



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

ORDER P-400

Appeals P-9100293, P-9100753, P-9101198
and P-9200212

Ministry of Agriculture and Food



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ORDER

In February, 1991, the Ministry of Agriculture and Food (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the minutes of the monthly board meetings (the minutes) of the Ontario Pork Producers' Marketing Board (the OPPMB) for the period April 1990 to "the present time". In June 1991, the same requester made a request for continuing access to the minutes for "the next two years".

The Ministry responded to the request for continuing access on four separate occasions. Each time, the Ministry notified the OPPMB pursuant to section 28(1) of the Act, and each time the OPPMB objected to the release of the minutes. Despite the OPPMB's objections, the Ministry decided to release the minutes to the requester, subject to certain severances. The OPPMB appealed the Ministry's four decisions, claiming that sections 17(1)(a), (b) and (c) of the Act applied to the minutes. This appeal is restricted to the four requests which cover the minutes for meetings held between April 1990 and December 1991.

During mediation, the requester confirmed that he was not interested in receiving access to those portions of the minutes which the Ministry had intended to sever and, accordingly, these parts of the minutes are outside the scope of this appeal. One of the types of information the Ministry purports to sever from the minutes is personal information of individuals other than the appellant. Having reviewed the minutes, I note that a few items which refer to individuals receiving research grants have not been severed. In my view, these items contain personal information that falls outside the scope of this appeal. Specifically, these minute items are the names of individuals contained in items 6.1 from August 1990; 18 from January 1991; 21.1 from May 1991; and 11.1 from August 1991. Attached to this order as Appendix A is a list of the items that were severed, either in whole or in part, by the Ministry, together with the items which include personal information and are outside the scope of this appeal.

Further mediation was not possible and notice that an inquiry was being conducted to review the Ministry's decisions was sent to the requester, the Ministry, the OPPMB, and other parties whose interests might be affected by the disclosure of the information (the affected persons). Written representations were received from the requester, the OPPMB, the Ministry, and one affected person.

In its representations, the Ministry indicates that although, it had initially been prepared to release certain parts of the minutes to the appellant, it now wished to deny access to the minutes in their entirety, pursuant to section 17(1)(b) of the Act.

It should be noted that the minutes are provided to the Ontario Farm Products Marketing Commission (the Commission) by the OPPMB pursuant to section 1 of Ontario Regulation 421/90 of the Farm Products Marketing Act. The Commission, which reports to the Ministry, is a regulatory agency that supervises the activities of various marketing boards in Ontario. The minutes are one of the tools it uses to carry out its regulatory function.

The sole issue in this appeal is whether the mandatory exemption provided by section 17(1) of the Act applies to the minutes.

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 reasonable be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of person, 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 to qualify for exemption under sections 17(1)(a), (b), and /or (c), the following three-part test must be satisfied:

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 Ministry in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of section 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17(1) claim invalid [Order 36].

Part 1 of the section 17(1) test

Both the Ministry and the OPPMB submit that the minutes, in their entirety, contain commercial information. In its representations, the Ministry states:

The purpose of the OPPMB is commercial; it pertains to the buying and selling of hogs with profit as the aim. All activities and discussions of the board are related to this primary purpose and, therefore, all information contained in the minutes of the board is commercial information.

Similarly, the OPPMB states:

The board minutes contain in their entirety commercial information, ...

...

Because of the nature and character of the OPPMB and the functions in which it is involved the subject matter of board meetings and hence the content of board minutes is the presentation of commercial information related to the marketing of pork on behalf of pork producers.

I do not agree. In my view, the minutes, in their entirety, do not automatically qualify as commercial information solely because the board is engaged in commercial activities. The Act provides a right of access to all records in the custody or under the control of an institution, with the exception of information which legitimately falls within one or more of the exemptions, and also provides that "necessary exemptions from the right of access should be limited and specific." Each record must be considered with a view to establishing whether the record, or part thereof, falls within the exemptions claimed.

In its representations, the Ministry states that the minutes reveal intimate aspects of the OPPMB's operations and then goes on to list many of the OPPMB's activities. The Ministry's representations do not, however, describe where such information appears in the minutes, nor do they provide examples of such information. Similarly, in its representations, the OPPMB submits that the minutes contain financial, technical, scientific, labour relations information and trade secrets, but does not describe which parts of the record qualify as which type of information. The OPPMB does, however, provide specific examples of information that it considers to be commercial, although I note that several of the examples are from minutes that are not at issue in these appeals.

I have carefully reviewed all of the minutes and, in my view, only a small proportion of them contain information which satisfies the first part of the test.

Much of the information is essentially administrative detail, such as attendance lists and approvals of agendas and minutes. Other information consists of accounts of discussions of such topics as preparations for attending a baseball game, the possible creation of a slogan for anniversary celebrations and dress codes for attendance at industry functions. These types of information do not, in my view, qualify as a trade secret or scientific, technical, commercial, financial or labour relations information.

Another large part of the record contains information about the pork industry which, in my view, is only indirectly related to the actual business of marketing pork. For example, there are updates about meetings of other provincial marketing boards, discussions of lobbying efforts,

grading standards and deadstock, reports about seminars attended by board members, discussions of western provinces' grain policies and the national Tripartite program, and discussions about "countering unfounded criticism". This type of information does not, in my view, relate directly to the exchange of goods or services (commercial information), nor does it relate to money or the use, management or distribution of money (financial information), nor is it a trade secret or technical, scientific, or labour relations information.

In my view, the only information which meets the definition of third party information under section 17 is information that relates directly to the actual marketing of pork or pork products, or to discussions of financial matters by the board. Such information includes descriptions of disbursements such as accounts of yard operations which refer to actual dollar amounts (financial), accounts of negotiations for the sale of pork (commercial) and updates of pricing and sales statistics (commercial). In several cases, the Ministry's severance of information, such as dollar figures, takes a particular item outside the scope of the definition of third party information. In addition, some of the information about government programs and customs issues, such as discussions of countervailing duties, qualifies as financial or commercial information, but only if it includes reference to actual dollar amounts or specific agreements for the sale of pork; generalized references to government programs or customs issues do not, in my view, constitute financial or commercial information.

I have attached a list of the minute items which I find contain third party information under section 17(1) of the Act as Appendix B to this order. My findings do not relate to minute items that were severed in their entirety by the Ministry because they are outside the scope of this appeal, but do apply to the unsevered parts of minute items that were partially severed.

Part 2 of the section 17(1) test

In order to satisfy the requirements of part 2 of the section 17(1) exemption test, the information must have been supplied to the Ministry in confidence, either implicitly or explicitly. The parties resisting disclosure must establish first, that the information was supplied, and second, that it was supplied in confidence.

With respect to the supplied requirement, it has been established in previous orders that information provided to an institution under a statutory reporting requirement is "supplied" for the purposes of section 17(1) [Orders P-314 and P-345]. Because section 1 of Ontario Regulation 421/90 requires the OPPMB to file copies of the minutes with the Commission, I am satisfied that the minutes were supplied to the Ministry.

With respect to the "confidentiality" element, both the Ministry and the OPPMB submit that the information was supplied in confidence, implicitly and explicitly. The OPPMB acknowledges that there is no written policy on keeping the minutes confidential, but states that it is their long standing corporate practice to treat the minutes confidentially.

The Ministry submits that the information contained in the minutes was supplied with the expectation that it would remain confidential. In addition, the Ministry states:

The well-established practices of the Commission have created a long standing expectation on the part of marketing boards that minutes are supplied to the Commission in confidence.

...

The [Commission] has never betrayed this confidence, which has contributed to a cooperative relationship in which marketing boards have been comfortable supplying full and informative minutes.

Having reviewed the representations, I am satisfied that the minutes were supplied in confidence. The Commission and the OPPMB both expected that the minutes would be treated confidentially, the minutes were stamped "confidential", distribution of the minutes was limited to specific individuals at the OPPMB and the Commission, and both the OPPMB and the Commission have a long standing practice of treating the minutes in a confidential manner. Therefore, I find that the second part of the test has been satisfied.

Part 3 of the section 17(1) test

Part 3 of the section 17(1) exemption test requires that the parties resisting disclosure present evidence that is detailed and convincing, and describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the minutes were released [Order 36].

My discussion of part 3 of the test is restricted to the relatively small number of minutes items, as set out in Appendix B, which I have found to satisfy parts 1 and 2 of the test. I will consider: first, the affected persons's representations; second, the OPPMB's and the Ministry's submissions regarding section 17(1)(b); and finally, the OPPMB's representations regarding sections 17(1)(a) and (c).

(a) Representations of the affected person

In its representations, the affected person states:

Not knowing exactly what information is in the minutes, but if any of the following are discussed at board meetings (I would be surprised if they were not) they would certainly impact on our business negatively if the information was released.

The affected person goes on to list three examples of the types of information it believes should not be released. In my view, the affected person's representations were, at best, generalized references to possible harm and I find that it has failed to establish the requirements of the third part of the test.

(b) Representations regarding section 17(1)(b)

Both the Ministry and the OPPMB submit that it is in the public interest that full and detailed minutes be provided to the Commission and that, if the minutes were to be accessible under the Act, similar information would no longer be supplied voluntarily.

The Ministry states that it relies on the minutes in carrying out its regulatory responsibilities and that it will not receive similar information unless it can assure confidentiality. In its representations, the Ministry states:

Boards, like any profit-oriented business, operate in their own self-interest and common sense dictates that boards will not supply information that could potentially be used to harm the industry or its member producers.

...

It is in the public interest that boards be monitored effectively and efficiently. This role is carried out by the [Commission]. Without access to minutes of the boards, minutes as detailed as those provided in the past, the Commission's ability to monitor boards in a timely and effective manner will be impaired and public interest will suffer.

The Ministry also refers to several letters it received from other marketing boards, which indicate that they would submit abbreviated minutes if they were subject to release.

The OPPMB concurs, stating in its representations that it would no longer supply detailed minutes to the Commission if they were accessible under the Act.

In support of their position, both the OPPMB and the Ministry point out that, although section 1 of Ontario Regulation 421/90 requires that the minutes of the OPPMB's board meetings must be filed with the Commission, it does not prescribe the type of information which must be contained in the minutes.

In previous orders, I have found that section 17(1)(b) was not intended to protect information which is provided pursuant to a statutory obligation [Orders P-314 and P-323]. In my view, the same principle applies to this appeal and, in light of the requirements of section 1 of Ontario Regulation 421/90, I am not satisfied that the information would no longer be provided.

In reference to the Ministry's assertion that release would harm its regulatory function, I am prepared to accept that the OPPMB may submit more cursory minutes in order to protect against the release of certain information; however, neither the OPPMB nor the Ministry have identified the specific type of information currently included in the minutes which, if excluded, would

hinder the Commission's ability to regulate. In any event, I note that Ontario Regulation 421/90 contains several other mandatory reporting requirements besides the minutes, which are directed at the Commission's regulatory mandate. The OPPMB must provide, for example, "all reports of its operations" and "the annual financial statement and audited reports".

In summary, I find that the Ministry and the OPPMB have failed to establish their claims that disclosure of the minutes would result in similar information no longer being supplied to the Commission, and the minutes do not qualify for exemption under section 17(1)(b).

(c) OPPMB's representations regarding sections 17(1)(a) and (c).

The OPPMB submits that release of the information contained in the minutes could be used to undermine its competitive position, interfere with its contractual negotiations, and cause it undue loss. In its representations, the OPPMB describes its history and provides a lengthy description of the pork industry. It states that the industry is very competitive, and that the OPPMB must compete with other pork producers across Canada and the United States and with producers of other commodities such as beef and poultry. With respect to the harm that could arise if the minutes were released, the OPPMB makes several general statements. For example, it states:

It is very much in the best interest of pork's competitors to know what pork producers are doing and what factors are at work in their marketing. Companies spend millions of dollars each year to gather market information. Disclosure of board minutes would make this sensitive information very easily and cheaply available to competitors.

In my view, the OPPMB's representations, for the most part, amount to generalized references to possible harm, and are not particularly relevant to the issue of whether release of the relatively small number of minute items I have found to contain commercial or financial information would cause harm under section 17(1). I find that these generalized representations are not sufficient to establish either of the harms enumerated in sections 17(1)(a) or (c).

The OPPMB does make some specific submissions about potential harm to its competitive position if the minutes are released. In its representations, the OPPMB lists eight categories of information and, for each category, identifies specific examples from the minutes. A number of these examples relate to minutes which are not at issue in this appeal; many more consist of information that I have already found does not qualify under part one of the section 17(1) exemption test; and others were originally severed by the Ministry and are not at issue in this appeal. I will not consider these three categories of minute items in my remaining discussion of part three of the test.

I will, however, consider those minute items for which the OPPMB has made specific submissions, and which I have found to be commercial or financial information, and which are contained in the minutes which are at issue in this appeal. These are the following six minute

items: item 26.1 from the November 1991 minutes (information about sales to a foreign country); items 4.2 and 22 from the September 1991 minutes (information about countervailing duties); items 24.1 and 24.3 from the June 1991 minutes (pricing information); and, item 4.4 from the March 1991 minutes (information about expenses related to yard operations).

sales to a foreign country (item 26.1 from the November 1991 minutes)

In 1991, the OPPMB was involved in negotiating a sale of pork to a foreign country. In its representations, the OPPMB states, "The following information could have been used by the NPPC as leverage to try and have the U.S. government change their policy and have U.S. Pork replace Canadian Pork." In my view, the harm requirements contained in sections 17(1)(a) and (c) relate to possible future harms that could reasonably be expected to arise if information were released, not harms which could have occurred in the past. I find that release of the information contained in this minute item, which relates to a possible sale of pork in late 1991 or early 1992, could not result in harm to the OPPMB's current competitive position. Therefore, the third part of the test has not been established with respect to this minute item.

I note that the OPPMB also cites item 12.1 from the December 1991 minutes under this category, which appears to be incorrect. There is a discussion of pork sales to the same foreign country contained in the December 1991 minutes as item 5. I have given the OPPMB the benefit of the doubt and have applied its representations regarding item 26.1 to item 5. However, for the same reasons as outlined for item 26.1, I find that the third part of the test has not been established.

countervailing duties (items 22 and 4.2 from the September 1991 minutes)

Earlier in this order, I found that discussions of countervailing duties that do not refer to specific dollar amounts do not qualify as financial information. Therefore, my discussion of part 3 of the test is restricted to the two minute items referred to in the OPPMB's representations which deal with countervail duties and refer to specific monetary sums. In its representations, the OPPMB states, "[A]lthough the trade disputes on the countervailing duty on live hogs has now gone to a panel set up under the Canadian - U.S. Free Trade Agreement, the following would provide useful information to the Americans on how we are attempting to cope with the problem - and could be used to generate negative publicity in the U.S." However, the OPPMB does not describe, specifically, how release of the information could harm its competitive position or result in undue loss or gain and, in my view, the third part of the test has not been established with respect to minute items 22 and 4.2 from the September 1991 meeting.

pricing (items 24.1 and 24.3 from the June 1991 minutes)

Under pricing, the OPPMB refers to their "unique" selling methods and states, in its representations that, "[K]nowing ahead of time, Quebec or Ontario Pork, were considering changing how hogs are sold would be an obvious advantage to the packers". The OPPMB does not, however, explain how knowledge of this information would be an "obvious advantage" and, in my view, the third part of the test has not been established for minute items 24.1 and 24.3 from the June 1991 meeting.

expenses related to yard operations (item 4.4 from the March, 1991 minutes)

This minute items refers to discussions of amounts paid to yard operators. [Yards are the places to which pork producers deliver their hogs.] In its representations, the OPPMB states, "[P]ublication of any of the following information would be used by the owners of other yards to weaken Ontario Pork's negotiating position when it came to negotiating new rents for their yards". Other than making this general assertion, the OPPMB does not explain how the release of such information would weaken their negotiating position. In my view, the third part of the test has not been established with respect to item 4.4 from March 1991.

Finally, I note that the OPPMB refers in its representations to the purchase of a computer in its representations. The OPPMB incorrectly identifies the relevant minute item as being from the April 1992 minutes, which are outside the scope of this appeal. The correct minute item is, in fact, item 4.6 from the April 1991 minutes, which are at issue in this appeal. The OPPMB submits that "it would not be in the competitive interest of either Ontario Pork or IBM, if information such as the following were routinely made public". The OPPMB does not explain what harm would arise or how such harm would arise if this information were released. In any event, this minute item is not at issue in this appeal because the amount paid for the computer was originally severed by the Ministry, and I found that the rest of the item does not satisfy the requirements of part one of the section 17(1) exemption test.

In summary, I have carefully reviewed the minutes and the representations of all parties and, in my view, the parties resisting disclosure have failed to establish that release of those minute items which I have found to contain commercial or financial information, and to have been supplied in confidence, could reasonably be expected to result in any of the types of harms enumerated in sections 17(1)(a), (b) and/or (c) of the Act. While the descriptions of the pork industry provided by the Ministry and the OPPMB were helpful in providing a context for my review of the minutes, the representations provided by these two parties failed to provide clear and specific evidence linking a reasonable expectation of harm to release of the information in the specific minute items.

Therefore, I find that the minutes should be released to the appellant, subject to the severances made by the Ministry in response to the original requests.

ORDER:

1. I order the Ministry to release the minutes to the appellant, subject to the severances made by the Ministry in response to the original requests, and the severances of personal information that I have found to be outside the scope of this appeal, within 35 days following the date of this order, and not earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the record which is disclosed to the requester, pursuant to Provision 1, **only** upon my request.

Original signed by: _____ January 15, 1993
Tom Mitchinson
Assistant Commissioner

A P P E N D I X A

LIST OF ITEMS NOT AT ISSUE

The following items have been severed from the records, either in whole or in part. Where an item has been partially severed, the unsevered portion of the record is still at issue.

April 1990

(a) in whole: 17.1

(b) in part: 3.1, 7.1, 30.1

May 1990

(a) in whole: none

(b) in part: 5.1, 6.4

June 1990

(a) in whole: none

(b) in part: 6.1, 19, 34

July 1990

(a) in whole: none

(b) in part: 17.1, 24

August 1990

(a) in whole: none

(b) in part: 6.1, 26

September 1990

(a) in whole: none

(b) in part: 4.2, 4.4, 10.5, 10.6

October 1990

(a) in whole: none

(b) in part: 3.1, 15.5, 36

November 1990

(a) in whole: none

(b) in part: 8.3

December 1990

none

January 1991

(a) in whole: 4.1

(b) in part: 18

February 1991

(a) in whole: none

(b) in part: 18.3, 31, 35.3

March 1991

(a) in whole: 24

(b) in part: none

April 1991

(a) in whole: 16

(b) in part: 4.6, 4.7, 10.1

May 1991

(a) in whole: 7, 21.1

(b) in part: none

June 1991

(a) in whole: 23

(b) in part: none

July 1991

(a) in whole: 11.1, 14.1

(b) in part: 13.2, 23 and the attachment

August 1991

(a) in whole: 3.2, 20.1

(b) in part: 11.1

Special meeting of September 12, 1991

(a) in whole: none

(b) in part: 3

September 1991

(a) in whole: 34.2

(b) in part: 9.1, 40

October 1991

The September meeting took place on September 30 and October 1, 1991. There is no separate October meeting.

November 1991

(a) in whole: 34

(b) in part: none

December 1991

none

A P P E N D I X B

LIST OF ITEMS WHICH SATISFY THE FIRST PART OF SECTION 17(1) TEST

April 1990

(a) financial: 11.1, 15.2, 18.3, 20, 28.3, 29, 31.1, 31.3, sub-number 39 from item 32

(b) commercial: 9.3, 10, 10.1, 12.2, 17.2, 35

May 1990

(a) financial: 4, 6.2, 10.1, 11, 16.2, 18.1, 19.2, 20, 22.2, 24.1, 25, 29.2, 29.8

(b) commercial: 6.1, 6.4, 8.2, 9, 15, 15.1, 18.3, 18.4

June 1990

(a) financial: 4.2, 8.1, 8.3, 10, 20.2, 29

(b) commercial: 6.1, 6.2, 7, 34

July 1990

(a) financial: 11.1, 17.2, 17.3, 21.1, 22, 26.1, 28.3, 31.1, 33

(b) commercial: 8, 15, 18

August 1990

(a) financial: 3.2, 4.5, 11.2, 32.3

(b) commercial: 4.2, 9, 33

September 1990

(a) financial: 4.4, 9.1, 9.2, 12.1, 12.2, 14.1, 15.1, 25.2, 28

(b) commercial: 6, 7, 22.2

October 1990

(a) financial: 7, 15.3, 15.5, 22,

(b) commercial: 11, attachment - document regarding "booking"

November 1990

(a) financial: 4.1, 8.2, 10.3, 17.2, 24, 25

(b) commercial: 7

December 1990

(a) financial: 4.1, 10.4, 12

(b) commercial: 7

January 1991

(a) financial: 3.1, 12, 19.2, 19.3, 21.1, 31.1

(b) commercial: 6

February 1991

(a) financial: 4.4, 14.1, 16, 17, 21, 28, 29

(b) commercial: 4.2

March 1991

(a) financial: 4.2, 4.4, 23, 27.1, 27.2, 27.3

(b) commercial: 25

April 1991

(a) financial: 6.2, 10.1, 10.2, 26.1, 31.2, 31.3

(b) commercial: 6.1

May 1991

(a) financial: 11.1, 19, 22.1, 27.1, 27.4

(b) commercial: 11.2, 12

June 1991

(a) financial: 4, 4.1, 4.2, 8.1, 10.5, 12.1, 20.2, 20.3

(b) commercial: 7, 10.2, 22, 24.1, 24.3, 24.4

July 1991

(a) financial: 4.3, 8.1, 14.1, 14.3, sub-number 38 of item 28, 29, 34.1,

(b) commercial: 4.1, 4.2, 5, 22

August 1991

(a) financial: 5, 5.1, 15.1, 26

(b) commercial: 27

Special meeting of September 12, 1991

no commercial or financial information

September 1991

(a) financial: 4.2, 25

(b) commercial: 22

October 1991

The September meeting took place on September 30 and October 1, 1991. There is no separate October meeting.

November 1991

(a) financial: 18.2, 30

(b) commercial: 6.2, 17, 26.1

December 1991

(a) no financial information

(b) commercial information: 4.1 through 4.8 including 4.81 and 4.82, 5