



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

ORDER P-295

Appeal 900280

Ministry of Housing



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ministry of Housing (the "institution") received a request for access to:

- (a) All correspondence and/or other documentation passing between:
 - (i) [named individual 1], and/or [named individual 2], or by or on their behalf; and,
 - (ii) the Ministry of Housing, including the Buildings Branch thereof, and/or the Building Code Commission;

during the period February, 1989 to present.

- (b) In particular, correspondence from [named individual 1] and/or [named individual 2] to the Ministry of Housing, including the Buildings Branch thereof, and/or the Building Code Commission dated October 16, 1989 and November 14, 1989.
- (c) Any internal memoranda or other documentation relating to communications with [named individual 1] and/or [named individual 2], or relating to the property located at 11 Arthur Street North in the City of Guelph, during the period February, 1989 to present.
- (d) Mr. Tom MacDonald and Mr. Ken Reel of the Buildings Branch of the Ministry of Housing are aware of the aforesaid documentation.

The institution responded to the request in the following manner:

... I am pleased to advise you that access is available to 36 pages from the file you requested... With respect to the other 20 pages, it may affect the interests of third parties.

The third parties are being given an opportunity to make representations concerning disclosure of the record. A decision on whether the record will be disclosed will be made by May 19, 1990...

One of the individuals notified by the institution objected to the disclosure of the records affecting his interests, claiming that the records qualified for exemption under sections 17(1)(a), (b) and (c) of the Freedom of Information and Protection of Privacy Act (the "Act"), and that the records consisted entirely of his own personal correspondence.

Following its receipt of representations, the institution decided to grant access to the remaining 20 records, and advised the two individuals and the requester accordingly.

One of the individuals named in the request (the "appellant") appealed the institution's decision to grant access. Notice of the appeal was provided to the appellant, the institution and the requester.

The records at issue in this appeal consist of three letters sent by the appellant to the institution dated October 16, 1989, November 14, 1989 and March 2, 1990, and seven attachments. A description of these ten records has been attached as Appendix A to this Order.

Attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the requester, the institution and the other individual named in the request. Enclosed with each notice was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal.

Written representations were received from the appellant, the requester and the institution.

PRELIMINARY ISSUE:

In addition to his representations on the application of sections 17 and 21 of the Act, the appellant submits that the institution should have notified him, under section 28(1) of the Act, and provided him with an opportunity to make representations before disclosing the 36 pages to the requester. This submission raises a jurisdictional issue. The appellant is, in effect, asking me to determine whether the institution made the correct decision when it decided that these 36

pages did not contain information which would trigger the obligation to provide notice under section 28(1).

The appellant's right to appeal an institution's decision to disclose a record, and my jurisdiction to review that decision, arises under section 50(1) of the Act. An affected person only has the right to appeal a decision under this section if he or she has been given notice of a request under section 28(1) of the Act. In the circumstances of this appeal, the appellant was not given notice under section 28(1) with respect to the request for the 36 pages. Accordingly, I do not have the jurisdiction to review the institution's decision not to notify the appellant under section 28(1) before disclosing the 36 records to the requester.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the records contain personal information as defined in section 2(1) of the Act.
- B. Whether the mandatory exemption provided by section 21(1) of the Act applies to the records.
- C. Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the records contain personal information as defined in section 2(1) of the Act.

The appellant claims that the records at issue contain his personal information.

Section 2(1) of the Act reads, in part, as follows:

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

...

- (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 or opinions of another individual about the individual, and

...

I have examined the records and, in my view, they contain recorded information about a commercial dwelling and the Building Code Act, not recorded information about any identifiable individual. The opinions and views expressed by the appellant in the records are recorded on business letterhead and were sent to the institution in support of a hearing before the Building Code Commission. They do

not contain views or opinions of another individual about the appellant, and are not, in my view, of a private, confidential, or personal nature. Therefore, I find that the records do not contain information which would qualify as personal information as defined in section 2(1) of the Act.

Because the answer to Issue A is no, it is not necessary for me to consider Issue B.

ISSUE C: Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.

The appellant claims that the records should be exempt from disclosure under sections 17(1)(a), (b) and (c) of the Act. Sections 17(1)(a), (b) and (c) read 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In Order 36, former Commissioner Sidney B. 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 test established in Order 36, and is also 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

All of the information contained in the records, with the exception of Record 7, relates to construction specifications, requirements, and associated costs regarding a property site in the City of Guelph. In my view, this qualifies as technical and/or financial information, and the first part of the section 17 test is thereby satisfied.

Record 7 is a two page excerpt from the Architect's Act and does not meet the requirements of the first part of the section 17 test. Because failure to meet any part of the test renders the section 17 claim invalid, Record 7 does not qualify for exemption under section 17 of the Act.

Part Two

The appellant claims that the records were sent to the institution explicitly in confidence.

The institution submits that at no time was confidentiality promised to the appellant either implicitly or explicitly, as it is the institution's practice to make full disclosure to parties in informal mediation efforts which are undertaken to attempt to resolve applications for a hearing before the Building Code Commission.

I have reviewed the records, and they contain nothing which explicitly indicates that they were to be treated in a confidential manner. However, because of the context in which the records were submitted and the detailed submissions made by the appellant with respect to his expectations of confidentiality, I am prepared to assume that, in the circumstances of this appeal, the records were supplied to the institution in confidence implicitly.

Part Three

The appellant submits, with specific reference to section 17(1)(a), that, should the records be disclosed to the requester:

... the capacity of the Building Code Commission, Buildings Branch of the Ministry to properly investigate matters on which it will need to make a ruling will be seriously impeded. Moreover its current power to mediate disputes will be compromised.

In my view, the scheme of the Act contemplates that the type of harm addressed under section 17 is harm to the position of an affected party (in this case the appellant). The appellant's submission refers to harm to the institution's position, which is

not one of the types of harm contemplated by section 17. Section 18 of the Act provides a discretionary exemption which can be claimed by an institution in situations of potential harm to the institution's interest. In this appeal, the institution has not claimed section 18.

The appellant's submissions also allude to the substance of section 17(1)(b) of the Act, as he indicates that, should the records be disclosed to the requester:

... I believe that it would be ill advised for anyone in similar circumstances to engage in any communication with the Buildings Branch of the Ministry of Housing.

... the impact on the building industry generally would not be beneficial.

I am not persuaded that disclosure of the records could reasonably be expected to result in similar information no longer being supplied to the institution. The Building Code Commission resolves disputes regarding the interpretation of the technical requirements of the building code. The appellant applied for a hearing before the Building Code Commission and supplied the records in support of his application. In my view, disclosure of the records will not result in similar information not being supplied if this party or any other feels that it is in his/her interest

to apply for a hearing before the Building Code Commission. Accordingly, in my view, section 17 does not apply to the records.

ORDER:

1. I uphold the head's decision, and order him to disclose all ten records to the requester.
2. I order that the institution not disclose the records described in provision 1 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 disclosed. 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 records be disclosed within thirty-five (35) days of the date of this Order.
4. 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.
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 requester, upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ May 1, 1992

APPENDIX A

RECORD NUMBER

DESCRIPTION

- | | |
|----|--|
| 1 | two page letter from the appellant to the institution, dated October 16, 1989 |
| 2 | one page construction diagram regarding a property in Guelph (enclosure with Record 1) |
| 3 | one page letter addressed to the affected person from an engineer, dated July 11, 1989 (enclosure with Record 1) |
| 4 | four page letter from the appellant to the institution, dated November 14, 1989 |
| 5 | one page document titled "Information" containing construction information and associated costs (enclosed with Record 4) |
| 6 | two page letter addressed to the affected person from the City of Guelph, dated November 14, 1989 (enclosed with Record 4) |
| 7 | two page excerpt from the <u>Architects Act</u> (enclosed with Record 4) |
| 8 | two page letter from the appellant to the City of Guelph, dated October 24, 1989 (enclosed with Record 4) |
| 9 | three page letter from the appellant to the institution, dated March 2, 1990 |
| 10 | one page letter addressed to the affected person from an architect, dated November 24, 1989 (enclosed with Record 9) |