



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

## **ORDER P-340**

**Appeals P-910633 and P-920187**

**Ministry of Health**



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# ORDER

## BACKGROUND:

The Ministry of Health (the institution) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to correspondence between the institution and five agencies for the calendar year 1990, together with any briefing notes, memoranda between department officials, records of telephone conversations, records of complaint and follow-up action pertaining to the five agencies.

The institution was able to locate responsive records for only one of the five agencies (the agency). Because it was felt that these records might contain information that could affect the interests of the agency, the institution provided notice pursuant to section 28 of the Act, seeking representation from the agency as to why the records should not be disclosed. The agency did not respond to this notice, and the institution advised the requester that access to eight records would be provided in full, and that partial access would be granted to the remaining five records, subject to severances under sections 17(1)(a) and (c), and 21(1) of the Act.

The agency was notified of the institution's decision, and appealed the decision to release the records (Appeal #P-910633). The original requester subsequently appealed the institution's decision to sever the records (Appeal #P-920187). The two appeals were joined for the purposes of this order.

A copy of the records were received and reviewed by the Appeals Officer. They are described in Appendix "A" which is attached to this order.

During the course of processing these appeals, the Appeals Officer made several unsuccessful attempts to contact the agency at a number of different locations, by telephone, facsimile and mail. All correspondence was returned unopened, and the phone numbers were no longer in service.

Also as the appeal progressed, the original requester withdrew her request for the one page of Record A12 which was exempt by the institution under section 21(1) of the Act, thereby narrowing the issues to the proper application of section 17(1).

Because the agency could not be contacted, mediation was not possible and the matters proceeded to inquiry. Notice that an inquiry was being conducted to review the decisions of the head was sent to the institution, the original requester, and the agency at its last known address. Enclosed with each Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeals. Written representations were received from the institution and the original requester, and the correspondence sent to the agency was returned unopened.

Following the receipt of representations, it was determined that the interests of 18 individuals and/or organizations identified in Records A9 and A11 might be affected by the release of these records. The original requester confirmed that she was not interested in receiving any personal

information contained in these records, thereby reducing the number of potential affected persons to 12. Notices were sent to those potential affected persons who could be identified from the contents of the two records (seven of 12), seeking their representations regarding the application of section 17(1). Representations were received from five of these affected persons.

## **ISSUES:**

The issues in this appeal are as follows:

- A. Whether any of Records A2, A8, A9 or A11 were properly exempt by the head under sections 17(1)(a) and/or (c) of the Act in Appeal P-920187.
- B. Whether any of the records qualify for exemption under section 17(1) of the Act in Appeal P-910633.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether any of Records A2, A8, A9 or A11 were properly exempt by the head under section 17(1)(a) and/or (c) of the Act in Appeal P-920187.**

Sections 17(1)(a) and (c) of the Act 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 organizations;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order to qualify for exemption under sections 17(1)(a) and/or (c), the institution and/or agency must satisfy the requirements of the following three-part test, first established by former Commissioner Sidney B. Linden in Order 36:

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.

### **Records A2 and A8**

Record A2 is a 5-page letter written by the agency to the Minister of Health, which outlines a proposal to participate in the restructuring of the manner in which OHIP funds are paid to addiction treatment facilities in the United States. Record A8 is a 6-line letter from the agency to the institution, attaching copies of 2-page letters sent by counsel for the agency to the Premier, Minister of Health and Mayor of the City of Toronto, which identify a proposal to construct a treatment hospital in Toronto.

The institution claims that the information contained in these two records is "commercial information". As stated earlier, the agency could not be contacted and has provided no representations.

In my view, Records A2 and A8 contain information which relates to business activities of the agency, and can properly be characterized as "pertaining or relating to or dealing with commerce" (Order 179), thereby satisfying the requirements of the first part of the test for exemption under section 17.

As far as the second part of the test is concerned, both records are marked "Personal and Confidential", and the subject matter of the letters supports the institution's position that information contained in the records was supplied by the agency to the institution in confidence.

In order to satisfy the requirements for the third part of the test, it must be established that disclosure of the information contained in the records could reasonably be expected to result in one of the types of harms specified in sections 17(1)(a) and/or (c).

In its representations, the institution makes generalized assertions of possible harm to the agency, pointing out the highly competitive nature of the treatment referral business, and the possible impact disclosure of the records could have on the agency's plans for drug and alcohol treatment if its proposal was accepted by the institution. In my view, the evidence provided by the institution is too speculative and remote to establish a reasonable expectation of sufficient prejudice to the agency's competitive position, or that release of the records would result in undue loss to the agency or gain to its competitors.

Therefore, the third part of the test for exemption under section 17(1) has not been established, and Records A2 and A8 do not qualify for exemption.

### **Record A9**

In Record A9, the agency provides the institution with an outline of its suspicions about questionable operational and financing practices of one of the affected persons, and makes reference to certain aspects of its own operations.

Having reviewed the record, I find that it contains information which is properly characterized as "commercial information" of an affected person and the appellant, and for the reasons outlined in my discussion of Records A2 and A8, it was also supplied to the institution in confidence.

Turning to the third part of the test, the institution submits that disclosure of the record could reasonably be expected to result in undue loss to the affected person, because the record alleges questionable practices which, if known, could adversely affect the affected person's ability to carry on its business. Although the affected person did provide representations, they do not include any evidence in support of the institution's position, and, based on the evidence before me, I find that the institution and/or affected person have failed to provide sufficient evidence to establish the requirements for the third part of the section 17(1) exemption test.

In its representations, the institution also alludes to the possibility of legal action being instituted against the agency which could result in undue loss and prejudice significantly the agency's competitive position. In my view, the evidence provided by the institution is insufficient to establish a reasonable expectation of harm with respect to the agency. The possibility of legal action as a result of the record being released is speculative at best, and I am not convinced that harm of this nature could be properly characterized as "undue", given the fact that it would arise as a result of the agency's own actions in providing the information to the institution in the first place.

Therefore, I find that Record A9 does not qualify for exemption under section 17(1) of the Act.

### **Record A11**

Record A11 is a report by the agency regarding six patient referral agencies which the agency contends are engaged in illegal immigration practices.

The institution submits that this information qualifies as "commercial information" because it related to the business operations of the various referral agencies. None of the various affected persons who submitted representations make reference to whether or not the information contained in Record A11 contains any of the types of information enumerated in section 17(1).

The only connection between the information contained in Record A11 and the "operation of the businesses" is the simple linkage of the names of the various agencies to alleged illegal practices. In my view, this is not sufficient to properly characterize this information as "commercial information" for the purpose of section 17(1). The information does not "pertain or relate to or deal with commerce" (Order 179), nor does it relate to activities normally associated with commercial activity, such as the exchange of goods, products or property, or the buying, selling or exchange of goods and services (Order P-318). I also find that the record does not contain any of the other types of information listed in section 17(1).

Therefore, I find that the first part of the test has not been satisfied. Because all three parts of the test must be satisfied in order for a record to qualify for exemption, it is not necessary for me to consider parts two and three of the test, and I find that Record A11 does not qualify for exemption under section 17(1).

In summary, I find that none of Records A2, A8, A9 or A11 qualify for exemption under sections 17(1)(a) and/or (c) of the Act.

**ISSUE B: Whether any of the records qualify for exemption under section 17(1) of the Act in Appeal P-910633.**

As previously indicated, the agency could not be contacted and did not make any representations regarding its appeal. The institution's representations were restricted to those records which it intended to withhold from disclosure, and did not deal with the other 9 records which it was prepared to release to the appellant.

I have determined during my discussion of Issue A, that none of Records A2, A8, A9 and A11 qualify for exemption under section 17(1).

Because section 17(1) is a mandatory exemption, I have independently reviewed the contents of Records A1, A3, A4, A5, A6, A7, A10, A12 and A13 to determine if there is anything on their face which would indicate that they qualify for exemption under this section. I do not feel that there is, and, in the absence of any representations from the institution or the agency, I also find that none of these records qualify for exemption under section 17(1).

**ORDER:**

1. I order the institution to disclose Records A1-A8, A10, A13, and pages 1-4 of Record A12 to the original requester in their entirety. On the agreement of the original requester, page 5 of Record A12 should continue to be severed under section 21(1) of the Act and not released.
2. I order the institution to disclose Records A9 and A11 to the original requester, subject to the severance of the personal information of certain individuals referred to in the records. I have attached a highlighted copy of Records A9 and A11 with the copy of this order provided to the institution, which indicates the severances which should be made prior to the release of these records.
3. I order that the institution not release the records referred to in Provisions 1 and 2 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 the thirty (30) day period, I order the

records referred to in Provisions 1 and 2 be released 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. The 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 this order, I order the head to provide me with a copy of the record which is disclosed to the requester pursuant to Provisions 1 and 2, upon request.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ August 11, 1992

<b>Record No.</b>	<b>Description</b>
A1	28 page Assessment Package
A2	five-page letter dated November 21, 1990 from the agency to the institution
A3	eleven pages of correspondence between the institution and the agency
A4	two-page letter dated December 5, 1990 from the institution to the agency
A5	two-page letter dated November 29, 1990 from the Mayor of North York to the agency
A6	one-page undated form letter from the agency to "doctors" and two attached forms
A7	one-page letter dated November 21, 1990 from the agency to the institution
A8	one-page letter from the agency to the institution, attaching correspondence from the agency to the Premier, the Minister of Health and the Mayor of Toronto
A9	three-page letter dated October 26, 1990 from the agency to the institution and attached eight-page "Hospital Questionnaire"
A10	two-page pamphlet produced by the agency and a two page letter dated July 30, 1990 from the agency to a doctor
A11	three-page letter dated July 18, 1990 from the agency to the United State Department of Justice
A12	one-page internal memorandum dated July 3, 1990, three-page letter from the agency to a doctor, and one page portion of an unrelated letter
A13	one-page internal memorandum dated June 20, 1990, and four-page letter from the agency to a doctor