



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

# **ORDER P-269**

**Appeal 900480**

**Ministry of Labour**



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O R D E R

The following request was made to the Ministry of Labour (the "institution"):

"... a document which specifies output of tonnes sold to the road builders by Permanent Concrete in 1988 and 1989..."

One record was identified as being responsive to the request. It was a document provided to the institution by Permanent Concrete (the "affected person") in the context of an investigation conducted under the Employment Standards Act involving the appellant and the affected person.

Pursuant to section 28 of the Act the institution notified the affected person, offering it an opportunity to make representations as to whether the record should be disclosed. The affected person responded in writing, objecting to disclosure on the basis that the record contained commercial and financial information which was submitted to the institution in confidence, and its release would prejudice significantly the company's marketing position.

By letter to the requester, the institution denied access to the record pursuant to sections 17(1)(a) and (c).

The requester appealed the institution's decision to this office.

Mediation to resolve the appeal was attempted but was not successful, and the appeal proceeded to an inquiry. A Notice of Inquiry, accompanied by an Appeals Officer's Report, was sent to the institution, the appellant and the affected person, outlining the issues raised by the appeal and inviting representations. Written representations were received from all three parties.

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

Sections 17(1)(a) and (c) provide that:

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;

... [or]

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

In Order 36, dated December 28, 1988, former Commissioner Sidney B. Linden established a three-part test which must be satisfied in order for a record to be exempt under section 17. The test 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 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.

I adopt Commissioner Linden's views for the purpose of this appeal.

Section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in the Act lies with the head of the institution. For appeals involving a claim for exemption under section 17, the affected person resisting disclosure shares with the institution the onus of establishing that this exemption applies to the record.

Turning to the first part of the test, I must consider whether disclosure of the information in the record would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information".

In their representations, both the institution and the affected person submit that the record contains commercial and financial information relating to the business operations of the affected

person. The appellant makes no comments in her representations as to the proper characterization of the information.

It has been determined in a number of previous Orders that a record containing product information and market considerations is "commercial information". [See Orders: 47, 70, 101, 166, P-246]. I have reviewed the contents of the record at issue in this appeal and, in my view, the output of tonnes of concrete sold to road builders by the affected person qualifies as "commercial information", thereby satisfying the first part of the test.

In order to meet the requirements of the second part of the section 17 test, it must be established that the information contained in the records was "supplied in confidence implicitly or explicitly".

In its representations, the institution states that:

Both the company and the Employment Standards Branch have stated that there was an explicit understanding that the exempted document was being supplied in confidence, although we [the institution] do not have any document which clearly sets out this understanding at the time the record was supplied.

However, prior to the appellant's request under the FOIPPA, the Director of the Employment Standards Branch wrote to the appellant and informed her that it was the branch's belief that the record had been supplied to the Ministry in confidence.

The affected person's representations support the institutions position. They state:

The document supplied to your officer [named individual] was given to him on the explicit condition as assured by [named individual] that they would be kept for the ministry's information.

...

We also feel that the assurances of [named individual] as to the confidentiality were made by him in good faith and accepted with the assumption of no time limit.

The appellant made no representations on the issue of confidentiality, pointing out that the question is only answerable by the institution or the affected person.

Having reviewed the record and the representations of all parties, I am of the opinion that the record was supplied to the institution in confidence. Although the institution is not able to establish that the expectation of confidentiality was explicit at the time

the record was provided, based on the information provided by the parties during the course of this appeal, I am satisfied that there was at least an implicit expectation of confidentiality, and this is sufficient to satisfy the requirements of the second part of the test.

It has been established in a number of previous orders that to meet the requirements of the third part of the test for exemption under section 17, the institution and/or the 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 record is released. (See Orders: 36, 47, 68, 204, P-246, P-249).

Turning first to section 17(1)(a), the affected person submits that disclosure of the information contained in the record would prejudice significantly its marketing position and erode its competitive edge. It goes on to state that, because the record contains certain materials which are sold to its clientele on a confidential basis, disclosure could influence its competitors' manufacturing capabilities to the detriment of the affected person. The institution supports the position taken by the affected person.

The her representations, the appellant submits that the information contained in the record should be released for reasons which relate to the substantive issues involved in her employment standards dispute with the affected person. As far as the issue of harms under section 17 is concerned, the appellant points out that she is not in a position to address the question of the type of loss the affected person may or may not incur if the record is released.

In my view, there is sufficient evidence to support the assertion that disclosure of the record in question might reasonably be expected to significantly prejudice the competitive position of the

affected person under section 17(1)(a), and I find, therefore, that the third part of the section 17 test has been established.

Because all three parts of the test for exemption under section 17 of the Act have been satisfied, I uphold the head's decision to withhold the record at issue in this appeal.

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

\_\_\_\_\_  
February 6, 1992  
Date