



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

ORDER P-249

Appeal 900389

Ministry of Natural Resources



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O R D E R

On July 8, 1991, the undersigned was appointed Assistant Commissioner and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act, 1987 the ("Act").

BACKGROUND :

On May 8, 1990, a request was made to the Ministry of Natural Resources (the "institution") requesting access to:

Daily Fishing Records C.F.1's for the years 1980 and 1981 for Commercial Fishing Licence [number] [County] held by [company] of [address].

The institution informed the requester that access was denied because the record was exempt from disclosure under sections 17(1) (a) and (c) of the Act.

The requester appealed the institution's decision through an agent (the "appellant").

Notice of the appeal was given to the institution and the appellant. The Appeals Officer initially obtained and reviewed a representative sample of the record. The complete record which was eventually obtained consists of eighteen forms each outlining certain activities undertaken by the fishing company named in the report (the "affected party") during a one month period. The information on the forms includes the location of daily fishing operations, the type of fish caught, the weight of

the daily catch, and the average price per pound. The forms cover the months of April to December, 1980 inclusive and March to November, 1981 inclusive.

According to the institution, forms for the months of January, February and March, 1980, and January, February and December, 1981, do not exist. The non existence of these six forms was not disputed by the appellant and is not an issue in this appeal.

During the course of mediation, the Appeals Officer contacted counsel for the affected party to inquire whether they would consent to the disclosure of the record. The Appeals Officer was advised that such consent would not be granted.

After further discussions with the institution, the appellant and counsel for the affected party, it became apparent that mediation could not be effected. Therefore, notice that an inquiry was being conducted to review the institution's decision was sent to the appellant, the institution and the affected party. An Appeals Officer's Report, which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeal, accompanied the Notice of Inquiry.

Written representations were received from the appellant, the institution and the affected party. I have considered these representations in making this Order.

ISSUE:

Whether the head properly applied the mandatory exemptions provided by sections 17(1)(a) and (c).

This is the sole issue in this appeal.

SUBMISSIONS/CONCLUSIONS :

Sections 17(1) (a) and (c) of the Act 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 organizations;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

In Order 36, former Commissioner Sidney B. Linden outlined the following three-part test which must be satisfied in order for a record to be exempt under the mandatory provisions of section 17(1) of the Act:

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 types of harm 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 subsection 17(1) exemption claim invalid.

I concur with Commissioner Linden's view of the section 17(1) test and adopt it for the purposes of this appeal.

I will deal directly with part 3 of the test outlined above.

It has been established in a number of previous orders that the burden of proving the applicability of the section 17 exemption lies both with the institution and the affected party who has resisted disclosure. (See Orders 80, 101, 166, 204 and P-228). The institution and/or the affected party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed. (See Orders 36, 47, 48 and 68).

I have reviewed the contents of the record at issue in this appeal, together with the representations provided by the parties, and, in my view, the requirements of the part 3 test have not been satisfied. In its representations, the institution submits, "As the records are ten and eleven years old... the Ministry doubts that disclosure would result in the harms contemplated by subclauses 17(1)(a) and (c)." Counsel for the affected party states, "Admittedly, the records are not current and, as such, do not reflect the present commercial viability of [the affected party's company]." He goes on to say that the records reflect information which may relate to the

competition between the parties and may provide the appellant with sufficient information to determine the manner in which the affected party conducts his business. In my view, these arguments are not sufficient to discharge the burden of proving a reasonable expectation of harm to the affected party if the records were released.

As indicated above, failure to satisfy any one of the three requirements renders section 17 inapplicable to the records at issue. Accordingly, I find that the records do not qualify for exemption under section 17 of the Act.

ORDER:

1. I order the head to disclose the record at issue in this appeal.
2. I further order the head not to disclose the record described in provision 1 of this Order until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give the affected party sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided that an application for judicial review has not been served on the institution or my office within this thirty (30) day period, I order that the record as described in provision 1 of this Order be disclosed within thirty-five (35) days of the date of this Order.
3. The institution is further ordered to advise me in writing within five (5) days of the date of disclosure, of the date on which disclosure was made. This notice should be

forwarded to my attention, c/o Information and Privacy
Commissioner/Ontario, 80 Bloor Street West, Suite 1700,
Toronto, Ontario, M5S 2V1.

Original signed by:
Tom Mitchinson
Assistant Commissioner

November 6, 1991
Date