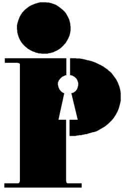

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2758

Appeal PA07-89

McMaster University

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NATURE OF THE APPEAL:

McMaster University (McMaster) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*Act*) from a member of the media for:

> …copies of all contracts between the university and food and beverage companies between 2004 and present. Contracts requested include any involving soft drink companies, restaurants, … cafeteria contractors and vending machine operators.

McMaster responded on December 19, 2006. The subject line of the letter identifies it as an "Interim Decision." The first paragraph also states that the letter is an "interim" access decision:

> … On August 25, 2006, you submitted a request for all contracts between the University and food and beverage companies between 2004 and the present. I am now writing to provide you with an interim access decision and fee estimate.

The "interim access decision" advised the requester that access to "certain portions" of the responsive records would be denied pursuant to section 18(1)(c) of the *Act* and that the estimated total fee to process the request was $98.05.

In a separate letter, also dated December 19, 2006, McMaster wrote to the requester to advise that disclosure of two of the responsive records "… may constitute an unjustified invasion of privacy pursuant to section 21(1) of the *Act*." Section 21(1) is a mandatory exemption aimed at protecting personal privacy. McMaster also advised the requester that it had notified the individuals named in the two records under section 28(1)(b) of the *Act*, which requires such notice before disclosure of information "that the head has reason to believe might constitute an unjustified invasion of privacy for the purposes of clause 21(1)(f)…."

On January 22, 2007, McMaster sent a letter to the requester advising that "a portion of two records that are responsive to your request shall be released to you, such records being copies of contracts between McMaster University and food and beverage vendors. You shall be given access to a portion of the records within 30 days unless an appeal of my decision is commenced within such time period by either of the parties to whom the information relates." The individuals contacted by McMaster in relation to these records did not appeal its decision to disclose redacted versions of these records, which are contracts they entered into with McMaster.

McMaster then sent a further letter to the appellant dated February 27, 2007, which (like the first letter of December 19, 2006) has a subject line describing it as an "Interim Decision." The February 27 letter states:

> I write in regards to the above noted matter. On August 25, 2006 you submitted a request under FIPPA for all contracts between the University and food and beverage companies between 2004 and the present. Two of the contracts required us to provide notice to the third parties and to allow those third parties to make

> representation concerning the release of information contained in those contracts. I am now writing to provide you with an access decision and fee estimate.

McMaster went on to advise the requester that upon payment of $35.74, it would release the portions of the responsive records that are not exempt under the *Act*. The February 27 letter again states that access to "certain portions" of the responsive records is denied under section 18(1)(c) of the *Act*.

The requester (now the appellant) appealed McMaster's decision to this office in a letter dated March 6, 2007. During the intake stage of this appeal, McMaster forwarded a letter dated April 4, 2007 to this office and raised the following concerns:

- the appellant failed to appeal its access decision of December 19, 2006 within 30 days of McMaster's decision, as required under section 50(2) of the *Act*;

- the appellant should be barred from appealing McMaster's access decision of December 19, 2006 because the appellant did not pay the requested $98.05 fee and obtain a redacted version of the records or appeal McMaster's fee decision; and

- the appellant should be barred from appealing McMaster's access decision of February 27, 2007 because the appellant did not pay the requested $35.74 fee and obtain a redacted version of the records or appeal McMaster's fee decision.

Initially, an Intake Officer from this office had discussions with the parties, in which the appellant confirmed that he was not appealing McMaster's fee decisions. Despite being requested to do so, McMaster did not provide copies of the responsive records to this office during these discussions. This office opened an appeal file and subsequently appointed a mediator pursuant to section 51 of the *Act*.

During mediation, McMaster continued to voice its concerns that the appellant should be barred from appealing its decision, and claimed that the appeal is frivolous or vexatious because the appellant did not pay or appeal the requested fees. Also during mediation, McMaster provided a copy of the responsive records to this office, which showed McMaster's proposed redactions with highlighting.

At the end of mediation, the appellant advised that he continues to seek access to the withheld portions of the food and beverage agreements located by McMaster. The appellant also explained that he did not appeal McMaster's decision dated December 19, 2006 because he was of the opinion that it was an interim fee decision.

As the issues were not settled in mediation, this appeal then moved on to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. I was assigned as the adjudicator and provided a Notice of Inquiry to McMaster and all of the companies and individuals identified as providing food and beverage services in the records, including the

individuals notified by McMaster at the request stage. The individuals and companies will be referred to in this order as the "affected parties".

McMaster was invited to provide representations on all issues set out in the Notice of Inquiry. The Notice of Inquiry explained the background of the case and identified the following issues:

- whether the appeal should not be heard on the basis that was filed late;
- whether the request and/or appeal is frivolous or vexatious and/or an abuse of process under section 10(1)(b) or in accordance with the principles enunciated in Order M-618;
- the mandatory exemption at section 21(1) (personal privacy);
- the mandatory exemption at section 17(1) (third party information); and
- the discretionary exemption at section 18(1)(c) (economic and other interests).

The affected parties were also invited to provide representations.

McMaster and four affected parties provided representations. One of the four affected parties providing representations claimed that the record pertaining to it is not responsive to the request, which accordingly became a further issue in the appeal, in addition to those identified above. A fifth affected party, one of the two who had been contacted by McMaster at the request stage with respect to a possible invasion of his privacy, and who did not provide written representations, telephoned this office to advise that he was not concerned about the disclosure of his name but had possible concerns about some portions of his contract for "competition reasons." This affected party provided no further representations.

A Notice of Inquiry was then sent to the appellant enclosing copies of the non-confidential portions of the representations of McMaster and the affected parties. With its representations, one of the affected parties provided copies of the records pertaining to it with proposed redactions that would withhold more information than McMaster had proposed doing. These copies of the records were not shared with the appellant for confidentiality reasons.

The appellant subsequently provided representations, which were then shared with McMaster and all of the affected parties who had provided written representations in response to the initial Notice of Inquiry. McMaster and two affected parties responded with reply representations.

RECORDS:

The records at issue consist of the withheld portions of 21 agreements between McMaster and 15 affected parties. The records include franchise agreements, franchise amending agreements, licensing agreements, agreements respecting the use of "Mac Express" cards, a caterer's agreement, and a "supply" agreement.

PRELIMINARY ISSUES:

WHETHER THE APPEAL WAS FILED IN TIME

Section 50(2) of the *Act* addresses the time for filing an appeal. It states:

> An appeal under subsection (1) shall be made within thirty days after notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

McMaster initially responded to the appellant's request on December 19, 2006. As noted above, in the subject (or "re") line at the beginning of this letter, McMaster characterized it as an "interim" decision, and in the first paragraph of the letter, explained further that it was an "interim access decision and fee estimate."

As also noted above, in this "interim access decision," McMaster claimed the exemption found at section 18(1)(c) of the *Act* in relation to "certain portions" of the responsive records. McMaster did not indicate how many responsive records it had located, nor did it indicate which specific portions were being withheld pursuant to this exemption. This letter also contained no reference to McMaster's decision to notify two affected parties of the request pursuant to section 28(5) of the *Act*, or to the fact that those parties had twenty days after notification to provide representations to McMaster in relation to those records, and that a subsequent decision would be made concerning access to those records. Significantly, that information was contained in a separate letter of the same date that was also sent to the appellant.

McMaster's later correspondence, outlined above and dated January 22 and February 27, 2007, referred to the notice to the other two parties and set out McMaster's eventual decision to disclose the two records to the appellant in redacted form. The February 27 letter reiterated the University's decision to apply section 18(1)(c) to "certain portions" of the records, but again provided no details. Although this appeared to be a final access decision in every respect, it was again titled an "interim" decision. This appears to have been a typographical error caused by re-use of the "re" line from the December 19 letter.

Following the February 27 final decision, the appellant decided to file an appeal, which he did by a letter dated March 6, 2007, received in this office on March 7. This was well within the period of thirty days after the February 27 letter, but more that thirty days after December 19, 2006. McMaster objects to the timeliness of the appeal because it was filed outside the thirty day period following the "interim" decision of December 19.

In its representations, McMaster states that "… there was no indication that the decision to redact portions of the Non-Personal Information Records was anything but a final decision." One of the affected parties agrees that the appeal was out of time and supports this specific argument.

In response, the appellant submits that:

> [h]aving labelled the December 19, 2006 letter an "Interim Decision", I don't understand McMaster's claim that it is a "final decision". Even if this was their intention, this is not how a reasonable requester would have interpreted the letter. It would be grossly unfair to deny a right of appeal in these circumstances.

McMaster's reply submissions concede that the December 19 letter was identified as an "interim" decision, but argue that "… this decision was labelled "interim" because a final decision had not been made in respect of two of the records.…"

As I have already noted, the two records that were supposedly the subject of the "interim" decision were not even mentioned in McMaster's letter of December 19 claiming section 18(1)(c). They were the subject of a separate letter, which, oddly, was *not* referred to as an "interim" decision.

I am in full agreement with the appellant's position on this issue. Regardless of McMaster's intentions, its December 19 letter used the phrase, "interim access decision." On this basis, the only reasonable interpretation of the letter is that the decision to claim section 18(1)(c) was an "interim" decision, since that was the only access decision set out in the letter in question. That being the case, there was no basis for the appellant to believe that he was required to file an appeal of the section 18(1)(c) decision at that time, and to hold him to such a requirement would be unfair. It would also be contrary to the spirit of access-to-information legislation, whose purpose is to provide access to the records of public institutions.

Moreover, I note that the issue of appealing an "interim" access decision is expressly addressed in Order 81 and many subsequent orders. Order 81 describes the import and effect of an interim access decision as follows:

> … Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed. However, in my view, if no indication is made at the time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees.
>
> **"Interim" section 26 decisions are not binding on the head and, therefore, cannot be appealed to the Commissioner.** [Emphasis added.]

The fact that the access decision component of an "interim access decision and fee estimate" cannot be appealed was reiterated as recently as Order PO-2634, issued in January 2008. In my view, this provides a definitive basis for rejecting McMaster's argument about the timeliness of this appeal. I find that the appellant was in compliance with section 50(2) of the *Act* by filing his appeal when he did.

FRIVOLOUS OR VEXATIOUS REQUEST/ABUSE OF PROCESS

As noted above, McMaster objects to the appellant's failure to pay the fees set out in its decisions, obtain the responsive records and review the proposed redactions before appealing McMaster's decision to deny access. In its initial response to the appeal, McMaster characterizes the appeal of the decision to deny access as an attempt by the appellant "… to exercise a right of appeal that is simply unavailable to it at this stage."

I would observe that this argument fundamentally contradicts the one I have just dealt with to the effect that the appeal was out of time; by contrast, in this instance, McMaster appears to argue that the appeal is premature. Regardless, I will go on to consider the merits of McMaster's position.

The right of appeal is set out in section 50(1) of the *Act*. The relevant portion of that section in the circumstances of this appeal states as follows:

> A person who has made a request for,
>
> (a) access to a record under section 24(1);
>
> … may appeal **any decision of a head under this Act** to the Commissioner [emphasis added.]

In my view, it is abundantly clear from the wording of this section that, where an institution decides to charge a fee and deny access to portions of a record, the requester may decide to appeal both decisions, or may appeal only the fee, or only the access decision (as the appellant has done here).

The *Act* does not specify that the fee charged by an institution must be paid and the non-redacted portions of a record to which partial access is granted must be reviewed before the right of appeal to deny access may be exercised, nor does McMaster point to any section of the *Act* that could possibly give rise to such an inference. In fact, this is a demonstrably incorrect interpretation that entirely contradicts the purpose set out in section 1 of the *Act*, of making records held by public institutions broadly accessible to members of the public unless they are subject to an exemption. For example, if the fee were not $100 but were, instead, $10,000, McMaster's position would require a requester to apply substantial resources in order to obtain a record that might well be entirely unsatisfactory because of what had been redacted, before enjoying the right of appeal so clearly conferred by section 50(1). This cannot possibly have been the Legislature's intention.

In its appeal representations, McMaster expands on this argument under the heading, "Frivolous or vexatious request/abuse of process". It submits:

> … the appellant's continued refusal to pay the prescribed fee (or even request a waiver of the fee) and, in turn, review the Records can only be described as an abuse of process. That is, McMaster is of the opinion that the Appellant may be

> acting in bad faith by continually refusing to pay the prescribed fee, or at least request a waiver of such fees, and review the redacted records.
>
> How can the Appellant possibly know that McMaster has redacted the particular portions of the Records which the Appellant initially sought to review? McMaster submits that if the Appellant were truly interested in reviewing the Records, it would have paid the prescribed fee or requested a waiver and then, subsequently, examined the redacted records to determine if the information it wished to review had been revealed before even beginning the appeal proceedings. McMaster submits that the Request is, therefore, subject to an examination of whether such request has been made in good faith. McMaster shall not speculate as to what the purpose of the Request actually is, but given the refusal to review the Records despite having an opportunity to do so in a manner prescribed by the Act [sic], McMaster suggests that the purpose is something other than to obtain access and may therefore be frivolous, vexatious and an abuse of process.

The appellant responds:

> The claim that my request is frivolous or vexatious or an abuse of process is unfounded and offensive. It is grounded on the assumption that because I did not pay the fee for the records that McMaster did agree to provide, i.e. approx[imately] $100, I am not interested in accessing the records but [am] simply trying to interfere with the operations of the University or making the request for some other improper purpose. The claim itself is frivolous or vexatious. As a journalist, I have a clear interest in receiving information about contracts that public institutions enter into and … there is absolutely no basis for asserting that my claim is frivolous or vexatious or an abuse of process. I simply did not wish to pay $100 for records that clearly didn't contain what I felt I wanted or had a clear right to receive so I decided to appeal directly rather than obtain incomplete and ultimately useless records.

In its reply, McMaster reiterates that the appellant's approach "… was a conscious decision to follow a procedure other than the one set out in the Act [sic]. Such conduct can only be described as frivolous, vexatious, or an abuse of process."

To reiterate, there is no "procedure" set out in the *Act* that would require payment of a fee and inspection of a partially redacted record prior to filing an appeal of an access decision. This notion is entirely contradicted by the clear right to appeal "any decision of the head" conferred by section 50(1).

As indicated by the title of this part of its submissions, McMaster appears to be arguing that the *request* is frivolous or vexatious, although its real objection appears to relate to the appellant's decision to file an *appeal*. One of the affected parties agrees with McMaster's submission in this regard.

Frivolous or vexatious requests are dealt with in sections 10(1)(b) and 27(1) of the *Act* and section 5.1 of Regulation 460.

Section 10(1)(b) of the *Act* states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 27.1(1) of the *Act* states:

> A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 26,
>
> > (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
> >
> > (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 50 (1) for a review of the decision.

Sections 5.1(a) and (b) of Regulation 460 prescribe that:

> A head … shall conclude that the request for a record or personal information is frivolous or vexatious if:
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

If McMaster was of the view that the *request* was frivolous or vexatious, this would in normal circumstances have been set out in one of its decision letters. It was not. There is, moreover, no evidence whatsoever to support an allegation that the request is part of a pattern of conduct that amounts to an abuse of the right of access, that it would interfere with the operations of McMaster, or that the request was submitted in bad faith or for a purpose other than to obtain

access. The appellant was simply exercising the rights conferred on him by section 50(1), as already outlined.

Nor is there any evidence whatsoever to support McMaster's argument that the request, or the appeal, represents an abuse of process at common law (as discussed in Order M-618, referred to in the Notice of Inquiry).

I find that McMaster's objection to the appeal and, apparently, the request, based on the appellant's failure to pay the fee and review the redacted records, is without merit. In acting as he did, the appellant was simply exercising rights clearly conferred by section 50(1) of the *Act*.

RESPONSIVENESS OF RECORDS

As noted above, one of the affected parties submits that the record pertaining to it is not responsive to the request. This record is a memorandum of agreement between McMaster and a private, non-profit organization.

To reiterate, the appellant seeks access to the following records:

> …copies of all contracts between the university and food and beverage companies between 2004 and present. Contracts requested include any involving soft drink companies, restaurants, … cafeteria contractors and vending machine operators.

This affected party submits that it is not a food and beverage company, nor a soft drink company, a restaurant, cafeteria contractor, or a vending machine operator. However, it concedes that it "... provides dining and other services.…"

In *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance, and referred the matter back to the adjudicator. In Order P-880, Adjudicator Anita Fineberg followed the Court's guidance and stated:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour (Orders P-134, P-880).

In my view, given the "dining and other services" this affected party concedes it provides to members of the McMaster community, it would be an unduly narrow interpretation of the request to exclude the memorandum of agreement from the scope of the request. In keeping with the authorities I have just cited, which I agree with, I find that the memorandum of agreement between McMaster and this affected party is responsive to the appellant's request.

DISCUSSION:

PERSONAL INFORMATION/PERSONAL PRIVACY

As outlined at the beginning of this order, McMaster notified several affected parties at the request stage to solicit their views on disclosure of two records that relate to them. In its letter to the appellant concerning the notification of these parties, McMaster referred to the possibility that "the release of two records that are responsive to your request may constitute an unjustified invasion of privacy pursuant to section 21(1)" of the *Act*.

As also outlined above, one of the individuals named in these two contracts indicated verbally to this office that he does not object to disclosure of his name, but has concerns about disclosure of other information for competitive reasons.

Section 21(1) is a mandatory personal privacy exemption. It states that "[a] head shall refuse to disclose *personal information* to any person other than the individual to whom the information relates" (emphasis added) unless one of an enumerated list of six exceptions applies. The application of the exemption is therefore contingent on the records actually containing "personal information." If no such information is contained in a record, section 21(1) does not apply.

In its subsequent decision relating to these two records, McMaster indicated that portions would be withheld. The decision only refers to section 18(1)(c) and not to section 21(1). The copies of the records showing proposed redactions did not indicate that McMaster proposes to withhold the names of the individuals who are parties to these contracts. As well, McMaster's representations indicate that it does not rely on section 21(1). However, given that McMaster raised this exemption in its initial correspondence, and in view of its mandatory nature, I will consider whether the two records contain personal information.

"Personal information" is defined in section 2(1) of the *Act* as "… recorded information about an identifiable individual …", followed by a non-exhaustive list of examples. Section 2(3) provides that "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." In the circumstances of this appeal, I find that the affected parties' names appearing in these two records, which are contracts, do not constitute personal information because the names appear in a business capacity.

With respect to other information in these two records, in order 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 [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

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 [Orders P-1409, R-980015, PO-2225].

None of the affected parties named in these two records has argued that the records contain personal information, and having reviewed them, I can find no evidence that they "reveal something of a personal nature." Accordingly, I find that neither the names of the affected parties, nor the other contents of these two records, constitute personal information. Accordingly, these records are not exempt under section 21(1). I will however, consider whether the redacted portions are exempt under section 17(1) or 18(1)(c).

THIRD PARTY INFORMATION

The potentially relevant portions of section 17(1) state:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; …

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 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) and/or (c) of section 17(1) will occur.

Under part 3 of the test, the institution and/or the affected parties 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 this appeal, only five of fifteen affected parties responded in any way to the Notice of Inquiry, although it was sent to all fifteen.

One of the affected parties submits that disclosure of portions of its contract, specifically the management fee it pays to McMaster and a 10-year financial model of its projected operating revenues and expenses, would "adversely prejudice" its competitive and economic interests, "… specifically with respect to its forthcoming negotiation for a renewal of its contract with its unionized work force, and generally with respect to its ability to negotiate or renew any contract for management services in the future."

A second affected party declines to consent to disclosure, stating that "the information has been supplied in confidence implicitly where disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization."

A third affected party submits that its agreements have been consistently treated as confidential, and disclosure could reasonably be expected to prejudice its competitive position as they "contain details of virtually every operational and financial term" with its franchises, and this information "essentially provides the blueprint for the creation of a successful franchise system."

A fourth affected party submits that "a competitor could and would be highly motivated to access this information and would very easily prejudice [the affected party's] competitive position in maintaining the contract … because of competitor's knowledge of the exact amount by which it can undercut [the affected party]." The affected party submits that this would be an unfair advantage. This affected party also argues that disclosing details of its contracts with McMaster would jeopardize its negotiations with potential franchisees, who would then demand terms "at least as favourable" as those given to McMaster. This affected party also provides its own redacted version of the records pertaining to it, and seeks to exempt more information than McMaster decided to withhold. Although only the proposed redactions of McMaster are technically before me because this affected party did not appeal McMaster's decision to disclose more information, my conclusion regarding section 17(1) takes these additional proposed redactions into account. This affected party also provides detailed submissions in relation to requirement 2, or the "supplied in confidence" aspect of the exemption. I will refer to these submissions in my discussion of that requirement, below.

The other affected party who provided comments simply stated verbally that he had concerns of a competitive nature about disclosure of some aspects of his contract. He did not indicate which portions those were, nor did he provide written representations.

The appellant responded to the affected parties' written submissions. In particular, the appellant contends that the agreements do not meet the "supplied" test under requirement 2, as discussed in more detail below. He also submits that the parties' representations concerning harm, set out above, are not "detailed and convincing" and do not meet requirement 3.

Two affected parties submitted reply submissions, in which they essentially reiterated the positions they had initially taken. The second affected party also sought to refute comments of the appellant that I have not reproduced in this order because I do not need to rely on them to reach the conclusions I have concerning section 17(1).

Part 1: type of information

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

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. [Order 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].

Having reviewed the records, I find that they all contain commercial and financial information.

Part 2: supplied in confidence

This requirement contains two components, both of which must be met. The information must have been "supplied" within the meaning of section 17, and if it was, this must have been done "in confidence." I will begin with a consideration of whether the information was "supplied."

Supplied

As noted, the records at issue in this case consist of twenty-one contracts relating to food and beverage operations at McMaster, or to the use of "Mac Express Patron Cards". They include licensing and franchise agreements.

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].

McMaster's representations expressly state that it "… does not believe that the information in the contracts would satisfy the Section 17 requirement that the information be 'supplied' in confidence." McMaster does not rely on section 17(1) in this appeal.

Only one of the affected parties addresses the meaning of "supplied" in its representations. This party argues that the effect of this interpretation, "… which excludes all contracts, regardless of [their] substance, is inconsistent with legislative intent of the exemptions to protect confidential 'informational assets' of businesses." This affected party submits further:

> Information that is unilaterally "supplied" to the institution is not the only kind of information that should be protected from exploitation by a competitor in the marketplace. The practical reality is that how information is "supplied" to the institution has no direct bearing on the confidential nature of the information. The narrow interpretation of the Act that excludes information on the basis of how it is provided to the institution is inconsistent with its purpose of balancing competing parties' interests. In fact, it may be said that contracts that are generated through significant negotiation should be afforded a higher degree of protection under the exemption because the terms that are negotiated may include information about the third party's competitive advantages, which would easily be exploited by a competitor in the marketplace.
>
> …
>
> [The affected party] submits that a purposive interpretation of the exemption provisions of the Act exempts information that is proprietary to the third party or unique to the transaction with the institution. Contracts that are not heavily negotiated, or standard form contracts, should be afforded a lower degree of protection. In contrast, contracts that are highly negotiated likely contain highly specific and atypical business terms that tend to be more sensitive. …
>
> [The affected party] respectfully submits that with a purposive interpretation of the exemption provisions, the sensitive commercial and financial information in the redacted portions of the records be considered to be supplied in confidence. The fact that there were negotiations between McMaster and [the affected party] leads to a reasonable inference, as would be expected by commercial standards, that the redacted information in the Records [was] supplied in confidence.

In my view, the affected party's representations amount to no more than a suggestion that the wording of the exemption is inappropriate, and as such, these representations provide no basis for reversing a well-established interpretation.

As the appellant notes in his representations on this aspect of the exemption, this affected party concedes that the records it seeks to withhold were, in fact, the product of negotiations, which

adds to the basis for concluding that they were mutually generated rather than "supplied" as required by section 17(1). This view is reinforced by the judgement of the Divisional Court in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J, No. 2243.

In that case, the Court upheld Adjudicator Beverley Caddigan's decision not to uphold a section 17 claim by an affected party because the records were contractual, and the information was the product of negotiation and not "supplied." The Court stated (at paras. 4-8):

> The applicant takes issue with the Adjudicator's conclusion that the information relating to wood supply from private sources and total operating capacity was not supplied in confidence. …
>
> The Adjudicator found that the documents at issue were the result of a negotiation process. Indeed, that was made clear in a letter from the applicant to the Ministry dated October 19, 1998.
>
> The Adjudicator found that the letters of commitment were essentially a contract between the parties. There is a statement in the 1998 documents where the Ministry recognizes the "Ministry Recognized Operating Level" ("MROL"), which suggests this is a mutually agreed upon term of the contract between the parties.
>
> As a result of her findings, the Adjudicator concluded that the information in the documents was not "supplied" within s. 17(1) of the Act. She also held that there was insufficient evidence before her to show that any of the information, including the private source of wood supply, was "immutable" (even though the applicant did not raise the issue of immutability before her).
>
> On the record, the conclusion with respect to immutability was reasonable. In reaching her decision, the Adjudicator applied existing jurisprudence to the material before her. In our view, her decision was a reasonable one.

As referred to by the Court, an exception to this rule exists if information in the records is "immutable". An additional exception may apply where information permits the drawing of accurate inferences as to information that was actually "supplied in confidence." None of the affected parties argues that either of these exceptions applies, and having carefully reviewed the records, I find that they are not established.

Based on my careful review of the records, I conclude that all of them are contracts, and based on the rule that contractual information will not generally have been found to have been "supplied" to McMaster, I find that requirement 2 under section 17(1) is not met. As all three requirements for the application of this exemption must be met, I find that none of the records are exempt under section 17(1).

Requirement 3: harms

My finding under requirement 2 is sufficient to dispose of the section 17(1) exemption. In addition, I have set out the principal arguments of the affected parties who provided representations in my introductory discussion, above, which relate to the "harms" aspect of the exemption referred to under requirement 3. An additional reason for not upholding the section 17(1) exemption in relation to the records at issue is that I agree with the appellant's submission to the effect that the affected parties who have provided representations have not provided "detailed and convincing" evidence of harm.

Rather, their positions amount to speculation and fail to explain how any claimed damage to their negotiating or competitive position, or undue gain or loss, could reasonably be expected to occur. Even the fourth affected party, who identifies parts of the records that it argues could cause harm of this nature, treats it as self-evident that other parties could somehow demand the same terms as were given to McMaster, regardless of the difference in their size or potential client base, or the passage of time, or other relevant factors that could be expected to inform any future negotiations.

The same could be said of the party who argues that negotiations with unionized employees could be damaged. Its representations are general and speculative, and do not establish a reasonable basis for concluding that such harm could be expected to occur.

I am therefore not satisfied that there is a reasonable basis on which to conclude that disclosure could produce harms of the nature alleged by the affected parties who chose to provide representations.

For all these reasons, I find that section 17(1) does not apply to any portion of the records.

ECONOMIC AND OTHER INTERESTS

McMaster relies on section 18(1)(c) to deny access to the portions of the records it seeks to withhold. This section states:

Section 18(1) states:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 its representations, McMaster refers to the principles referred to above, as set out in Orders P-1190 and PO-2014-I. It also refers to Order PO-1745. In that order, former Senior Adjudicator David Goodis upheld a claim under section 18(1)(c) by the Ontario Casino Corporation (OCC) to deny access to information about slot machines. The withheld information revealed "the average percentage of money that the slot machines of a given type at a given casino 'held back' during the given month." In upholding OCC's decision to deny access, the Senior Adjudicator stated:

> Notwithstanding my reluctance to find a reasonable expectation of the harm alleged on the basis of the evidence before me, I am prepared to infer that such harm could reasonably be expected to result based on my independent analysis of the facts and circumstances.
>
> …
>
> In short 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.
>
> …
>
> The information at issue, the "hold percentages", describes the pricing practices and/or strategies of the casinos for specific types of slot machines at specific locations. This information reveals how patrons, as an overall group, are "charged" on a monthly basis for the use of the machines, expressed as a percentage of amount wagered rather than as a dollar figure. Disclosure of this information could well increase competition by setting off a price or "winnings" war among casinos within Ontario, as well as between Ontario casinos and those in border states such as Michigan and New York.
>
> … [C]ompetition from disclosure could reasonably be expected to produce lower revenues or profits for Ontario casinos, which in turn would prejudice the economic interests of the OCC. While I have not been presented with detailed

> and convincing evidence to demonstrate the degree of likelihood of increased competition of the sort described (which would have made this decision much easier), I am prepared in the circumstances to accept that this kind of competition among casinos serving a common market is, on balance, more likely than not to occur, with resulting prejudicial consequences to the economic interests of the OCC.

In its representations, McMaster also refers to the need to demonstrate a "clear and direct linkage" between disclosure and the harm mentioned in section 18(1)(c). This office does not apply the "clear and direct linkage" test. Rather, as noted in *Workers' Compensation*, cited above, detailed and convincing evidence of a reasonable expectation of harm is required, and even if that evidence is not provided by a party, harm can also be inferred from the adjudicator's independent analysis of the facts and circumstances as discussed in Order PO-1745.

Referring to the records at issue in this appeal, McMaster submits:

> By revealing certain detailed negotiated financial payments contained in the Records such as rent, royalty payments, payment arrangements and other commercial terms, McMaster's negotiating position is severely compromised when negotiating new agreements. The same can be said in instances where McMaster is attempting to negotiate renewal terms of existing agreements.

McMaster argues that this is the case because:

> … the competitor would have knowledge of the actual pecuniary and commercial terms negotiated between McMaster and the original Service Provider. A precedent of a "floor" or ceiling would be established for any prospective supplier in advance of negotiations.

McMaster also refers to a scenario involving two service providers attempting to pressure McMaster based on knowledge of terms and conditions previously negotiated by the other. McMaster goes on to submit that:

> [r]evealing the precise negotiated pecuniary terms of the records would hinder McMaster's competitive position by providing an unfair competitive advantage in respect of negotiating position to parties with whom McMaster negotiates such contracts. In turn, this would cause significant harm to McMaster's future economic interests by deflating the economic value of future negotiated contracts.

The appellant disagrees with these submissions, referring to McMaster's effective "monopoly" in controlling who can "do business" on campus. The appellant states:

> While negotiations can and do occur, the reality is that the food and beverage suppliers must agree to terms acceptable to McMaster if they want to do business on campus. So, even if one contractor is able to access the terms of the contract

> that a competitor has entered into with McMaster, it is simply not true that they can demand similar or identical terms.
>
> …
>
> The terms contained in existing contracts were terms provided at a particular point in time. The release of such historic information cannot reasonably be expected to harm McMaster as such information is not necessarily relevant to future or upcoming negotiations.

McMaster responds to the appellant's submissions by arguing that the appellant "… completely fails to address the fact that having access to previously negotiated contracts gives third parties a negotiating advantage when dealing with McMaster." McMaster also argues that the age of the information is irrelevant.

I have considered these arguments and carefully reviewed the records. In my view, McMaster has not provided detailed and convincing evidence of harm, nor does this appeal present circumstances in which harm can reasonably be inferred as it was in Order PO-1745.

I agree with the appellant that McMaster has significant power in determining what companies it will do business with. McMaster offers an environment in which a large body of individuals require access to food and beverage services.

Even more importantly, McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality. In my view, this is a totally different situation than in Order PO-1745, where there was an obvious danger that customers would move to a casino where the slot machines had a lower "hold percentage."

For all these reasons, I find that section 18(1)(c) does not apply.

CONCLUSION:

As I have found that all the records identified by McMaster are responsive to the appellant's request, and that none of the claimed exemptions apply, the records at issue must be disclosed in their entirety.

ORDER:

1. I order McMaster to disclose the records at issue to the appellant, in their entirety, by sending them to the appellant no later than **March 4, 2009** but not earlier than **February 26, 2009**.

2. To verify compliance with this order, I reserve the right to require McMaster to send me a copy of the records disclosed pursuant to order provision 1.

Original signed by: January 27, 2009
John Higgins
Senior Adjudicator