



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

# **ORDER P-251**

**Appeal 900344**

**Ministry of Correctional Services**



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## ORDER

On May 14, 1990, the appellant requested copies of an Agreement of Purchase and Sale between the Ministry of Correctional Services, the Ministry of Government Services and Better Beef Limited, signed on May 11, 1990. The record in issue consists of an 11 page Agreement of Purchase and Sale of land. The request was originally made to the Ministry of Government Services but was subsequently "referred" to the Ministry of Correctional Services (the "institution").

Pursuant to section 28 of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act"), the institution notified Better Beef Limited (the "affected party"), to determine if it had any concerns regarding possible disclosure of the record. The affected party did not reply and this was interpreted by the institution as a lack of consent to disclosure.

By letter to the appellant, dated June 22, 1990, the institution denied access to the record pursuant to sections 17(1)(a) and (c) as the agreement had not been "finalized".

The institution's decision was appealed to this office. As the institution's decision letter dated June 22, 1990 was post-marked July 3, 1990, the appellant also raised concerns about what he perceived to be deliberate tactics on the part of the institution to delay disclosure of the record.

Mediation to resolve the appeal was attempted but was not successful. The appeal proceeded to an inquiry. A Notice of Inquiry accompanied by an Appeals Officer's Report was sent to

the institution, the Ministry of Government Services, the affected party and the appellant, outlining the issues raised by the appeal and inviting representations.

Written representations were received from the institution and from the affected party. No representations were received from the Ministry of Government Services or the appellant.

As a preliminary matter I will briefly address the appellant's suggestion that the institution was employing deliberate delay tactics. In its representations the institution indicated that for a period of time its offices were housed in interim office space at various locations throughout the City of North Bay and this temporary disruption may have contributed to the delay. The institution maintained that the delay was not intentional, but was caused by circumstances beyond its control.

I accept the reasons offered by the institution and I am satisfied that there was no deliberate attempt by the institution to delay responding to the appellant.

The primary issue raised in this appeal is whether the requested record falls within the exemption contained in section 17 of the Act.

Sections 17(1)(a) and (c) of the Act provide:

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

In Order 36, dated December 28, 1988, former Commissioner Sidney B. Linden established the three-part test which must be satisfied in order for a record to be exempt under section 17. The test is as follows:

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 harms 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) claim invalid.

I adopt Commissioner Linden's views for the purpose of this appeal.

Section 53 of the Act provides that the burden of proof that a record or part thereof falls within one of the specified exemptions in this Act lies with the head of the institution. Further, with respect to the section 17 exemption, the affected party resisting disclosure shares with the institution the onus of establishing that this exemption applies to the record.

In determining whether the first part of the test has been satisfied, I must consider whether disclosure of the information in the record at issue in this appeal would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information".

In its representations, the institution indicated that the record in question contains information related to a specific property site and detailed financial arrangements.

In Order 87, dated August 24, 1989, former Commissioner Sidney B. Linden considered the nature of commercial and financial information. He found that specific data relating to the price paid for land is financial information, and that information regarding the sale of land is commercial in nature. I agree with his interpretation and am of the view that the information in question satisfies the first part of the test.

The second part of the section 17 test raises the question of whether the information in the record at issue in this appeal was "supplied in confidence implicitly or explicitly".

This part of the test is more problematic for the institution and affected party. The application of the second part of the section 17 test to information contained in a contract has been dealt with in several previous Orders. In general, the conclusion in these Orders has been that, in order to meet the test of "supplied", the information contained in the record at issue must be one and the same as that originally provided to the institution by an affected party for the purpose of creating the record. [See: Orders 87, 179, 203 and 204].

The affected party did not address this issue in its representations. In its representations, the institution asserted:

We claim that as a party to the agreement the ministry was supplied with the information.

We claim that all parties understood implicitly or explicitly that the information was not being collected or maintained specifically for the purpose of creating a record available to the general public.

I do not accept the institution's argument that information was "supplied" to the institution simply because it was a party to an agreement with the affected party. Nor, is it obvious on the face of the record that it contains information which was supplied directly to the institution. In fact, a review of the record and the information provided by the institution strongly suggests that the record at issue was the result of a considerable amount of negotiation between the institution and the affected party.

I have stated previously that I will find that information contained in records would "reveal" information "supplied" by an affected party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution [See Orders 203 and 218].

From my examination of the record, I cannot conclude that disclosure of the record would permit accurate inferences to be drawn about information actually supplied to the institution. No representations were received on this issue from either the institution or the affected party.

In my view, the institution and affected party have failed to establish that the information contained in the record was supplied to the institution. Accordingly, the requirements of the second part of the test for exemption under section 17 have not been met.

As stated earlier, failure to satisfy any one of the three parts of the test will render the section 17 exemption claim invalid. As I have found that the record was not supplied within the meaning of section 17, it is not necessary for me to consider the third part of the test.

In closing, I have a final comment. In reviewing the record, I note that it contains several clauses, such as "Time is of the essence", which are found in virtually every contract for the purchase and sale of land in this province. I hope that in the future an institution reviewing a record such as the one at issue in this appeal will look carefully at the information it is refusing to disclose. In my view, this is of particular importance in cases such as this where the record is an agreement to sell publicly-owned lands. As well, leaving aside the other two parts of the section 17 test, in my opinion, it is unlikely that the disclosure of "standard" clauses could reasonably be expected to result in the types of harms contemplated by section 17.

**ORDER:**

1. I order the head to disclose the record in issue in this appeal to the appellant.

2. I order that the institution not release the record until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually released. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the record be released 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 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 Wright  
Commissioner

November 13, 1991  
Date