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

ORDER P-345

Appeals 900086, 900624, P-910469,
P-910479, and P-910604

Ministry of the Environment

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ORDER

BACKGROUND:

The Ministry of the Environment (the institution) received four requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to refillable soft drink containers, which is submitted to the institution under O. Reg. 623/85 of the Environmental Protection Act. All four requests were made by the same individual.

Section 8(1) of O. Reg. 623/85 provides that brand owners and users of carbonated soft drinks must file monthly reports indicating sales for each brand, and the types and sizes of containers sold. Generally, brand owners are franchisers of carbonated soft drinks, and brand users are the bottlers or distributors. These monthly reports are submitted to an independent auditor appointed by the institution who in turn uses the information provided to prepare other related reports for the institution.

The institution uses the ratios of refillable sales to non-refillable sales to determine compliance with sections 8(2) and (4) of O. Reg. 623/85, which provide that 30 per cent of monthly sales and 40 per cent of annual sales of carbonated soft drinks must be in refillable containers, and to prosecute those companies in violation.

The institution identified the following reports as being responsive to the requests:

1. Brand User Audit Report

   This report is submitted by each brand user to the auditor. It lists the brand user's refillable and non-refillable container sales information for a particular soft drink brand by each retail size and includes the total ratio of refillable to non-refillable sales.

2. Monthly Ratio Report

   This report is prepared for the institution by the auditor. It contains a listing of all brand users, their approved brand group, and their monthly and annual refillable ratios.

3. Monthly Ratio Exception Report

   This report is prepared for the institution by the auditor. It contains a listing of those brand users (and corresponding approved brand group) whose refillable ratios are not in compliance with O.Reg. 623/85.

4. Brand User 12 Month Ratio Report

This report is prepared for the institution by the auditor. It is similar to the Monthly Ratio Report, but lists the monthly refillable ratios over the preceding twelve month period.

5. Brand Owner Ratio Report

This report is prepared for the institution by the auditor. It contains a listing of the brand owner, the refillable and non-refillable container sales and the corresponding monthly and annual ratios.

The institution provided the requester with a copy of the summary page contained in the Monthly Ratio Report and Monthly Ratio Exception Report, but denied access to the monthly reports pursuant to sections 17(1)(a), (b) and (c) of the Act. The requester appealed the institution's decision.

During the course of mediation, it was confirmed that the records at issue covered the period of January 1, 1986 to May 15, 1991. As well, the institution provided the appellant with a copy of the stratification sheet contained in the Monthly Ratio Report and Monthly Ratio Exception Report.

Further attempts to mediate the appeals were not successful and the matters proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head of the institution was sent to the appellant, the institution and the Ontario Soft Drink Association (OSDA), as well as the soft drink brand owners and users whose interests might be affected by the disclosure of the records. Written representations were received from the institution, the appellant and the OSDA. Only one of the many brand owners and users notified submitted representations (the affected party). After he submitted his representations, the appellant indicated that he was no longer seeking access to sales information contained in the records.

PRELIMINARY ISSUE:

During the time the appeals were being processed, the appellant made a request under the Act for access to the representations submitted by the institution in relation to Appeal 900086. The institution denied access to this record pursuant to sections 52(13) and 19 of the Act.

Section 52(13) of the Act reads:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make

> representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

The issue of access to representations has been addressed by both former Commissioner Sidney B. Linden and myself in Orders 164 and 207 respectively. In Order 164, former Commissioner Linden stated that section 52(13) does not confer a right on a party to an appeal to obtain access to the other party's representations. He noted that while section 52(13) does not prohibit the Commissioner from ordering such access in the proper case, he emphasized that it would be an extremely unusual case where such an order would be issued.

Commissioner Linden also stated that since the Statutory Powers Procedures Act does not apply to an inquiry under the Act, the only statutory procedural guidelines that govern inquiries under the Act are those which appear in the Act. He went on to discuss the procedures respecting inquiries:

> . . . while the Act does contain certain specific procedural rules, it does not in fact address all the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
>
> . . .
>
> Clearly, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeals Officer's Report, allow the parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

In Order 207, I adopted the reasoning of Commissioner Linden and noted that:

> If an appellant were provided with access to the [representations] or other information that would disclose the content of the record, before the decision on access was made, the appeal would be redundant.

Access to representations and section 52(13) were the subject of further discussion by Mr. Justice Isaac of the Ontario Court (General Division) in an unreported decision dated May 16, 1991, in the context of an application for judicial review of Order 167. At pages 11 and 12 of his decision, Mr. Justice Isaac commented:

> I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the Corporation to the Commissioner should be sealed and not disclosed to [the named appellant] for purposes of the application for judicial review. This reason is found in two sections of the Act which, in my view shield such information from disclosure.

Mr. Justice Isaac went on to quote sections 52(13) and 55(1) of the Act. The latter provision prohibits the Commissioner and his staff from disclosing information which comes to their knowledge in the performance of their duties.

In the circumstances, I conclude that the appellant has no right of access to the representations made in the course of Appeal 900086.

ISSUES:

A. Whether the mandatory exemption provided by section 17(1)(a), (b) or (c) of the Act applies to the records.

B. If the answer to Issue A is yes, whether section 23 applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 17(1)(a), (b) or (c) of the Act applies to the records.

Sections 17(1)(a), (b) and (c) of the Act read:

> 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;

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

In Order 36, former Commissioner Linden established a three part test, each part of which must be satisfied in order for a record to be exempt under sections 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the three part test, and also is not relevant in the circumstances of this appeal.

The test for exemption under sections 17(1)(a), (b) or (c) 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 types of harms specified in (a), (b), or (c) of subsection 17(1) will occur.

Part One

The institution, the affected party and the OSDA submit that the information contained in the records constitutes commercial, financial and/or technical information. The appellant indicates that he is not seeking access to sales information, and takes the position that the remaining information is environmental information and consequently does not fall under any of the types of information specified under section 17.

The information contained in the records relates to the sale of soft drinks. In my view, the information qualifies as commercial information and thereby satisfies the first part of the section 17 test.

Part Two

The institution, the OSDA and the affected party submit that the ratio information was supplied to the institution in confidence.

The appellant submits that the information cannot be said to have been provided in confidence, because confidentiality is not indicated in O.Reg. 623/85. In my view, information does not automatically lose its confidential character, simply because it is provided pursuant to a mandatory legislative reporting requirement.

Although it is no longer the subject of the appeal, I think it is useful to consider the circumstances under which the sales information was supplied to the institution. It is clear from the information I have reviewed that the institution, as well as the brand owners and users, understood that the sales information would be treated confidentially. The institution gave written assurances to brand owners and users that the sales figures would not be divulged and similarly advised the auditor. Some of the information contained in the record is passed on to the Waste Reduction Advisory Committee (WRAC), an advisory body to the Minister of the Environment on waste recycling and reduction strategies.

The WRAC is comprised of representatives from various sectors and experts in the waste management field, and is required by Order in Council to report in writing to the Minister of the Environment no less than twice per year so that the Minister may consider such reports and publicize them. In its representations, the institution confirms that the WRAC, while entitled to some of the information contained in the records, does not receive any sales information. Based on this information, I would have been satisfied that the sales information was supplied to the institution in confidence.

As to the refillable and non-refillable sales ratio information, I am not satisfied that it was within the reasonable contemplation of the institution and/or the brand owners and users that this information would be confidential. A press release issued by the institution on December 10, 1985, relating to O. Reg. 623/85 stated:

> Sales figures are kept strictly confidential, but **the percentage ratios of sales a brand user makes of non-refillable and refillable containers may be made public if a brand user does not meet his legal ratio requirements**. [Emphasis added.]

Similarly, the "Terms of Reference for Appointment of a Auditor for the Soft-Drink Container Regulations" state:

> All sales statistics will remain strictly confidential. However, **the Government reserves the right to publish sales ratios**. [Emphasis added.]

Accordingly, I am of the view that the ratio information contained in the records was not supplied to the institution in confidence. I am also satisfied that disclosure of the ratio

information would not permit the drawing of accurate inferences with respect to the corresponding sales information supplied to the institution in confidence.

The appellant also submits that because the information contained in the records was provided to the institution under the requirements of O.Reg.623/85, it cannot be considered to have been "supplied", because the information was not provided voluntarily. In my view, information which is provided to an institution under a mandatory legislative reporting requirement is "supplied" for the purposes of section 17 of the Act. The Brand User Audit Reports contain information which is "supplied" by each Brand User to the auditor pursuant to such a legislative requirement, although only the sales information can be said to have been "supplied" in confidence. It is not entirely clear to me where the non-sales information contained in the other records originated, i.e. whether the information was provided to the institution by the brand users or owners, or whether the information was created by the institution/auditor. In any event, since I have found that the necessary element of confidentiality is missing, it is not necessary for me to decide whether the non-sales information was "supplied" within the meaning of section 17.

As stated earlier, failure to meet any one of the three parts of the test will render the section 17 exemption claim invalid. Since I have found that the second part of the test has not been met, I have not considered the third part of the test.

As I have found that the information is not exempt under section 17, I have not considered Issue B.

ORDER:

1. I order the head to disclose the Monthly Ratio Reports, Monthly Ratio Exception Reports and Brand User 12 Month Ratio Reports in their entirety.

2. I order the head to disclose the Brand User Audit Reports and the Brand Owner Ratio Reports, with the exception of the sales information.

3. I order the head to disclose the information referred to in Provisions 1 and 2 within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order.

4. I order the head to advise me in writing within five days of the date on which disclosure was made. Such notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

5. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2, only upon request.

POSTSCRIPT:

The records which I have ordered the institution to disclose are quite voluminous. Since the institution will have to sever the sales information from certain of the records, the institution will be required to do a considerable amount of work to prepare them for disclosure. I also note that although the information contained in the records is different for each month, the records are of an identified type. Accordingly, I feel that it would be in the mutual interest of the institution and the appellant to consider alternate access methods. I encourage the institution and the appellant to work together during the 30 day period set out in Provision 3 of this order to select a mutually agreeable method of access. I suggest that the institution and the appellant may wish to consider visual access where appropriate and/or proceeding by way of a representative sample of the records.

I confirm that nothing in this postscript is intended to reduce or alter the obligations of the institution to disclose the records in accordance with the requirements of Provisions 1, 2 and 3 of this order.

Original signed by: August 27, 1992
Tom Wright
Commissioner