



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

ORDER 53

Appeal 880054

Ministry of Transportation



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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 to the Commissioner. Further, subsection 57(4) allows a person who is required to pay a fee under subsection 57(1) to ask the Commissioner to review the head's decision to charge a fee or the amount of the fee.

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

1. On March 11, 1988, the Ministry of Transportation (the "institution") received a request for access to:
 - (a) "The complete original application form bearing the original signature and certification of the applicant" for a total of twenty three (23) different applicants for extra_provincial operating authority;
 - (b) "The complete file of the Director (of the Motor Vehicle Transport Act, 1987 (the "MVTA")), containing all of the materials, documents, notes, reports, and memoranda considered, relied upon or viewed in the course of the Director's determination of safety rating" with respect to the 23 applications;
 - (c) "The complete file of the (Ontario Highway) Transport Board (the "Board") containing all of the materials, documents, notes, report and memoranda considered, relied upon or viewed in the course of the Provincial

Transport Board's determination and certification of compliance with the fitness criteria outlined in the Motor Vehicle Transport Act, 1987 and regulations passed pursuant thereto";

(d) Copy of the Registrar of Motor Vehicle's designation as Director pursuant to section 9(1)(f) Motor Vehicle Transport Act, 1987;

(e) "Any statement, memorandum, directive, or other instrument outlining procedures to be followed by the Provincial Transport Board in considering applications, objections, adjudication of public interest proceedings, issuance of licenses, determinations and certifications of fitness and any other matters touching on the administration of applications made under the Motor Vehicle Transport Act, 1987 if any such statements, memoranda, directives, or other instruments exist."

2. By letters dated March 28 and April 13, 1988, the Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") for the institution advised the requester that some information had been deleted from certain requested documents, pursuant to exemptions contained in the Act. The rest of the requested material was either provided to the requester unsevered, or was material already in the public domain and otherwise available.

3. The Co_ordinator also provided an estimate of fees charged to provide the requested information.

4. The specific exemptions relied on by the head for the deletions were:
 - (a) sections 17 and 21, with respect to the 23 complete original application forms referred to under paragraph 1(a), above; and
 - (b) subsection 17(1)(b), with respect to the sample answers to the "Safety Program Test", which is included in the information about procedures used in the evaluation of MVTA applications referred to under paragraph 1(b), above.
5. On March 30, 1988, the requester appealed the decision of the head to sever the information and stated that the estimated amount of the fees was excessive.
6. Notice of the appeal was given to the institution and the appellant.
7. Efforts were made by an Appeals Officer and the parties to settle the appeal. A copy of the records at issue, including sample completed application forms, were reviewed by the Appeals Officer. A settlement was not effected as both parties maintained their respective positions.
8. By letter dated July 13, 1988, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decision of the head, and inviting them to make written representations on the issues arising in the appeal. Enclosed with this letter was a copy of a report by the Appeals Officer, intended to assist the parties in making their representations concerning the

subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all persons affected by the subject matter of the appeal.

9. The 23 applicants for extra_provincial operating authority were identified as "affected" parties and invited to make written representations to me. Seven of these 23 affected parties did so.
10. Subsequently, my office was contacted by the Chair of the Ontario Highway Transport Board who expressed a desire to make representations respecting the Board's role in processing and adjudicating applications under the MVTA. I decided that this would be appropriate in the circumstances of this appeal.
11. I have considered all representations received in making my Order.

It should be noted, at the outset, that the purposes of the Act as defined in subsections 1 (a) and (b) are:

- (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

...

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions...

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

(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.

Further, section 53 of the Act provides that the burden of proving that the record falls within one or more of the specified exemptions under sections 12 to 22 of the Act lies with the party who is resisting disclosure of the records.

Background

The Ministry of Transportation is an "institution" as defined in subsection 2(1) of the Act. The Ontario Highway Transport Board has been designated as an "institution" by Ontario Regulation 532/87, as amended. Notwithstanding the fact that the Ministry of Transportation and the Ontario Highway Transport Board are

separate institutions for purposes of the Act, the "head" of both institutions is the Minister of Transportation.

The Motor Vehicle Transport Act, 1987 came into force on January 1, 1988, the same day as the Freedom of Information and Protection of Privacy Act, 1987. Prior to that date, applications for extra_provincial trucking licences were filed with or given to the Board, and the Board's file of applications was fully open to the public. Effective January 1, 1988, when these two new acts came into force, the process was changed, and all applications were received by the Ministry of Transportation. The practice of the Ministry was to sever some information from the applications, claiming certain exemptions under the Freedom of Information and Protection of Privacy Act, 1987 and send the severed application forms to the Board.

In early 1988, a question arose as to whether the Minister of Transportation or the Board had the lawful authority to issue extra_provincial trucking licences. The Board applied by way of stated case to the Supreme Court of Ontario (Divisional Court) for an answer to this and other questions. The relevant questions contained in the application as far as this Order is concerned were:

1. Is the Ontario Highway Transport Board the "Provincial Transport Board" for the purposes of the Motor Vehicle Transport Act, 1987, S.C.1987, c.35?
2. Is the Minister of Transportation for Ontario the "Provincial Transport Board" for the purposes of the Motor Vehicle Transport Act, 1987, S.C.1987 c.35?

The written opinion of the Court in Ontario Highway Transport Board and Ontario Trucking Association, Ontario Motor Coach Association, the Honourable Ed Fulton, Minister of Transportation was released October 20, 1988. The Court answered Question No.1 in the affirmative and Question No.2 in the negative.

As a result of these answers, a new application form for extra_provincial trucking licences was developed and applications were to be made directly to the Board. This revised form included a section where the applicant provided consent to the release of the information contained in the application to "interested parties, the public and the Board".

On January 31, 1989, the Truck Transportation Act, 1988 became law, which further amended the application process. Applications for extra_provincial trucking licences were now required to be filed with the Ministry, rather than the Board. The new application form contains a notice that portions of the application will be made available "to interested persons as

necessitated by the licensing process". The Ministry has agreed to disclose the entire contents of the application file to the Board, and the application file maintained by the Board is open to the public.

Having regard to the Divisional Court opinion dated October 20, 1988, I hereby order that the institution forward the 23 application forms referred to under paragraph 1(a), above, to the Board, as I believe it is now the appropriate body to have custody of these records. I was advised during the course of my inquiry that some 2800 applications are "caught" by the procedure followed by the institution from January 1, 1988 to

October 20, 1988 to deal with what they perceived as conflicts between their practice of disclosure and the requirements of the Act. Although those applications are not the subject of this appeal, I trust that the institution will also release all of those applications, intact, to the Board.

In its submission, the Board argued that access to records in the custody or control of quasi_judicial or administrative tribunals, should be governed solely by the terms of the Statutory Powers Procedure Act, to which they are subject. I do not agree with this position. Disclosure of records which are in the custody or control of any institution governed by the Freedom of Information and Protection of Privacy Act, 1987, must be determined in accordance with the terms of that Act. The Board has been designated as an institution under Ontario Regulation 532/87, as amended, and as such, has the same responsibilities and obligations as all other institutions with respect to complying with the provisions of the Act.

In my view, if there is a perceived conflict between the practice of an administrative tribunal covered by the Act and the Act itself, disclosure of records by those tribunals should be examined in light of the Freedom of Information and Protection of Privacy Act, 1987, together with the traditions of

the administrative tribunal and the rules of natural justice. The Act establishes a right of access to government information subject to certain exemptions. In my view, the Act and its exemptions do not operate in a way which would deny access to information through other legal rules or principles, including the rules of natural justice and the requirements of the Statutory Powers Procedure Act. I find support for this conclusion in section 64 of the Act, which provides as follows:

(1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

In my view, the Act was not intended to prevent administrative tribunals from carrying out their statutory functions. However, the Act has introduced a new scheme for access to information and protection of privacy in the province, which must be implemented by all institutions covered by the Act, including designated administrative tribunals. In my view, the Act can and should operate as an independent piece of legislation.

The issues arising in this appeal are as follows:

- A. Whether the exemption provided by section 17 of the Act applies to the information deleted by the head from the 23 complete original application forms.
- B. Whether the exemption provided by section 21 of the Act applies to the information deleted by the head from the 23 complete original application forms.
- C. Whether the exemption provided by subsection 17(1)(b) of the Act applies to the information deleted by the head from the "Safety Program Test" used in the evaluation of the Motor Vehicle Transport Act applications.

ISSUE A: Whether the exemption provided by section 17 of the Act applies to the information deleted by the head from the 23 complete original application forms.

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

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 my Order 36 (Appeal Number 880030), released on December 28, 1988, I outlined the three_part test which must be met in order for a record to be exempt pursuant to section 17. The test, as outlined on page 4 of that Order, is as follows:

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.

The head has deleted the following type of information from the 23 completed original applications, citing section 17 of the Act:

- a. shareholder information _ An application for an operating licence under the MVTA requires an applicant to provide the surname, given name and initial or company name of the applicant together with the mailing address and business address and telephone number. The second part of the applicant information section requires information to be given on corporate shareholders and is to be completed only when the applicant is a corporation. The names of the ten largest shareholders are to be listed together with the percentage of voting shares held. It is this latter information that was deleted by the head with respect to the 23 application forms.
- b. the name, address and telephone number of the applicants' "agent" in Ontario _ An application for an operating licence under the MVTA requires an applicant to provide the name, address and telephone number of a "contact person" for the purposes of the application. This information was deleted by the head with respect to the 23 application forms.
- c. information relating to bankruptcy _ An application for an operating licence under the MVTA requires an applicant to provide the Registrar with information concerning the past performance of the applicants' commercial motor vehicle operations. The application form requires information detailing any undischarged bankruptcy for the applicant and/or any partner or corporate officer associated with the application. Details to be provided include the surname, given name and initial or company name of the bankrupt, their (its) position, the bankruptcy number, the jurisdiction where the bankruptcy was filed and the date of the bankruptcy. This information, where

provided, was deleted by the head with respect to the 23 application forms.

- d. information relating to the planned scope of the applicants' operation (fleet size and number of drivers) _ An application for an operating licence under the MVTA requires an applicant to provide the institution with information relating to the "Scope of Operation". The applicant is required to set out information about the equipment it owns or leases _ trucks and trailers and their type _ both currently owned or leased and planned. It is this latter information, i.e., what is "planned", that has been deleted by the head, together with answers to the question "What percentage of these power units will be operated in Ontario?" (current and planned) and information on the planned number of drivers the applicants estimate using under the new or extended operating authority(ies).
- e. answers of applicants to the Safety Program Test _ An application for an operating licence under the MVTA requires an applicant to fill out the answers to a "safety program test" which consists of 19 questions related to driver and vehicle information. The answers of the applicants to this test were deleted from the 23 completed applications.
- f. the name of the applicants' insurer and policy number _ An applicant for an operating licence under the MVTA must provide the institution with information relating to their insurance coverage. The form clearly states that "An operating licence will not be issued until this information is received by the Ministry." The form requires the applicant to provide details about "Cargo Insurance", such as the name of the insurer, the policy number, the amount of coverage and the expiry date. The same details are required with respect to details about "Public Liability and Property Damage Insurance". The form also asks that either a "Yes" or "No" box be ticked in response to the question "Does your insurance policy cover you for the transportation of dangerous goods requiring the filing of an emergency response plan under the Transportation of Dangerous Goods Regulations (Canada)?" All information relating to insurance, except the headings, have been deleted by the head from this part of the 23 completed application forms.

As outlined earlier, all three parts of the test under section 17 must be satisfied in order for the exemption to apply. After

reviewing the records and considering the submissions of all parties, I find that the second part of the test has not been established by the institution: there is no evidence to indicate that the information was provided by the licence applicants to the institution in confidence, either implicitly or explicitly. It is not necessary for me to consider whether the other two parts of the test have been met before concluding that the section 17 exemption does not apply.

The practice of the Ministry of Transportation and the Board before the Freedom of Information and Protection of Privacy Act, 1987 came into effect and after the Divisional Court opinion of October 20, 1988 was, and is, to make all such information available to interested parties and the general public. Subsection 63(2) of the Act states specifically that:

This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.

I find, therefore, that the exemption provided by section 17 of the Act does not apply to the information deleted by the head under Issue A, and, unless this information is found to be exempt under another provision of the Act it should be released to the appellant.

ISSUE B: Whether the exemption provided by section 21 of the Act applies to the information deleted by the head from the 23 complete original application forms.

The head deleted the following type of information from the 23 complete original applications, citing various parts of section 21 of the Act:

- a. applicants' driver's licence numbers (subsection 21(3));
- b. the name, address and telephone number of the applicants' "contact person" (subsection 21(1));
- c. the name, address and telephone number of the applicants' "agent" in Ontario (subsection 21(1));
- d. information relating to bankruptcy (subsection 21(3)(f));
- e. shareholder information.

During the course of the appeal, the appellant abandoned his request for the driver's licence numbers of the applicants.

In all cases where the request involves access to personal information, it is my responsibility, before deciding whether the exemption claimed by the institution applies, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act.

Subsection 2(1) of the Act states:

"Personal information" means recorded information about an identifiable individual, including,

- (a) information relating to race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved.
- (c) any identifying number, symbol or other particular assigned to the individual.
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views of opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The definition of "personal information" contains no reference to information relating to a corporation, partnership or sole proprietorship. Therefore, it is not proper for the head to claim exemption under section 21 with respect to information pertaining to an entity other than an individual. All such information must be released to the appellant.

In my view, the information contained in the 23 complete application forms that relates to individuals meets the definition of "personal information" under subsection 2(1) of the Act. I must now determine whether the head was correct in

denying access to this information under the section 21 exemption.

Section 21 of the Act provides a mandatory exemption for the non_disclosure of personal information, subject to certain exceptions. If one of these exceptions applies, the exemption is no longer available to the head, and the information must be released.

Section 21 states:

(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

...

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

If it is established that disclosure of the personal information contained in the records does not constitute an "unjustified invasion of personal privacy", then it must be released to the appellant.

Subsections 21(2) and (3) of the Act provide guidance in determining if disclosure of personal information would constitute an unjustified invasion of personal privacy. Subsection 21(2) sets out some criteria to be considered by the head:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Subsection 21(3) goes on to describe a number of types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy:

- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
 - (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
 - (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary

to prosecute the violation or to continue the investigation;

- (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
- (d) relates to employment or educational history;
- (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Having considered the provisions of subsections 21(2) and (3), the submissions of the various parties, and the circumstances in which the information on the 23 application forms was originally provided to the institution, in my view, disclosure of this information would not constitute an unjustified invasion of personal privacy.

Therefore, I find that Issue B has been answered in the negative, and the 23 original complete application forms should be released to the appellant in their entirety.

ISSUE C: Whether the exemption provided by subsection 17(1) (b) of the Act applies to the information deleted by the head from the "Safety Program Test" used in the evaluation of the Motor Vehicle Transport Act applications.

The relevant record under Issue C consists of "...[t]he complete file of the Director (of the Motor Vehicle Transport Act, 1987), containing all of the materials, documents, notes, reports, and memoranda considered, relied upon or viewed in the course of the Director's determination of safety rating..." with respect to the 23 applications, requested by the appellant in his original request dated March 11, 1988.

The head made this record available to the appellant with the "sample answers" to the "Safety Program Test" severed, relying on subsection 17(1)(b) of the Act. The "sample answers" were developed by the institution and are not the actual answers given by an applicant for an extra_provincial trucking licence.

Subsection 17(1)(b) provides that:

(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,

...

(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

Again, in order to fall within the section 17 exemption, the records at issue must meet a three_part test as set out under Issue A of this Order.

In my view, the sample answers to the "Safety Program Test" are clearly not one of the types of information contemplated by section 17. The sample answers were prepared by the institution

and were not supplied by a third party. As such, they fail to meet the requirements of the test for exemption under section 17.

I therefore order the head to disclose these records to the appellant, without severances.

In conclusion, my order with respect to the issues raised in this appeal is as follows:

1. I order that the head of the institution release the 23 completed application forms at issue in this appeal to the Ontario Highway Transport Board within twenty (20) days of the date of this Order. The institution is further ordered to advise me in writing, within five (5) days of the date of release of the record, of the date on which release was made. I further recommend that the institution forward to the Board any other application forms or files that are "caught" by the interim procedure devised by the institution and in effect between January 1, 1988 and October 20, 1988 as the Board is the appropriate institution to have custody of those records.
2. I order that the various types of information deleted by the head from the 23 completed original application forms under sections 17 and/or 21 of the Act be released by the Board to the appellant in their entirety within twenty (20) days of the date on which the Board receives the records from the institution. The Board is further ordered to advise me, in writing, within five (5) days of the date of

disclosure of the records, of the date on which disclosure was made.

3. I order that the institution disclose to the appellant the sample answers deleted from the "Safety Program Test", included in information about procedures used in the evaluation of the MVTA applications, within twenty (20) days of the date of this Order. The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure of the record, of the date on which disclosure was made.

There was also an issue in this appeal with respect to fees which I will deal with briefly.

Because I have found that no severances should have been made to the records at issue in this appeal, fees are restricted to photocopying costs for producing these records for release, as provided in the regulations. In the circumstances of this case, the appellant should not be charged for any time spent in "preparing" the record for release, and the institution should refund any overpayment of fees made by the appellant.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ April 20, 1989
Date