



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

ORDER P-286

Appeal 900391

Ministry of Industry, Trade and Technology



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O R D E R

BACKGROUND:

On June 18, 1990, the Ministry of Industry, Trade and Technology (the "institution") received a request for access to information pertaining to discussions between the institution and a company involved in the truck and trailer industry. The requester sought access to studies, letters and other materials dated after January 1, 1990, about one of the company's plants which had closed.

Following receipt of representations from the company (the "affected party"), the institution granted partial access to the records, with severances pursuant to sections 12, 13 and 17 of the Freedom of Information and Protection of Privacy Act (the "Act"). The requester appealed the institution's decision.

The Ontario truck and trailer industry was experiencing commercial and financial difficulty in 1989 and 1990. The affected party was one of the member companies of the delegation from the truck and trailer industry that attended meetings with provincial government representatives, made representations and presentations, provided documentary material, and made requests for support and financial assistance.

During the course of mediation, the affected party and the institution agreed to disclose additional information to the appellant, and the appellant agreed to limit his appeal to those records where section 17 was the only exemption being relied on

by the institution. The appellant maintains that there is a compelling public interest in disclosure of the records.

As further mediation was not possible, the matter proceeded to an inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the institution and the affected party. Enclosed with each notice was a report

prepared by an Appeals Officer, which is intended to assist the parties in making their representations concerning the subject matter of the appeal. Written representations were received from the institution, the affected party and the appellant.

The records which remain at issue in this appeal are:

1. Briefing note dated January 18, 1990, on Truck Trailer Industry.
2. Letter dated January 25, 1990, from the affected party to the institution.
3. Letter dated January 29, 1990, from the affected party to the institution.
4. Submission dated February 1, 1990, from the affected party to the institution.
5. Submission dated May 31, 1990, from the affected party to the institution.

Two of the severances made to Record 1 contain information about another company, and are, in my view, not responsive to this request. These severances are outside the scope of this appeal and will not be considered in this Order.

ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 17 of the Act applies to the severances at issue.
- B. If the answer to Issue A is yes, whether there is a compelling public interest in the disclosure of any of the severances which clearly outweighs the purpose of the exemption.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 17 of the Act applies to the severances at issue.

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 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 harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Part One

The institution and the affected party both submit that the material provided to the institution to show the state of the industry in general and to support requests for financial assistance included facts, figures, commercial data, financial information and labour statistics. Having reviewed the records, I am of the view that they all contain commercial, financial and/or labour relations information, and that the first part of the section 17(1) test is satisfied.

Part Two

Records 2, 3, 4, and 5 are letters and/or submissions which contain information supplied by the affected party to the institution. The information severed from Record 1 would, in my view, reveal information supplied by the affected party to the institution in Records 2, 3, 4 and 5. In its representations, the affected party clearly outlines an expectation of confidentiality with respect to specific details contained in the severed portions of Records 2, 3, 4 and 5. As well, the institution submits that it generally regards all commercial, financial or labour relations information received from businesses or companies seeking financial assistance from the institution to be confidential.

The appellant disputes the intention to preserve confidentiality because the discussions between the provincial government and the company were raised in both the Ontario Legislature and the House of Commons. As well, the appellant states that the affected party has confirmed that talks between his company and the institution had occurred and that the affected party has commented on the nature of the discussions.

I have reviewed the relevant excerpts in the Ontario Legislature and House of Commons debates, and note that some, but not all, of the information contained in the severances was revealed. In my opinion, the information revealed in these forums does not satisfy the second part of the section 17 test, and should be disclosed. With respect to the remaining severances, in my view, there was a demonstrated intention on the part of both the institution and the affected party to treat the financial and commercial details contained in these severances confidentially,

and I have been provided with no evidence to indicate that the remaining information has been publicly disclosed by either party.

In my view, the information contained in the remaining severances at issue in Records 1, 2, 3, 4 and 5 was supplied by the affected party to the institution in confidence, implicitly with respect to Records 1, 2, 3 and 4, and explicitly in the case of Record 5. Therefore, the second part of the section 17 test has been satisfied with respect to these remaining severances.

Part Three

At page 7 of Order 36, Commissioner Linden set out the requirements for meeting the third part of the test as follows:

In my view, in order to satisfy the Part 3 test, the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of

facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a)-(c) would occur if the information was disclosed.

The affected party submits that disclosure of information contained in the severances would reveal the financial/commercial state of the company at the time the various records were created. The affected party also submits that this information would impact upon its ability to negotiate labour contracts, maintain the confidence of customers and suppliers, and dramatically affect its ability to compete in the market [s.17(1)(a) and (c)].

In its representations and other correspondence, the institution submits that in order to properly assess the needs of particular companies and businesses for financial assistance, the government must be able to obtain and rely upon complete disclosure of all facets of a company's operations. According to the institution, disclosure of the severances could weaken a company's confidence in the institution's ability to protect confidential information. This, in turn, could result in similar information no longer being supplied to the institution where it is in the public interest that this type of information be supplied when negotiating financial assistance involving public funds [section 17(1)(b)].

The appellant submits that the information contained in the severance is too dated to be of significance to the affected party's competitors; that the climate of the trucking industry has changed since the records were created; and that because the plant in question has closed, it is not possible for disclosure to interfere significantly with the affected party's negotiations or result in undue loss to it or gain to another party [s. 17(1)(a) and (c)]. It is also the appellant's view that disclosure of the severances will not prevent companies experiencing closure from seeking government aid [s.17(1)(b)].

I have reviewed the severed portions of the records, and carefully considered all representations. I note that the information contained in the records is now dated, and I must weigh this factor against the claim that its disclosure would give rise to a reasonable expectation of harm.

In my view, the disclosure of certain specific financial information relating to the company's capitalization, including budget statements and re-financing arrangements, could prejudice its current competitive position and its relationship with other parties. I uphold the institution's decision with respect to these severances.

However, I find that the third part of the section 17 test has not been satisfied with respect to severances regarding more general information about the company's circumstances at the time the records were created. I have not been provided with sufficient evidence to establish that disclosure of this information will give rise to a reasonable expectation that one of the types of harms specified in sections 17(1)(a), (b) and (c) will occur, and I order that this information be disclosed.

I have provided a highlighted copy of the records to the institution indicating the severances which I have found are properly exempt under section 17(1).

ISSUE B: If the answer to Issue A is yes, whether there is a compelling public interest in the disclosure of any of the severances which clearly outweighs the purpose of the exemption.

Because I have found that portions of the records qualify for exemption under section 17 of the Act, I will now consider the application of section 23 of the Act, which was raised by the appellant in his representations.

Section 23 of the Act states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the burden of proof in respect of section 23. Where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed the severances which I have found to be subject to the exemption, with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the exemption found in section 17.

I have carefully reviewed all of the appellant's representations on this issue, which can best be summarized by the following excerpt:

I believe the public interest clearly outweighs the purpose of the exemptions. Stated simply, 334 [company name] employees have suffered job losses and thousands more workers in [named city's] shrinking manufacturing sector could see their jobs affected by changes now underway in the economy. They deserve to know how the government can be expected to assist them in the future.

I have reviewed the remaining severances and, in my view, the concerns raised by the appellant have, to a large extent, been satisfied by the information which has and will be disclosed. I cannot conclude that there is a compelling public interest in the disclosure of the information contained in the remaining severances which clearly outweighs the purpose of the section 17(1) exemption.

ORDER:

1. I uphold the head's decision not to disclose the portions of Records 1, 2, 4 and 5 which I have highlighted in the copy of the record which is being forwarded to the institution with this Order.
2. I order the head to disclose Record 3 and the balance of Records 1, 2, 4, and 5 not referred to in provision 1 of this Order.
3. I order that the head not make this disclosure 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 records are 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 the head to disclose the portions of the record described in provision 2 of this Order to the appellant within thirty-five (35) days of the date of this Order.

4. I order the head 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 Mitchinson
Assistant Commissioner

April 8, 1992