Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2226

Appeal PA-030030-2

Ministry of Enterprise, Opportunity and Innovation

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NATURE OF THE APPEAL:

The Ministry of Enterprise, Opportunity and Innovation (now the Ministry of Economic Development and Trade) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the sale of de Havilland Inc. (de Havilland) to Bombardier Aerospace (Bombardier) and the Ontario government in 1992, and the subsequent sale of the Ontario government's share of the company to Bombardier in 1997, together with related information concerning tax incentives, benefits and corporate commitments from Bombardier relating to jobs. The request was subsequently clarified to the various sale agreements entered into by the Ontario government and Bombardier relating to de Havilland.

The Ministry identified 3 responsive records:

1. Asset purchase agreement dated January 22, 1992 among various organizations including Bombardier, the Boeing Company (Boeing), the Ontario government as represented by the Minister of Industry, Trade and Technology (now the Ministry) and de Havilland for the purchase of de Havilland.

2. Shareholders agreement dated March 9, 1992 among Bombardier, Ontario Aerospace Corporation, the Ontario government as represented by the Ministry and de Havilland.

3. Share purchase agreement dated January 26, 1997 among Bombardier, Ontario Aerospace Corporation and the Ontario government as represented by the Ministry.

After notifying Bombardier and the federal government department of Industry Canada and receiving submissions from Bombardier, the Ministry wrote to the requester denying access to all three records in their entirety on the basis of the following exemptions in the *Act*:

- section 17(1) - third party commercial information
- sections 18(1) - economic interests of Ontario

The specific provisions of section 18(1) identified by the Ministry in the decision letter were paragraphs (a), (c), (d), (e) and (g).

The requester (now the appellant) appealed the Ministry's decision.

Mediation was not successful and the appeal was transferred to the adjudication stage of the appeal process.

I initially sent a Notice of Inquiry to the Ministry, Bombardier and Boeing, setting out the facts and issues in the appeal. I asked for representations from the Ministry on both exemption claims; from Bombardier on section 17(1) as it relates to all three records; and from Boeing on section 17(1) as it relates to Record 1 only. The Ministry advised that Industry Canada does not have an interest in the records at issue in this appeal, so I did not provide it with a Notice. I also

did not notify the Ontario Aerospace Corporation because the Ministry advised that it has been wound up.

I received representations from the Ministry, Bombardier and Boeing. I then sent the Notice to the appellant, along with the Ministry's representations and the non-confidential portions of the representations of the other two parties. The appellant responded with representations.

RECORDS:

The records are described in the Ministry's representations as follows:

1. Asset Purchase Agreement dated January 22, 1992 among The Boeing Company, Boeing of Canada Ltd., Boeing Canada Technology Ltd., 692567 Ontario Limited, de Havilland Inc., (the "Vendors) Bombardier Inc., and Her Majesty the Queen in right on Ontario as represented by the Minister of Industry, Trade and Technology (now [the Ministry]) and de Havilland Holdings Inc. (the "Asset Purchase Agreement"). This agreement documents the terms and conditions of the sale of assets constituting the de Havilland business by the Vendors to de Havilland Holdings Inc., a company formed by Bombardier and the Ministry to acquire the de Havilland business.

2. Shareholders Agreement dated March 9, 1992 among Bombardier Inc., Ontario Aerospace Corporation, Her Majesty the Queen in right of Ontario and de Havilland Holdings Inc. (the "Shareholders Agreement"). Ontario Aerospace Corporation was formed by the Ministry to hold its shares of the de Havilland business. The assets of Ontario Aerospace Corporation were assigned to the Ministry in 1997 pursuant to a General Conveyance and Assumption Agreement dated May 15, 1997.

3. Put Agreement (or Share Purchase Agreement) together with the Promissory Note dated January 28, 1997 among Bombardier Inc., Ontario Aerospace Corporation and Her Majesty the Queen in right of Ontario as represented by the Minister of Economic Development, Trade and Tourism (now [the Ministry]) (the "Put Agreement"). Pursuant to the Put Agreement the Ministry sold its shares in the de Havilland business to Bombardier Inc. for a sale price of $49.0 million dollars subject to certain terms and conditions outlined in the promissory note and the Put Agreement. The debt remains outstanding.

DISCUSSION:

THIRD PARTY INFORMATION

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, if 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;

Section 17(1) recognizes that in the course of carrying out public responsibilities, government bodies receive information about the activities of private businesses, and the exemption is designed to protect the "informational assets" of businesses or other organizations that provide information to the government in this context (Order PO-1805). 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 information that, while held by government, constitutes confidential information of third parties which could be exploited in the marketplace.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the Ministry, Bombardier and/or Boeing 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 Ministry 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 (a), (b) or (c) of section 17(1) will occur.

(Orders 36, P-373, M-29 and M-37).

Part 1: type of information

All three records reflect detailed contracts entered into by the Ontario government and various private and public sector bodies relating to assets and shares of what the Ministry describes as "the de Havilland business". There would appear to be consensus among the various parties in this appeal that the information contained in the records relates to "the buying, selling or exchange of merchandise or services", and therefore satisfies the definition of "commercial information" (Order P-493). I concur. Portions of the records also contain "financial information" and "labour relations information" as those terms have been defined by this office in previous orders (Orders P-47, P-394 and P-653).

Accordingly, I find that part one of the section 17(1) test has been established.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the Ministry, Bombardier and/or Boeing must establish that the information was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

"Supplied"

General principles

The requirement that information be "supplied" to the Ministry 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 (Orders PO-2018, MO-1706).

Representations

The Ministry's representations on the "supplied" component of part 2 consist of the following:

> Although the contents of agreements to which the Institution is a party do not usually qualify as having been "supplied", the IPC has consistently held that if the information at issue in the agreement is the same as that which was actually supplied to the Ministry by the affected party, then the information is "supplied" for the purposes of section 17. (P-1105)

> The Ministry is one of eight parties to the Asset Purchase Agreement which was prepared by one of the affected parties. The Ministry submits that for all intents and purposes the Agreement was "supplied" to it.

Bombardier's representations do not address the "supplied" component of section 17(1), instead focusing on the existence of confidentiality provisions in the various records as well as the perceived harm that could result from disclosure.

Because Boeing is a signatory to Record 1 only, its representations are restricted to that record. Like Bombardier, Boeing's representations on part 2 focus on the confidentiality provision of Record 1 and do not address the "supplied" component.

The appellant's representations also do not deal with part two of the section 17(1) test.

Analysis and Findings

As indicated above, information in a contract is not normally considered as having been "supplied". In Order P-1545, I looked at whether information in a contract was "supplied" and concluded:

> Although some of the terms of the contract, and perhaps the contract as a whole, may have been agreed to with little discussion or the more extensive negotiation process normally associated with this type of agreement, I find that the record nonetheless represents a negotiated arrangement between Hydro and the affected person. In its representations on section 18(1)(c), quoted earlier in this order, Hydro appears to acknowledge that there is an element of negotiation to this type of contract when it argues that disclosure of the record could result in a potential future candidate choosing to "negotiate more advantageous terms". I find that the contract was the result of negotiations, however minimal, and that the record was not "supplied" for the purposes of section 17(1).

Record 1 in this appeal is a complex, multi-party agreement for the purchase of the assets of a large corporation. Records 2 and 3 are agreements that flow from Record 1, and they are also detailed and complex. All three contracts are multi-faceted and contain customized terms and conditions. None of the parties resisting disclosure have provided representations supporting the position that the agreements or any specific provisions in them were "supplied" to the Ministry or that they would reveal information actually supplied to the Ministry and, in my view, it is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as "the informational assets of non-government parties", but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".

Accordingly, I find that the "supplied" component of part two of the section 17(1) exemption test has not been established for any of the three records.

Conclusion

Because all three parts of the test must be established in order for records to qualify under section 17(1), this exemption does not apply in the circumstances of this appeal.

ECONOMIC AND OTHER INTERESTS

The Ministry originally claimed sections 18(1) (a), (c), (d), (e) and (g) of the *Act* as alternative grounds for denying access to all three records in their entirety. However, in its representations, the Ministry restricts its claim to sections 18(1)(a), (c) and (d), and argues that these exemptions apply only to Sections 3 and 7 of Record 3 as well as the Promissory Note attached as "Schedule A" to that record.

Because section 18(1) is a discretionary exemption, I will assume that the Ministry is no longer relying on sections 18(1)(e) and (g). Also, in the absence of evidence or argument from the Ministry on the application of the section 18(1) exemption to Records 1 and 2 and the remaining portions of Record 3, I find that these records and partial record do not qualify for exemption and should be disclosed.

I will restrict my discussion to the remaining portions or Record 3, as described above.

Sections 18(1)(a), (c) and (d) of the *Act* read as follows:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

Section 18 (1)(a)

In order to qualify for exemption under Section 18 (1)(a), the Ministry must establish that the information at issue:

1. is a trade secret, or financial, commercial, scientific or technical information; and
2. belongs to the Government of Ontario or an institution; and

3. has monetary value or potential monetary value.

"financial, commercial, scientific or technical information"

I have already determined in my earlier discussion of section 17(1) that Record 3 contains "commercial information", thereby satisfying the first requirement of section 18(1)(a). The Promissory Note also contains "financial information".

"belongs to"

The Ministry submits:

> The Put Agreement and the Promissory Note sets out the terms and conditions whereby Bombardier Inc. will repay Ontario Aerospace Corporation for the purchase of the Ministry's shares in de Havilland Holdings Inc. The Put Agreement and Promissory Note were assigned by Ontario Aerospace Corporation to the Ministry pursuant to a General Conveyance and Assumptions Agreement dated May 15, 1997 and is thus "owned" by the Ministry.

The Ministry attached a copy of the Notice of Assignment with its representations.

The appellant's representations do not address the "belongs to" component of section 18(1)(a).

In Order PO-1783, Senior Adjudicator David Goodis reviewed some of my earlier orders (Orders P-1281 and P-1114) and then provided the following comments on the phrase "belongs to" in section 18(1)(a). He stated:

> [Assistant Commissioner Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business-to-business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. …

Applying this reasoning to the portions of Record 3 that remain at issue here, I find that Sections 3 and 7 of the Put Agreement, or the agreement as a whole for that matter, do not "belong to" the Ministry. The Ministry does not have a proprietary interest in the Put Agreement that requires its protection from misappropriation by another party. The Ministry's willingness to disclose a significant portion of this record is evidence of the absence of any generalized concern for its

protection, and I find that the contents of Sections 3 and 7, which outline covenants provided by Bombardier to the Ministry as part of the share purchase arrangement and general provisions detailing the impact of a default under the terms of the agreement are not proprietary in nature and cannot accurately be said to "belong to" the Ministry as that term is used in section 18(1)(a).

As far as the Promissory Note in Schedule A is concerned, it is a negotiable instrument that can be sold. The right to sell implies the right of ownership, and for that reason I accept that it "belongs to" the Ministry in the requisite sense.

"monetary value"

The Ministry submits:

> Section 18(1)(a) of [the *Act*] requires that the information itself has monetary value. "Monetary value" means the information has an intrinsic value. The Promissory Note as qualified by sections 3 and 7 of the Put Agreement has both an intrinsic (the net present value of the cash flow to the Ministry) and a market value (the value that a third party would be willing to pay for the cash flow). The Promissory Note, as qualified by sections 3 and 7 of the Put Agreement is a negotiable instrument and could be sold or assigned by the Ministry to another party.

The Ministry refers to the *Bills of Exchange Act* in support of its argument.

Again, the appellant's representations do not address this part of the section 18(1)(a) test.

In Order M-654, Adjudicator Holly Big Canoe made the following statements with respect to the third component of the section 18(1)(a) test:

> The use of the term "monetary value" in section 11(a) [the equivalent provision to section 18(1)(a) found in the *Municipal Freedom of Information and Protection of Privacy Act*] requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information . . ..

Although I accept that the Promissory Note comprising Schedule A may have a market value, as argued by the Ministry, I do not accept that it has an intrinsic value, as required in order to meet the requirements of section 18(1)(a). The total value of the Note itself is already known to the parties, so it is not possible for the Ministry to argue that disclosing that figure would "deprive the institution of the monetary value of the information". As far as the terms and conditions outlined in the Note are concerned, which include payment schedules and provisions to deal with default, in my view, they have no intrinsic value. In order to have intrinsic value in the context of section 18(1)(a), the information at issue must have value in not otherwise being known. That is simply not the case with respect to the Promissory Note. Disclosing the content of the Note

would not impact its value. On the contrary, its content determines its value. It stands to reason that a prospective purchaser would only be interested in buying the Note from the Ministry if made aware of its contents, and disclosure to one prospective purchaser in the context of any such discussions would not affect the value of the Note as a marketable asset to another prospective purchaser. Unlike a trade secret, business-to-business mailing list or other type of confidential business information that derives its value by not being otherwise known, a Promissory Note has no value unless its content is made known, and as such it has no intrinsic value, as required in order to satisfy the requirements of section 18(1)(a).

Therefore, I find that the Promissory Note attached as Schedule A to Record 3 does not have "monetary value", thereby failing to satisfy the third requirement of section 18(1)(a).

In summary, I find that Sections 3 and 7 and Schedule A of Record 3 do not qualify for exemption under section 18(1)(a) of the *Act*.

Sections 18(1)(c) and 18(1)(d)

Sections 18(1) (c) and (d) are harms-based exemption claims.

Section 18(1)(c) provides the Ministry with a discretionary exemption that can be claimed where disclosing information could reasonably be expected to prejudice the Ministry in the competitive marketplace, interfere with its ability to discharge its responsibilities in managing the provincial economy, or adversely affect the government's ability to protect its legitimate economic interests (Order P-441).

Section 18(1)(d) is a different discretionary exemption, available if the Ministry can demonstrate that disclosure of information contained in a record could reasonably be expected to cause injury to the financial interests of the Government of Ontario or the ability of the Government to manage the provincial economy (Orders P-219, P-641 and P-1114).

The words "reasonably be expected to" appear in both of sections 18(1)(c) and (d). In order to establish that the particular harms in either of these sections "could reasonably be expected" to result from disclosure of a record, the Ministry must provide "detailed and convincing" evidence sufficient 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)* (1988), 41 O.R. (3d) 464 (C.A.)).

The Ministry submits:

> … disclosure of the business terms and conditions of the Promissory Note as qualified by sections 3 and 7 of the Put Agreement could reasonably [be] expected to prejudice the Ministry's ability to renegotiate those terms and conditions thereby affecting the Ministry's financial and economic interests under section 18(1)(c) and (d). The Ministry submits that any long term contractual arrangement is likely to be reviewed and/or amended over time. If the terms and

> conditions are disclosed to parties with an interest in the business affairs of Bombardier those parties could try to pressure the Ministry, in the event that a renegotiation takes place, to accept terms that are adverse to the economic interests of the Ministry. This factor was considered when the Ministry made its decision to exercise the section 18 discretionary exemption.
>
> …
>
> The Ministry submits that the terms and conditions of a financial arrangement with a recipient, including the repayment terms of a sale of shares should not be disclosed as it represents valuable government information. The economic position of the Ministry projects could be prejudiced by the disclosure of the terms and conditions in this case which may be different than terms and conditions negotiated in other cases. …
>
> In addition, the disclosure of the information could affect the ability of the Government to manage the economy of Ontario by impairing the ability of the Ministry to deal on a confidential basis with potential industrial partners. Part of the mandate of the Ministry is to undertake economic development activities including the attraction of new investment in the province of Ontario. Companies, including Bombardier, that are considering investment in Ontario could be reluctant to share confidential financial and commercial information with the Ministry if that information could be disclosed to competitors which would result in the Ministry being unable to enter into agreements which would have positive benefits for the Ontario economy. Furthermore, it is the public interest that detailed information about the operations of a business be supplied in order for the government to be in a position to assess and implement effective and efficient programs that affect businesses.

The appellant makes a number of submissions on sections 18(1)(c) and (d). She states:

> The Ministry's assertion that the disclosure of this information could be prejudicial is not supported by the representations of the Ministry. Parties to a contract that opt to renegotiate the terms of the contract will always be faced with pressure by other parties to renegotiate the contracts on more favourable terms. Further, the Ministry makes reference to a potential renegotiation and such a potential renegotiation does not create a reasonable expectation of harm.
>
> …
>
> … Here de Havilland, Boeing and Bombardier entered into an agreement with the Ministry. As a result of the agreement the Ministry provided financial assistance to a commercial enterprise. [The Ministry's] position is untenable in that there will continue to be financial incentive, to companies seeking public funding for commercial ventures, to provide the information. It is logical to assume that the

> provision of financial and other particulars would be a necessary part of securing funding.
>
> …
>
> The Appellant further submits that the Ministry's bold [sic] and general assertion of disclosure potentially affecting the ability of the Ministry to enter into other agreements that could have positive implications on the economy of Ontario is unfounded. The Ministry cannot rely on a general demand of complete confidentiality by the private sector to assert an exemption under subsection 18(1) even if this means that the Ministry is no longer able to give such an assurance (Order P-55). Moreover, disclosure of 11 and 6 year old agreements, respectively, is unlikely to have such far reaching consequences since any information supplied becomes less sensitive with the passage of time.

I find that the evidence and argument put forward by the Ministry in support of the sections 18(1)(c) and (d) are not sufficiently detailed or convincing to establish a reasonable expectation of any of the harms outlined in these exemptions should the remaining portions of Record 3 be disclosed.

As stated earlier, the various agreements for the purchase and subsequent sale of "the de Havilland business" reflect a complex, multi-faceted arrangement for the re-structuring of a large commercial venture. As such, the contract terms are by necessity tailored to the particular facts and interests of the various parties participating in the re-structuring exercise. Any subsequent similar arrangement involving other parties would have a different set of issues and interests and, in my view, the particulars reflected in the records at issue in this appeal would have limited value or relevance in any subsequent negotiations. The fact that the Ministry is prepared to disclose Records 1 and 2 in their entirety and significant portions of Record 3 supports my position in this regard.

I am also not persuaded that disclosing contracts of this nature could reasonably be expected to put a chill on future dealings between the Ontario government and commercial enterprises seeking financial assistance. In my view, the well-established role of government in this regard, and its willingness and capacity to utilize contracts of this nature as a tool to manage the provincial economy, is sufficient incentive for the private sector to engage the government in discussions similar to those that led to the various agreements at issue here.

Finally, as noted by the appellant, the records at issue in this appeal were executed in 1992 and 1997 and, although the provisions of the Put Agreement are not yet fully implemented, in my view, the age of the records and the fact that the details of the arrangements relating to "the de Havilland business" is to at least some extent already publicly known, and will be revealed in considerable detailed to the appellant as a result of the Ministry's agreement to disclose records in this appeal, is also a factor that helps to mitigate any harms under sections 18(1)(c) and (d).

For all of these reasons, I find that Sections 3 and 7 and Schedule A of Record 3 do not qualify for exemption under sections 18(1)(c) or (d) of the *Act*.

ORDER:

1. I order the Ministry to disclose the records to the appellant by **February 23, 2004** but not before **February 18, 2004**.

2. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant, only upon request.

Original Signed By: January 19, 2004
Tom Mitchinson
Assistant Commissioner