



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

ORDER 179

Appeal 890068

Ministry of Health



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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Commissioner. On August 3, 1989, the undersigned received a delegation of the power to conduct inquiries and make Orders under the Act to be exercised with respect to this Appeal.

The facts of this case and the procedures employed in making this Order are as follows:

1. On January 25, 1989, the Ministry of Health (the "institution") received a request for access to "...information on the sales of Scooters, #'s WHSFS2001, 2002, 2003, 2010 and 2011 by Fortress Scientific located at 3750 Chesswood Dr., Downsview, Ontario, Canada." "Scooters", it should be noted, are three_wheeled vehicles designed for use by disabled persons.
2. Upon receipt of the request, the institution initiated a search involving the Assistive Devices Program of the institution (the "ADP"). The ADP program pays approximately 75% of the cost of these devices payable by the purchaser or end user of the product. On January 26, 1989, the institution retrieved from a machine readable databank the total number of scooter purchases, categorized by type of scooter, that had been approved during the

period of November 15, 1987 to January 26, 1989 (the date of the search). The search continued up to January 31, 1989, at which time it was concluded that no other information existed.

3. On February 1, 1989, the institution issued notice to Fortress Scientific in accordance with section 28 of the Act. The notice contained a statement that the institution was considering the release of a record that might affect the interests of Fortress Scientific, a description of the contents of the record, and a statement that Fortress Scientific could, within twenty_one days of the notice, make representations to the institution as to why the record should not be disclosed.
4. On February 13, 1989, the institution received written representations from Fortress Scientific objecting to the release of the information regarding the sales of scooters by their company.
5. On February 17, 1989, the institution notified the original requester of the revised time frame for processing the request and informed him that disclosure was granted, but because "the information you have been granted access to affects a third party, the Act requires we wait 30 days before disclosing the record, to give the third party an opportunity to appeal this decision". The institution further advised that if an appeal were not filed, the record could be disclosed on March 19, 1989.
6. By letter to the Commissioner dated March 17, 1989, Fortress Scientific appealed the head's decision. On March

29, 1989, notice of the appeal was given to the institution and the requester.

7. The record identified by the institution was obtained and reviewed. After some investigation, it became clear that the record identified by the institution did not contain information on actual "sales of scooters" as requested by

the requester, but was in fact a record of approvals for sales by the ADP. While sales usually follow approval, they need not. Thus, the information does not provide definite information concerning government-assisted sales in Ontario. Nor, of course, does it provide information concerning all sales of devices manufactured by the appellant. Total sales figures would include sales which have not been assisted by the institution. Further, it is apparent that the statistic generated by the institution is a compilation of information which is not supplied by manufacturers of the equipment but rather is supplied by either the dealers who sell to the end user of the device or by the end users themselves. That is to say, the information at issue in this appeal is a compilation of data relating to approvals granted by the institution, through its ADP program to requests for financial assistance in the purchase of particular scooters.

8. All parties to the appeal (the institution, the original requester, and the appellant) were contacted by the Appeals Officer, and they agreed to continue with the appeal concerning the records of approval, the nature of which was explained by the Appeals Officer.

9. By letters dated August 3, 1989, notice was sent to the appellant, the institution, and the original requester indicating an inquiry into this matter was being undertaken. Enclosed with these letters was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. This report outlines the facts of the appeal and sets out questions which appear to the Appeals Officer or any of the parties, to be relevant to that appeal. The Appeals Officer's Report indicates

that the parties, in making representations, need not limit themselves to the questions set out in the Report. It also indicates that if a relevant new issue is raised during the inquiry, each party will be advised and given the opportunity to make further submissions.

10. I received representations from all parties and have considered them in making my Order.

The record consists of a one_page computer printout which indicates the scooter model number and the total number of approvals for each model.

It should be noted at the outset that the purpose of the Act as defined in subsection 1(a) is "to provide a right of access to information under the control of institutions in accordance with the principles that information should be available to the public, that necessary exemptions from the rights of access should be limited and specific". Further, section 53 of the Act provides that the burden of proof that the record or a part of a record falls within one of the specified exemptions in the Act

lies upon the head. However, where a third party (Fortress Scientific in this case) appeals a decision of the head to give access to the record, the burden of proof lies upon the third party appellant resisting disclosure.

The sole issue arising in this appeal is whether the record in issue is subject to mandatory exemption from release pursuant to section 17 of the Act.

As I have noted above, the burden of proving that this record falls within the section 17(1) exemption lies with the party resisting disclosure, the appellant.

Section 17(1) of the Act reads as follows:

17.__(1) 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

On January 1, 1990, a further provision, subparagraph (d), was added to subsection 17(1) by virtue of the coming into force of the Freedom of Information and Protection of Privacy Amendment

Act, 1989. This new subparagraph which is not relevant to this appeal, provides as follows:

- (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.

In Order Number 36, the Commissioner described the general structure of the section 17 exemption in the following terms at page 4:

In order for the section 17(1) exemption to apply, the information at issue must meet a three_part test:

1. The record must contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
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 types of injury specified in (a), (b), or (c) will occur.

All three parts of this test must be satisfied in order for section 17 to apply.

In its submissions to me, the appellant argued that the record contains information which is "clearly of a commercial and financial nature" as it includes the number of ADP approvals for each scooter model for a specified period. While the information may not provide accurate sale figures, it comes close to doing so. The requester submits that it is the major

supplier within the province, and further, that virtually all scooters purchased by users within the province are assisted by the ADP program. Thus, information about approvals, it is said, is tantamount to Ontario sales figures for the appellant's products.

The original requester, on the other hand, submits that the record involved does not reveal any "trade secrets or scientific, technical or commercial knowledge, or pricing data". For its part, the institution submits that the "statistics contained on the record do not reflect any trade secret, scientific, technical, financial or labour related information". The institution also submits that "since the information contained on the record does not pertain to actual sales, but only to approved sales through the Assistive Devices Program, the record does not contain commercial information". In addition the institution also submits that "even if the total number of scooters approved were actually purchased, the record would only reflect those sales through the Assistive Devices Program and not all of Ontario".

The first issue to be addressed is whether the information in question is "commercial" information in the sense required by section 17(1). The information, it will be recalled, is a statistical summary of approvals of requests for financial assistance in the purchase of scooters through the ADP. Is such information "commercial" in character? One might reasonably characterize the information in question as information about a government program, i.e. the ADP, rather than as information about commercial matters. To be sure, the requester likely has a commercial reason for seeking access to the information. But this will normally be the case with requesters engaged in

commerce. The character of the information for purposes of section 17(1) must be derived, however, from its content rather than from the motives of the requester in seeking access to it. On the other hand, there is little doubt that confidential sales information supplied to a ministry by a manufacturer could qualify as "commercial" information within the meaning of section 17(1). Can it be said that information about a government program that will, if disclosed, facilitate the drawing of inferences concerning sales volumes in a particular geographic area also has a "commercial" aspect which engages section 17(1)? It is my view that the concept of "commercial" information should be broadly construed to include, in the words of an American judge interpreting an analogous provision of the American Freedom of Information Act, information "pertaining or relating to or dealing with commerce." See American Airlines Inc. v. National Mediation Board, 588 F.2d 863 at p. 870 (2d Cir. 1978). Nonetheless, to characterize the information at issue in the present appeal as "commercial" would stretch the notion beyond reasonable bounds. Information about government programs which supports the drawing of inferences about commercial activity that is related to those programs is not itself, in the requisite sense, information about commerce.

Even if I am incorrect in this holding, however, a more substantial hurdle is presented to the appellant by the requirement of section 17(1) that the commercial information in question has been "supplied in confidence".

In order to satisfy this part of the test, the record must have been supplied to the institution, in confidence, implicitly or explicitly.

The appellant in its submissions stated:

"Fortress sells to durable medical equipment (DME) dealers who in turn resell the products to the end users. Since November 1987 virtually all scooters sold in Ontario are funded through the Assistive Devices Program (ADP) which is administered through the Ontario Ministry of Health and which pays approximately 75% of the cost payable by the end user to the DME dealer for the product. Fortress submits its products and pricing to ADP for approval and obtains authorization numbers for each type of approved product. Information on the number of products sold under the ADP Program is obtained by the Ministry of Health from the DME dealers and the end users who submit application for payment."

"Secondly, with respect to the issue of confidentiality, it is noted that the confidentiality claimed need not be explicit. In our case the information requested was for the most part obtained through a compilation of information received from DME dealers and third party users who received funding under the ADP Program. Fortress at no time directly or indirectly authorized or participated in the compilation of this information and would under no circumstances have voluntarily agreed to provide this information to any third party as such information would disclose to Fortress' competitors the strength of Fortress position as the major seller of scooters in its home market and the specific models and features that are suited to the Ontario market. It is submitted that such information would only be useful to competitors of Fortress who are seeking to avoid the significant costs of marketing surveys and other normal commercial methods by which a company prepares to distribute its products in a particular market.

This type of sales information is treated as highly confidential by all companies who are manufacturing and selling their products in a competitive marketplace."

The original requester submitted the following:

"The recommendation for approval from which these statistics are derived, in these cases was made by an Ontario Assistive Devices program authorized prescriber and was not the result of individual sales activity by Fortress. Further, since, the subsequent provision of the product was substantially paid for by Government funds, and since knowledge for the number of units sold gives no access to either the customers, the prescriber or the costs/price of the unit, there is no risk of loss of privileged sales information on the part of Fortress. This information is of statistical value only for broad understanding and planning in this area."

The institution submitted that "the Ministry has neither implicitly nor explicitly implied to any manufacturer or individual, dealing with the Assistive Devices Program, that Ministry generated information regarding the program's operation would be held in confidence". The institution also submitted that "the information from which the statistics were derived, were supplied by individuals seeking funding under the Assistive Devices Program, and not necessarily by the appellant".

As a preliminary point, it may be noted that the inherent structure of section 17(1) appears to suggest that the "supplier" of the information in question is the person who has a commercial interest in its non_disclosure. Thus, section 17(1)(b) contemplates the public interest in the supplier's continued willingness to supply the information in question. In the present case, however, the appellant is not the supplier of the information in issue. Indeed the appellant noted in its submissions that "... the information requested was for the

most part obtained through a compilation of information received from DME dealers and third party users who received funding under the ADP Program. Fortress at no time directly or

indirectly authorized or participated in the compilation of this information and would under no circumstances have voluntarily agreed to provide this information to any third party...".

This circumstance gives rise to two interpretive difficulties confronting the appellant. First, the information in issue has been generated by the institution itself. It has not been supplied by anyone from outside the institution and certainly not by the appellant. While it is plausible to interpret section 17(1) as being applicable to information generated by government which will, if disclosed, permit the drawing of accurate inferences with respect to the nature of confidential commercial information that has been supplied by a third party, that is not the case here. Neither the appellant nor anyone else supplied the data with respect to which the appellant seeks to prevent disclosure. Thus, there is some difficulty in reaching the conclusion that the information requested has been "supplied" by any third party.

Secondly, to the extent that the institution's information is based on data supplied by others, those others are not the appellant. They are dealers who sell the devices and purchasers who use them. Thus, if section 17 requires that the supplier of the information in issue must be the person having an interest in its non_disclosure, that requirement would not be met in this case. Again, however, a plausible reading of section 17(1) might include information supplied by parties other than the persons opposing disclosure. Where, for example, confidential commercial information concerning X Co. Ltd. has been obtained by Y Co. Ltd. as a result of "industrial

espionage" and then disclosed to the institution or where confidential commercial information about X Co. Ltd. is supplied by Z in breach of a duty of confidence owed to X Co. Ltd. by Z, section 17(1) might reasonably be thought to be applicable. In the present case, however, no such considerations are present. The suppliers of the information are providing information about themselves and about their proposed purchase of a scooter. The information they supply is only incidentally about the appellant and indeed, in isolation, is not in the least sensitive. For this additional reason, then, it is difficult in the present case to reach the conclusion that the information is commercial information that has been "supplied" in the requisite sense.

Quite apart from these considerations, however, the appellant confronts the difficulty that even if the supplying of data by dealers and purchasers constitutes a "supplying" of "commercial information", there is no basis on the present facts to support the inference that the information was "supplied in confidence implicitly or explicitly" within the requirements of section 17(1). As has been suggested above, the information in question, when taken in isolation, is not particularly sensitive. Moreover, the institution does not propose in its disclosure to provide information concerning any identifiable individual. There is no reason to believe that any individual supplier of data would have considered that the submission of a request for approval in the ADP program would be confidential in the sense that the particular purchase could not be included in the compilation of statistics concerning the program. Accordingly, on the present facts, the appellant fails to meet the second branch of the Section 17 test as it has failed to establish that the information in question was "supplied in confidence implicitly or explicitly".

As stated earlier, failure to satisfy any one of the three parts of the test will render the section 17 exemption claim invalid. Since the second part of the three_part test has not been met and, as a result, the section 17 exemption cannot apply, it is not necessary for me to comment on the third part of the test.

In summary, I order the head to release the record in issue in this appeal, in full, to the original requester. I also order that the institution not release this record until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give the appellant sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on the Information and Privacy Commission and/or the institution within this 30_day period, I order that the records be released within 35 days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

Accordingly, I uphold the decision of the head.

Original signed by: _____
John D. McCamus
Inquiry Officer

June 20, 1990
Date