



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

ORDER P-314

Appeal 900275

Ministry of Financial Institutions



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O R D E R

BACKGROUND:

The Ministry of Financial Institutions (the "institution") received a request under the Freedom of Information and Protection of Privacy Act (the "Act") for access to copies of records that a particular trust company filed with the institution between May, 1985 and October, 1988.

The institution denied access to the documents in their entirety pursuant to sections 17(1)(b) and (c) of the Act. The requester appealed the institution's decision.

The Ministry identified the following records as being responsive to the request: monthly reports; quarterly liquidity reports; quarterly maturity reports; annual statements for the time period May, 1985 to October, 1988; and weekly reports for the time period August 16, 1986 to January 23, 1987.

Because attempts to mediate the appeal were not successful, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution and the trust company identified in the request (the "affected party"). Enclosed with the notice was a report prepared by the Appeals Officer, intended to assist the parties in making representations to this office concerning the subject matter of the appeal.

The representations received from the affected party raised the application of section 17(1)(a) of the Act. The institution and the appellant were notified of this additional claim. Representations were received from the institution, but not from the appellant.

On agreement of all parties, this inquiry proceeded by way of representative sample. The institution provided this office with the following documents:

- monthly report for December, 1988
- quarterly liquidity report for quarter ended December 31, 1988

- quarterly maturity report for quarter ended December 31, 1988
- weekly financial report for week ended January 23, 1987
- . annual statement for 1988

In his original request, the appellant acknowledges that he has already received the relevant annual information, and I find that these records are no longer at issue. My Order will be based on the four remaining records but, on agreement of the parties, it will apply to all of the records at issue in this appeal.

The only issue raised in this appeal is whether the records fall within the mandatory exemption provided by sections 17(1)(a), (b) and/or (c) of the Act.

Sections 17(1)(a), (b) 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 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 in Order 36, 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.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) claim invalid.

The records are financial documents which contain detailed descriptions of the financial affairs of the affected party. In my view, the records clearly contain financial information, and the first part of the test has been satisfied.

The affected party submits that the information was supplied to the institution implicitly in confidence. It states that the information was provided to the Superintendent of Financial Institutions "as part of the regulatory process whereby the Superintendent monitors the activities and performance of registered trust and loan companies". In the affected party's view, the disclosure provisions of the Loans and Trust Corporations Act enable the government to "deal promptly with potential financial difficulties of the regulated entities prior to an unnecessary erosion in public confidence due to negative publicity". The affected party goes on to submit that public disclosure of such information would undermine this regulatory process.

The institution submits that the scheme of the Loans and Trust Corporations Act clearly contemplates that information received through its provision will remain confidential. In this regard

the institution notes that section 134 of that statute provides that "the financial information is required to be provided to the Superintendent and not to any other person".

Having considered these representations, I am satisfied that a certain degree of confidence is essential to the regulatory process under the Loans and Trust Corporations Act and, in my view, the institution and affected party have provided sufficient evidence to

indicate that the information contained in the records was supplied implicitly in confidence. Therefore the second part of the section 17 test has been satisfied.

It has been established in a number of previous orders that to meet the requirements of the third part of the section 17 test, the institution and/or affected person must present detailed and convincing evidence which describes a set of facts and circumstances that would lead to a reasonable expectation that harm would occur if the information contained in the records were released. (See Orders 36, 47, 68, 204, P-246 and P-249)

The institution and the affected party made representations on each of sections 17(1)(a), (b) and (c).

With respect to section 17(1)(a) the affected party submits that the release of the information contained in the records would result in at least three types of harm. First, competitors could extract information from the records and create negative publicity by abusing the information, thus creating the possibility of a premature run on the deposits of the institution. Second, the affected party notes that there is outstanding litigation between the appellant and the affected party, and submits that the release of the records could circumvent the discovery process and interfere with possible settlement negotiations. Third, the affected party states that information is a point of negotiation, and that in the context of commercial mortgage negotiations the availability of the type of detailed financial information contained in the records could be used by a party to extract more advantageous terms from the affected party than would otherwise be available.

With respect to section 17(1)(b) the affected party submits that if the information contained in the records were released to the public, regulated entities would be less forthcoming and cooperative in their reporting to the institution, even in situations where information is provided pursuant to statutory compulsion.

The institution addresses the issue of harm under section 17(1) (b) in a similar vein:

"If financial information supplied to the Ministry is subject to disclosure under the Act, registrants could reasonably be expected to provide the Ministry with only the minimum prescribed disclosure. This would significantly impair the ability of the Ministry to regulate registrants under the Loans and Trust Corporations Act ... and would be contrary to the public interest".

With respect to section 17(1)(c), the affected party submits that the company's managers operate largely on the basis of the information contained in the statements, and that the release of detailed information about the operations of the affected party, such as ratios and asset yields, would reveal to competitors valuable information about management strategies. This information was acquired by management at substantial cost and effort, and its release would result in undue gain to recipients.

Having reviewed the records and considered all the representations, in my view, disclosure of the information contained in the records would give rise to a reasonable expectation that the types of harm specified in section 17(1) (a) and/or (c) would occur. Therefore, I am satisfied that the third part of the test has been met. As far as section 17(1) (b) is concerned, while it may be possible that corporations would be less likely to provide this type of information to the institution on a voluntary basis if it was accessible to others, I do not accept that this would be the case where the information is provided pursuant to mandatory statutory reporting requirements. In this circumstances of this appeal, much of the information contained in the records was provided to the institution pursuant to the requirements of the Loans and Trust Corporations Act, and, based on the evidence before me, I am not convinced that the requirements of section 17(1) (b) have been established.

In conclusion, I find that all three parts of the test for exemption under section 17(1) have been met, and that the records are properly exempt under that section.

ORDER:

I uphold the head's decision to deny access to all records at issue in this appeal.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 11, 1992