



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 76

Appeal 880105

Ministry of Agriculture and Food



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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) of the Act a right to appeal any decision of a head under the Act to the Commissioner.

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

1. On April 7, 1988, the Ministry of Agriculture and Food (the "institution") received a request for access to a "list showing names and addresses of Ontario dairy producers".
2. By letter dated May 2, 1988, the institution denied the request under section 21 of the Act.

In later communications, the institution specified subsections 21(2)(e), 21(2)(f), 21(2)(h), and 21(3)(d) as applicable to the record, and also raised subsections 17(1)(a) and 17(1)(c) as providing exemption from disclosure.

3. On May 4, 1988, the requester appealed the decision of the institution. I gave notice of the appeal to the institution, as provided for in the Act.
4. Between May 4, 1988 and October 25, 1988, investigations were made by an Appeals Officer with a view to settlement, but in the circumstances of this appeal no settlement could be reached.
5. During the course of the above-noted investigations, I sent notice to the Ontario Milk Marketing Board (the "Board") to advise them of the appeal, pursuant to subsection 50(3) of the Act.
6. On October 25, 1988, I sent notice that I was conducting an

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inquiry to review the institution's decision to the institution, the Board and the appellant.

7. On November 8, 1988, I invited the parties to submit written representations concerning this appeal.
8. Written representations were received from the institution and the Board, and further clarification of those representations was also received. The appellant chose to rely on written representations which he had submitted at the time the appeal was commenced. I have considered all representations in making my order.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter-balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should therefore provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies with the head of the institution (the "head"). In this case, the burden of proving the applicability of the section 17 exemption lies with both the head and the affected persons as they are the ones resisting disclosure.

The issues arising in this appeal are as follows:

- A. Whether the requested information is subject to exemption from disclosure under subsection 17(1) of the Act.
- B. Whether the requested information qualifies as "personal information" within the meaning of subsection 2(1) of the Act.

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- C. If the answer to Issue "B" is in the affirmative, whether the disclosure of the requested information is contrary to the provisions of section 21 of the Act.

ISSUE A: Whether the requested information is subject to exemption from disclosure under section 17 of the Act.

Subsection 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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

As I outlined in Order 36 (Appeal Number 880030), records must meet a three-part test in order to fall within the section 17 exemption:

1. the records must contain third party information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied by the third party to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the records must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17 exemption claim invalid.

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The appellant has made no submissions concerning the possible application of section 17. Both the institution and the Board have submitted arguments with respect to possible section 17 exemption, and I shall deal with these submissions in the context of the three-part test as outlined above.

Test - Part 1:

Both the institution and the Board, in their submissions, argued that the record is "commercial" information within the meaning of subsection 17(1).

The Board is an independent corporation, owned and operated by its members. Under regulation, the Board has the power to carry on business or "commercial" activities and, in fact, does so.

The institution and the Board have indicated in their submissions that the "list showing names and addresses of Ontario dairy producers" (the record at issue in this appeal) is a valuable asset with respect to one of the Board's commercial activities. That activity is the sale of advertising space in a magazine distributed by the Board to dairy producers.

According to its submissions, the Board's possession of a comprehensive list of Ontario dairy producers is the key factor that makes the magazine attractive to prospective purchasers of advertising. This is the most practical means of reaching all of the Board's dairy producers and possession of this list is a central factor in the sale of advertising by the Board.

The institution indicated further that the list has commercial value in and of itself because, should the Board decide to do so, it could sell the list to prospective buyers at a certain price per supplier name. In view of these submissions, I am persuaded that exclusive possession

of the list does have a bearing on the commercial activities of the Board. Accordingly, I find that the first part of the test for section 17 exemption has been met.

Test - Part 2:

In order to satisfy the second part of the test, the information must have been supplied to the institution in confidence. Both the Board and the institution have indicated in their submissions that the list of names and addresses constituting the record was indeed supplied to the institution in confidence by the Board. This assertion is supported by copies of correspondence between the institution and the Board, dating back to 1973, which clearly acknowledge the confidential nature of the information exchange between the Board and the institution.

These submissions and the supporting evidence have established to my satisfaction that the subject information was supplied in confidence to the institution by the Board. Accordingly, the second part of the test for section 17 exemption has been met.

Test - Part 3:

The third part of the test is met if it can be shown that disclosure could reasonably be expected to "result in undue loss or gain to any person, group, committee or financial institution or agency" (subsection 17(1) (c)) and both the Board and the institution rely on the provisions of this subsection.

In its submissions, the Board attempted to set out a reasonable chain of events whereby release of the record at issue could be expected to lead to undue financial loss, especially if the information in the record is used as a mailing list for advertising, or as a list of contacts for direct sales solicitations.

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It was submitted that this potential use of the information in the subject record as a mailing list could impact significantly on the Board's function with respect to the publishing of their trade magazine.

The Board pointed out that the potential for mailing advertising directly to the dairy producers could reasonably be expected to decrease the advertising revenue available to the Board from the magazine. Potential advertisers could reasonably be expected to see the opportunity to mail advertising directly to the producers as a cheap alternative to the purchase of magazine advertising space and, the Board's position was that it is reasonable to assume that advertising revenues available to the Board would drop as a result. Thus, the Board argued that release of the information in the record could reasonably be expected to result in financial loss to the Board and the decreased advertising revenues could cause the Board to cease publication of its magazine.

Board representatives provided specific information to demonstrate what this potential financial loss could mean to the Board itself. Figures were provided to show the place of the monthly magazine in the Board's overall functions, and the place of advertising revenue in the continued production of the magazine. Arguments were presented to show how a drop in advertising revenue could destroy the commercial viability of the magazine itself. It was therefore argued that release of the subject information, by creating a situation in which advertising revenues could reasonably be expected to fall, could cause the Board to cease publication of its magazine.

The Board further submitted that the magazine plays an important role in disseminating important information to its members. If the magazine were no longer published, information would have to be disseminated by other means, such as a newsletter mailed to the producers.

Board representatives provided me with figures for the projected cost of
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sending out such a newsletter. The increased financial burden occasioned by the loss of advertising revenue, coupled with the production costs of the newsletter, would have to be met by an increase in Board revenues in other areas - most likely by an increase in licence fees paid by the producers themselves.

Having reviewed all of the arguments and information presented to me, I am satisfied that the Board has established that the release of the subject record could reasonably be expected to result in undue financial loss for the Board. Accordingly, I find that the third part of the test for section 17 exemption has been satisfied.

In summary, all three parts of the section 17 requirements for exemption of the record from disclosure have been met.

Issues B and C

As I have answered the question posed in Issue A in the affirmative, it is not necessary for me to deal with the questions raised in Issues B and C.

In conclusion, my Order is that the decision of the head in this matter be upheld.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ July 17, 1989
Date