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

ORDER 16

Joined Appeals
Appeals Listed on Page 1

Ministry of Agriculture and Food

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

Appeal Nos. 880025, 880041, 880060,
880061, 880062, 880063, 880064, 880065
880080 and 880081

O R D E R

These appeals were 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), or any person who has been given notice of a request under subsection 28(1), a right to appeal any decision of a head under the Act to me. Further, subsection 57(4) allows the person who is required to pay a fee under subsection 57(1) to ask me to review the head's decision to charge a fee or the amount of the fee.

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

1. On November 20, 1987, a request was made to the Ministry of Agriculture and Food (hereinafter referred to as the "institution") for access to all 1987 meat inspection reports for meat packing plants located in eastern Ontario.

2. The institution processed the request under the Freedom of Information and Protection of Privacy Act, 1987 which came into force on January 1, 1988. The institution clarified

with the requester that "eastern Ontario" was the area east from Kingston to Ottawa and north to Pembroke.

3. On February 1, 1988, the requester was notified by the institution pursuant to subsection 28(1)(a) of the Act that third parties, possibly affected by release of the information, would be given the opportunity to make representations as to why the information should not be released, and that following receipt of these representations, a decision concerning disclosure would be made by the head of the institution. Affected third parties were invited by the institution to make their representations by February 22, 1988.

4. The institution received representations from six of approximately thirty_five affected third parties. The institution also received representations from a meat packers trade association. After considering these representations, the institution, pursuant to subsection 28(8), notified the requester and all affected third parties of the head's decision to grant partial access to the inspection reports. The head decided that identifying information (i.e. name, location and plant number) was to be severed in accordance with subsection 17(1)(a) of the Act. The fee for the preparation of the inspection reports was estimated at $18.00 (45 minutes at $6.00 for each 15 minutes). The requester was asked to provide written acceptance of the fee estimate.

5. By March 31, 1988, eight affected third parties (hereinafter referred to as the third party appellants) had filed appeals with my office pursuant to subsection 50(1)

of the Act. A letter was also received by my office from a meat packers trade association on behalf of its members.

6. By letter dated March 31, 1988, the requester asked the institution to reconsider the application of section 17 of the Act to the record, and to waive the $18.00 fee as he

argued the data sought was "clearly public safety data" and therefore subject to the waiver provisions of subsection 57(3)(c). The requester also asked for copies of the letters received from the affected third parties objecting to his request for access.

7. The institution advised the requester that the decision to provide partial access to the reports had been appealed to me by some of the affected third parties and that the inspection reports would not be released until further direction was received from my office. The institution further advised the requester that the ". . . fee is based on partial access to reports in accordance with the Freedom of Information and Protection of Privacy Act, 1987, section 57 and Regulation 532/87, subsection 5(2)(2). The fee will not be adjusted unless required by the nature of the appeal decision".

8. On April 5, 1988, I advised the requester that some affected third parties claiming an interest under the Freedom of Information and Protection of Privacy Act, 1987 in the reports at issue, had filed appeals concerning the institutions decision to grant partial access to the inspection reports.

9. On April 6, 1988, the requester, (hereinafter referred to as the appellant), wrote to me:

   (a) appealing the head's decision to sever identifying information from the meat inspection reports pursuant to section 17(1)(a) of the Act;

   (b) requesting the inspection reports of those affected third parties who did not appeal the institution's decision to grant partial access to the reports requested;

   (c) requesting the identity and written representations of the third party appellants;

   (d) appealing the institution's decision to charge a fee of $18.00 and to not grant a public safety fee waiver. (This is the sole issue in appeal 880081.)

10. On April 10, 1988, the appellant again wrote to the institution requesting access to the reports of those affected third parties who did not appeal the head's decision.

11. On April 13, 1988, the institution responded to the appellant's request for the written representations received by them from six of the affected third parties, by claiming that these records were personal information and thus exempt from disclosure pursuant to section 21 of the Act.

12. On April 20, 1988, the appellant wrote to me objecting to the institution's use of section 21 to exempt the release

of the identities and written representations of the affected third parties.

13. By letter dated April 26, 1988, the institution responded to the appellant's request for the meat inspection reports of affected third parties who had not appealed the head's decision to release, with severances. The institution advised that it had "no legal alternative" but to refuse access to any of the reports as the appellant's request had been for all inspection reports and affected third parties had appealed the decision of the head to me. The institution advised the appellant that the release of any of the reports at this stage would be a violation of the Act.

14. By letters dated May 13 and June 15, 1988 (appeals 880025, 880041, 880060_65 and 880080) and July 5, 1988 (appeal 880081), I sent notice to the appellant, the institution, the third party appellants, and the affected third parties who had not appealed, that I was conducting an inquiry into these matters. All parties were invited to provide written representations to me.

15. Representations were received from the appellant, the institution, three third party appellants, eight affected third parties, and from a meat packers trade association on behalf of its members who included the third party appellants as well as certain of the affected third parties.

The issues arising in this appeal are as follows:

A. Whether any parts of the 1987 meat inspection reports for meat packing plants located in eastern Ontario (hereinafter referred to as the "records") are subject to exemption from release pursuant to section 17 of the Freedom of Information and Protection of Privacy Act, 1987.

B. Whether the appellant is entitled to know the identity of the third party appellants and to be provided with their representations.

C. Whether any part of the records qualifies as "personal information" within the meaning of subsection 2(1) of the Act? If this question is answered in the affirmative, whether the disclosure of the personal information would constitute an unjustified invasion of personal privacy as provided for in section 21 of the Act?

D. Whether the institution was correct in refusing to provide the appellant with access to the records (with identifying information severed) of the affected third parties who did not appeal the head's decision of partial access to my office.

E. Whether the amount of the fees estimate was in accordance with the terms of the Act?

F. Whether the head's decision not to waive fees was in accordance with the terms of the Act?

Background

The records at issue involves thirty_five 1987 meat inspection reports for meat processing/packing plants in eastern Ontario. These plants are regulated by the Meat Inspection Act (Ontario), R.S.O. 1980, c.260 and Regulation 607, R.R.O. 1980.

The institution provided a detailed description of the inspection process under the Meat Inspection Act (Ontario) and I have reviewed this description along with the enabling legislation, accompanying regulations and the meat inspection procedures manual. It is clear from the material I have reviewed that the purpose of meat inspection is "to assure a safe, sound, wholesome meat food product for sale in this province". (Source: Meat Inspection Manual, page 2.) The inspection process involves an inspector being present at all times during a slaughter. The inspector is responsible for:

1. examination of animals before slaughter;
2. examination of carcasses after slaughter;
3. holding animals for veterinary inspection if abnormalities are detected at any stage;
4. random testing of carcasses for various substances; and
5. the monitoring of plant sanitation and maintenance.

The records in issue are annual audit inspection reports conducted by the Regional Veterinarian and Supervising Meat Inspector. I am advised that this type of inspection is done annually but may be more frequent if the facts warrant such further inspections. The audit reports are designed to ensure a safe food product by reviewing the condition of equipment, etc.,

the sanitation level maintained and the structural aspects of the plant's facilities.

A standard reporting form is completed for each plant. The areas inspected in the reports at issue included the cutting room/processing room/retail area, the cooler, the freezers, the killing room, the holding pens, the inedible offal/hide rooms, hygiene and the environment.

The institution explained the purpose of these reporting forms as follows: "...the form is used as a tool to make plant operators aware of deficiencies and potential deficiencies...".

Failure to comply with the provisions of the Meat Inspection Act (Ontario) and its regulations can lead to a suspension, revocation or a refusal to renew a license to operate a meat processing plant.

General

The purposes of the Freedom of Information and Protection of Privacy Act, 1987 are set out in section 1 as follows:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be

> reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Section 10 sets out a person's right of access to records as follows:

> 10._(1) 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 record or the part of the record falls within one of the exemptions under sections 12 to 22.
>
> (2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

The burden of proving that a record falls within one or more of the exemptions under sections 12 to 22 of the Act, rests with the party who is resisting disclosure of the records. In this case, the burden of proving the applicability of the exemptions claimed lies with both the head and the third party appellants, because they are the parties resisting disclosure. (Section 53)

ISSUE A: Whether any parts of the 1987 meat inspection reports for meat packing plants located in eastern Ontario (hereinafter referred to as the "records") are subject to exemption from release pursuant to section 17 of the Freedom of Information and Protection of Privacy Act, 1987.

Subsection 17 (1) 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.

In order to fall within the section 17 exemption, the records in issue must meet a three part test:

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.

Test - Part 1

The head's decision in response to the original access request for all 1987 meat inspection reports was to grant partial access to the records after considering the arguments of the affected third parties. The head relied on subsection 17(1)(a) as justification for severing the name, location and plant number from the records he decided would be disclosed. This decision was then appealed to me by both the original requester and many of the affected third parties.

Looking first at the type of information the head intended to sever _ the name, location and plant number _ it clearly cannot be characterized as a trade secret or scientific, technical, commercial, financial or labour relations information, and therefore does not fall within the scope of subsection 17(1). The head's proposed severances, in and of themselves, would not meet the first part of the section 17 test and, in the absence of other considerations, would not be upheld.

However, eight of the third party appellants have argued that the entire record should be withheld from release under section 17, and for this reason it is necessary for me to apply the section 17 test to the content of the entire record. The arguments put forward by the third party appellants are that disclosure would result in: (a) an unjustified invasion of personal privacy (dealt with under Issue C, below); (b) exposure to unfair pecuniary and other harm; and (c) significant prejudice to their competitive position, thereby resulting in undue loss to their individual viability.

(Although the third party appellants have not made specific reference to subsections 17(1)(a) and (c) in their submissions,

because of the similarity between the wording in the submissions and the statute, I have assumed an intention on their part to rely on the subsections.)

In determining whether the first part of the test has been satisfied, I must consider whether disclosure of information contained in the records would reveal a "trade secret, or scientific, technical, commercial, financial or labour relations information."

The institution argued that the information contained in the records could be classified as "commercial" because meat packers are commercial slaughter plant operations. The Act does not define the term "commercial", and I have looked to other sources for guidance.

The seventh edition of the Concise Oxford Dictionary defines "commercial" as follows:

> "Of, engage in, bearing on, commerce".

"Commerce" is defined as follows:

> "Exchange of merchandise or services... ...buying and selling".

Black's Law Dictionary (fifth edition) defines "commercial" as:

> "Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. Generic term for most all aspects of buying and selling."

The records at issue contain no information concerning the buying or selling of goods and therefore, in my view, do not qualify as "commercial" information. While not an exhaustive list, the types of information that I believe would fall under the heading "commercial" include such things as price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business.

No party to this appeal has argued that the records contain information which corresponds with any of the other types of information listed in subsection 17(1), (i.e., trade secret or scientific, technical, financial or labour relations information) and I do not think that they do.

Accordingly, both the third party appellants and the head have failed to meet the first part of the test for a section 17 exemption.

As stated above, all three parts of the section 17 test must be satisfied to successfully claim the section 17 exemption. Accordingly, it is not necessary for me to decide whether or not the second and third parts of the test are met, however I propose to deal with each of them briefly.

Test _ Part 2:

In order to satisfy the second part of the test, the information must have been supplied by the third party to the institution in confidence. In this case the information in the records was not supplied by the third parties to the institution as required by

the Act. Rather, the institution obtained the information itself through inspections required by statute. The Federal

Court of Appeal in the recent decision of Canada Packers Inc. and Minister of Agriculture et al (July 8, 1988) addressed the issue of the meaning of "supplied" in the context of the federal Access to Information Act S.C. 1980_81_82, c.111. The Canada Packers case involved federal meat inspection team audit reports and, speaking for the Court, Justice MacGuigan at pg. 7 states:

> "Paragraph 20(1)(b) [of the Federal Act] relates not to all confidential information but only to that which has been 'supplied to a government institution by a third party'. Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed."

In addition, even if the third party appellants could successfully argue that the information had been provided by them, there is nothing in the Meat Inspection Act (Ontario) or elsewhere to indicate that the information gathered on an inspection must be kept confidential by the institution.

Test _ Part 3:

Finally, with respect to showing that disclosure of the records 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;... ...or result in undue loss or gain to any

person, group, committee or financial institution or agency", neither the head nor any of the third party appellants have provided any evidence to support an allegation of possible harm.

Several concerns were raised by both the institution and the affected third parties, namely that:

a. inaccurate conclusions could be drawn from the records as deficiencies noted may have already been corrected;

b. the records may contain errors;

c. the records may not reflect current conditions as they are only done yearly;

d. scores on the records are not an indication of product quality or wholesomeness.

The institution could, if it felt it necessary, address some of these concerns in a covering letter to the requester when access to the records is given. Nothing in the Act precludes an institution from explaining how or why an inspection is done, what is looked for during the course of the inspection, the scoring system used, the follow up done to remedy the situation, etc. Providing this type of information to a requester with the records, may very well alleviate concerns about misunderstandings arising from the disclosure of the requested information.

It should be noted that the Federal Court of Appeal released four decisions in addition to the Canada Packers decision already referred to, involving a similar subject matter on July 8, 1988. In those cases the Federal Court of Appeal reviewed the decision of the Trial Division ordering disclosure of federal meat audit inspection reports under the federal

Access to Information Act. In unanimous decisions, the court agreed that full disclosure should be afforded to the requester in those cases (See: Burns Meat Ltd. v. The Minister of Agriculture, Intercontinental Packers Limited v. The Minister of Agriculture, Gainers Inc. v. The Minister of Agriculture, Toronto Abattoirs Limited v. The Minister of Agriculture).

Mr. Justice MacGuigan noted in Canada Packers Inc. v. The Minister of Agriculture, at page 15 that, "All of the American reports have been available to the public under the U.S. Freedom of Information Act since 1974. The Canadian reports were also available in Ontario from late 1980 or early 1981 to 1983... ...no evidence was presented of any unfavourable publicity with respect to either...".

In summary, I find that both the head of the institution, in deciding to disclose with severances, and the third party appellants of his decision to partially disclose, have failed to meet any of the three parts of the test for an exemption under section 17, and therefore it is my order that the entire records be released to the appellant (original requester).

ISSUE B: Whether the appellant is entitled to know the identity of the third party appellants and to be provided with their representations?

The appellant requested the names of the third parties who had appealed the head's decision to partially disclose, and the opportunity to see their representations. He also asked the institution for copies of representations made by affected third parties before the head made his original decision to release

the records with severances. The appellant argued that the refusal to release this information prejudiced his position in making representations on the matter.

The release of the names of third party appellants is something that should be decided on a case by case basis. Ordinarily, releasing these names would not be a problem. However, if by releasing the names, the very information at issue in the appeal is released, then obviously, the names cannot be released. That is exactly the situation in this appeal. The institution

had decided to sever identifying material from the records. Had the appellant received the names of the parties who appealed that decision, the appellant would have been able to circumvent the appeal process, i.e. he would have obtained part of the information in issue in the appeal __ the identity of at least some of the affected third parties whose names had been severed. If the only issue in these appeals had been whether the contents of the records (as opposed to the identifying information and the contents) fell within any of the exemptions provided under the Act, the names of the third party appellants would not have been an issue and could have been released at an earlier stage.

Further, the appellant was aware in a general way of the identity of the third party appellants, and his failure to know their specific identity did not prejudice him in making his representations in any way that I can discern.

In my view, in the circumstances of this appeal, it would have been improper for the head, or for my office, to have released the names of the third party appellants to the appellant (original requester) prior to the release of this Order.

Likewise, to have released the representations of the affected third parties in the circumstances of this appeal would have provided the appellant with at least some of the information that is the subject matter of the appeal. In every appeal my office prepares and sends to each party an "Appeals Officer's Report" which sets out the issues in dispute with sufficient detail to enable a party to make meaningful representations. The Appeals Officer's Report states that the parties are not bound by the issues set out therein. It also states that if a new issue that is relevant is introduced at any stage of the proceedings, all parties will be advised and provided with an opportunity to respond. In my view, the procedure followed in this case was fair to all concerned.

ISSUE C: Whether any part of the record qualifies as "personal information" within the meaning of subsection 2(1) of the Act? If this question is answered in the affirmative, whether the disclosure of the personal information would constitute an unjustified invasion of personal privacy as provided for in section 21 of the Act?

The third party appellants, the trade association and several of the affected third parties submit that the information contained in the records is "personal information" and its disclosure would constitute an unjustified invasion of personal privacy under section 21 of the Act.

Subsection 2(1) of the Act states:

> "'Personal information' means recorded information about an identifiable individual, including,..." (emphasis added).

"Individual" is defined in Black's Law Dictionary, (fifth edition), as follows:

> "As a noun, this denotes a single person as distinguished from a group or class, and also, very commonly a private or natural person as distinguished from a partnership, corporation, or association; but it is said that this restrictive signification is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons".

The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear. The types of information

enumerated under subsection 2(1) of the Act as "personal information" when read in their entirety, lend further support to my conclusion that the term "personal information" relates only to natural persons.

The records are restricted to information about the physical conditions in and around a "plant". In my view, they do not include information about an "identifiable individual" so as to bring them within the definition of "personal information" in subsection 2(1) of the Act.

Having found that the records in question do not include "personal information", my conclusion is therefore, that disclosure of the records would not constitute an unjustified invasion of personal privacy pursuant to section 21 of the Act.

ISSUE D: Whether the institution was correct in refusing to provide the appellant with access to the records (with identifying information severed) of the affected third parties who did not appeal the head's decision of partial access to my office.

Upon receipt of the appellant's request for access, the institution notified all the meat packing plants that they considered to be affected third parties. After receiving representations from some of the affected third parties, the institution decided to release the records to the appellant (original requester), but with identifying information on the plants severed. Eight of the affected third parties appealed the institution's decision to me. The appellant then requested access to the records of the affected third parties who had not appealed the head's decision to release the record, with identifying information severed.

The institution decided not to release this information, arguing that because the request was for all records and the institution's decision to grant access had been appealed, the Act prohibits access until I have decided the appeal on all the records. Further, the institution was of the view that this position was supported by my office.

The institution's statutory obligation with respect to affected third parties is clearly provided for in section 28 of the Act. This section sets out when a third party should be notified (subsection 28(1)), the type of notice required (subsection 28(2)), the time limit for such notice (subsection 28(3)), the notice of delay required to be sent to the requester (subsection 28(4)), the rights of third parties to

make representations on disclosure (subsection (28(5) and (6)), the duty to make a decision on disclosure (subsection 28(7)) and the duty to give notice of the decision (subsection 28(8)).

Subsection 28(9) provides:

> Where, under subsection (7), the head decides to disclose the record or a part thereof, the head shall give the person who made the request access to the record or part thereof within thirty days after notice is given under subsection (7), unless the person to whom the information relates asks the Commissioner to review the decision.

In this instance, there were 35 affected third parties, each of which was the subject of one record. Subsection 28(9) uses mandatory language in requiring the institution to provide access to the record or a part of the record, unless the person to whom the information related has filed an appeal with my office. Because only eight affected third parties appealed to my office, it is my view that the institution was obligated to release the records (with identifying information severed as the

head had decided) of those third parties that did not appeal to me after the time for appeal granted in the Act had lapsed.

Unfortunately there was some misunderstanding that resulted from conversations between the institution staff and my staff. In my view, misunderstandings are unavoidable in the early stages of the administration of a new and complex piece of legislation, but I believe that with increased experience on the part of both my office and the institution staff these will be reduced. However, that being said, the decision to release these

non_appellant third party records properly lay with the head, and the records in question should have been released.

ISSUE E: Whether the amount of the fees estimate was in accordance with the terms of the Act?

Section 57 of the Act governs the instances where the cost incurred in providing access can be charged to the requester:

Subsection 57(1) states:

> 57._(1) Where no provision is made for a charge or fee under any other Act, a head may require the person who makes a request for access to a record or for correction of a record to pay,
>
> (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record; and
>
> (d) shipping costs.

In the circumstances of this appeal, the head estimated it would take 45 minutes to prepare the 41_page record for viewing by the appellant. Preparation would consist of severing the identifying information from the record and providing copies to the appellant for viewing. The fee estimate of $18.00 is in accordance with subsection 5(2) of Ontario Regulation 601/87, based on a charge of $6.00 for each 15 minutes of preparation time.

Subsection 57(1) of the Act provides the head with the discretion as to whether or not a fee should be charged in an individual case. I find no error in the exercise of the head's discretion to charge a fee nor in the calculation of the fee.

However, because I have ordered the release of the entire records, no severances are necessary, and therefore no preparation costs will be incurred. It is, however, open to the institution to charge the appellant appropriate fees for shipping or copying the records in accordance with section 57 of the Act following the appellant viewing the records in Ottawa.

ISSUE F: Whether the head's decision not to waive fees was in accordance with the terms of the Act?

The appellant requested a fee waiver with respect to the $18 charge, based on the argument that "dissemination of the record will benefit public ...safety" (s.57(3)(c)). However, as a result of my decision above it is no longer necessary for the institution to incur the $18 preparation time charge and therefore this ground of appeal has been resolved.

In summary, my order is that the institution produce all the 1987 meat inspection reports for eastern Ontario, without severances, for viewing by the appellant, in Ottawa, Ontario,

within 20 days of the date of this order. Further, the institution is requested to confirm to my office, in writing, that the reports have been produced to the appellant for viewing within the time specified above.

Original signed by:
Sidney B. Linden
Commissioner

September 8, 1988
Date