *Practice Direction* number 7 for more detailed information about sharing of representations.

What happens after I submit my representations?

An Adjudicator will consider the representations and resolve some or all of the issues in the appeal by issuing a written order. The Adjudicator will send copies of this order to you and the other parties involved in the appeal by mail.

Will my third party information be disclosed?

This depends on whether the release of the information meets the three-part test as required by the third party information exemption. This test is described in detail in the Notice of Inquiry.

Who can answer additional questions?

For general questions about third party information at the appeal stage, please contact the IPC's Assistant Registrar. This individual's name and telephone number appear on the covering letter attached to the Notice of Inquiry. The IPC can also be reached by dialling 1-800-387-0073 (in the Toronto area, dial 416-326-3333).

For questions about the nature of the records which contain your third party information, please contact the Freedom of Information and Privacy Co-ordinator at the institution identified in the Notice of Inquiry.

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If you have any comments regarding this document, wish to advise of a change of address, or be added to the electronic mailing list, contact:

Communications Department
Information and Privacy Commissioner/Ontario
2 Bloor Street East, Suite 1400
Toronto, Ontario M4W 1A8
Telephone: 416-326-3333 • 1-800-387-0073
Facsimile: 416-325-9195
TTY (Teletypewriter): 416-325-7539
Website: www.ipc.on.ca

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