



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

ORDER P-690

Appeal P-9400014

Ministry of Finance



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ORDER

BACKGROUND:

The Ministry of Finance (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for information about a named company which carries on business as an investment advisor and manager. The requested information relates to the company's compliance with the capitalization and bonding and insurance requirements of the Ontario Securities Act and the Commodity Futures Act.

The Ministry identified 36 responsive records totalling 151 pages which are described more fully in Appendix "A" of this order. The Ministry denied access to all of the records, based on the exemptions provided by sections 13 and 17 of the Act.

The requester appealed the decision of the Ministry to the Commissioner's office. Notice that an inquiry was being conducted to review the decision of the Ministry was forwarded to the appellant, the Ministry and the named company. Representations were received from all of the parties.

ISSUES:

- A. Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.
- B. Whether the discretionary exemption provided by section 13 of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A. Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.

The Ministry has claimed that sections 17(1)(a), (b) and (c) of the Act apply to all of the records at issue in this appeal. The section states 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;
- (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;

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the party resisting disclosure must satisfy each part of the following three-part test:

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.

[Order 36]

I will deal with each part of the section 17 test individually.

Part One

The records at issue in this appeal fall into four groups. The first category consists of internal memoranda generated by the Ontario Securities Commission (the OSC). The second is comprised of correspondence between the OSC and the company. The third category of records are the certificates of insurance of the company. The last, and most extensive category, are the financial statements of the company which were filed with the OSC for the years 1987, 1988, 1989, 1990 and 1991.

I have reviewed all of the records and am satisfied that each contains information which may be characterized as "financial" or "commercial" in nature. Accordingly, the first part of the section 17 test has been met.

Part Two

The second part of the test has two elements. First, the information must have been **supplied** to the Ministry and secondly, it must have been supplied **in confidence**, either implicitly or explicitly.

Several previous orders have determined that information contained in a record would reveal information "supplied" within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228, P-241 and P-472).

With respect to the first element of part two of the test, having reviewed the records and the representations of the parties, I am satisfied that the information contained in the records was either supplied by the company to the Ministry or would reveal information supplied by the company.

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, which is identical to section 17(1) of the Act:

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

I adopt these comments for the purposes of this appeal.

The information contained in the records at issue was supplied by the company to the OSC in order to meet the reporting requirements of the Ontario Securities Act and the Commodity Futures Act. There is no explicit confidentiality provision in these statutes which would create an expectation of confidentiality on the part of a registrant. Neither do the records themselves contain on their face explicit statement that they were submitted in confidence. I find, therefore, that an explicit expectation of confidentiality did not exist when the records at issue were supplied by the company to the OSC.

In its representations, however, the Ministry explained in great detail the reporting requirements under these statutes and the implicitly confidential manner in which such records are treated by the OSC. Historically, information supplied by OSC registrants, particularly those which are privately-held corporations is treated as confidential and is not made public. Based upon the evidence before me, I am satisfied that the information contained in all of the responsive records

was supplied with a reasonable expectation of confidentiality. Accordingly, the second part of the test has been satisfied.

Part Three

In order to satisfy part three of the test, the company or the Ministry must provide detailed and convincing evidence to indicate that the harms contemplated in the section could reasonably be expected to occur (Orders P-500 and P_655).

In its representations, the Ministry provided clear and direct evidence concerning the competitive nature of the securities industry and the harm which would be caused to the company's competitive position should the information contained in the records be disclosed. The records at issue contain information which is not otherwise available to the public, unless it relates to a publicly-traded company. Each of the records at issue contains detailed financial information relating to a privately-held company. I am of the view that the disclosure of any of the records would create a reasonable likelihood of significant prejudice to the competitive position of the company, under section 17(1)(a) of the Act.

Given the nature of the investment counselling industry, it can also be reasonably expected that information concerning the capitalization and bonding or insurance of a company registered under the Ontario Securities Act and the Commodity Futures Act may be used by that company's competitors in such a way as to result in an undue loss to the company and an undue gain to its competitors. On this basis, the harm described in section 17(1)(c) of the Act could reasonably be expected to occur should this information be disclosed.

As all three parts of the test have been met with respect to the information contained in the records at issue in this appeal, they are properly exempt from disclosure under sections 17(1)(a) and (c) of the Act.

Because of the manner in which I have addressed Issue A in this appeal, it is unnecessary for me to address Issue B.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ May 26, 1994

APPENDIX "A"

DOCUMENT NUMBER	RECORD DESCRIPTION	EXEMPTIONS CLAIMED	ORDER DISPOSITION
1.1	Internal memorandum dated 06 April 1988	13, 17(1)(a), (b) and (c)	Not Disclosed
1.2	[A named company's] audited financial statements for the eight months ended 31 August 1986	17(1) (a), (b) and (c)	Not Disclosed
1.3	[A named company's] unaudited financial statements for the eight months ended 31 August 1986	17(1)(a), (b) and (c)	Not Disclosed
1.4	Internal memorandum dated 08 September 1986	13, 17(1)(a), (b) and (c)	Not Disclosed
1.5	[A named company's] audited financial statements for the period 07 May 1985 to 31 December 1985	17(1)(a), (b) and (c)	Not Disclosed
1.6	[A named company's] letter to the OSC dated 31 March 1986	17(1)(a), (b) and (c)	Not Disclosed
2.1	OSC's letter to [a named company] dated 22 September 1989	13, 17(1)(a), (b) and (c)	Not Disclosed
2.2	Certificate of [a named company's] Secretary on insurance dated 06 February 1990	17(1)(a), (b) and (c)	Not Disclosed
2.3	Internal memorandum dated 09 April 1990	13, 17(1)(a), (b) and (c)	Not Disclosed
2.4	[A named company's] audited consolidated financial statements for the year ended 31 December 1989	17(1)(a), (b) and (c)	Not Disclosed
2.5	Draft of [a named company's] consolidated financial statements for the year ended 31 December 1989	17(1)(a), (b) and (c)	Not Disclosed
2.6	[A named company's] audited consolidated financial statements for the year ended 31 December, 1988	17(1)(a), (b) and (c)	Not Disclosed

DOCUMENT NUMBER	RECORD DESCRIPTION	EXEMPTIONS CLAIMED	ORDER DISPOSITION
2.7	[A named company's] letter to the OSC dated 14 February 1990	13, 17(1)(a), (b) and (c)	Not Disclosed
2.8	Internal memorandum dated 01 April 1987	13, 17(1)(a), (b) and (c)	Not Disclosed
2.9	[A named company's] audited financial statements for the year ended 31 December, 1986	17(1)(a), (b) and (c)	Not Disclosed
2.10	Certificate of [a named company's] Secretary on insurance dated 13 May 1991	17(1)(a), (b) and (c)	Not Disclosed
3.1	Internal memorandum dated 16 May 1991	13, 17(1)(a), (b) and (c)	Not Disclosed
3.2	[A named company's] unaudited financial statements for the quarter ended 31 March 1991	17(1)(a), (b) and (c)	Not Disclosed
3.3	Internal memorandum dated 03 April 1991	13, 17(1)(a), (b) and (c)	Not Disclosed
3.4	[A named company's] audited consolidated financial statements for the year ended 31 December 1990	17(1)(a), (b) and (c)	Not Disclosed
3.5	Internal memorandum dated 02 April 1990	13, 17(1)(a), (b) and (c)	Not Disclosed
3.6	[A named company's] audited consolidated financial statements for the year ended 31 December 1989	17(1)(a), (b) and (c)	Not Disclosed
3.7	[A named company's] letter to the OSC dated 12 September 1990	17(1)(a), (b) and (c)	Not Disclosed
3.8	[A named company's] letter to the OSC dated 08 August 1990	17(1)(a), (b) and (c)	Not Disclosed
3.9	[A named company's] letter to the OSC dated 21 June 1990	17(1)(a), (b) and (c)	Not Disclosed
3.10	Internal note dated 18 June 1990	13, 17(1)(a), (b) and (c)	Not Disclosed

DOCUMENT NUMBER	RECORD DESCRIPTION	EXEMPTIONS CLAIMED	ORDER DISPOSITION
3.11	[A named company's] letter to the OSC dated 18 May 1990	17(1)(a), (b) and (c)	Not Disclosed
4.1	Internal memorandum dated 02 April 1993	13, 17(1)(a), (b) and (c)	Not Disclosed
4.2	[A named company's] consolidated financial statements for the year ended 31 December 1992	17(1)(a), (b) and (c)	Not Disclosed
4.3	Internal memorandum dated 06 April 1992	13, 17(1)(a), (b) and (c)	Not Disclosed
4.4	[A named company's] consolidated financial statements for the year ended 31 December 1991	17(1)(a), (b) and (c)	Not Disclosed
4.5	[A named company's] letter to the OSC dated 08 May 1992	17(1)(a), (b) and (c)	Not Disclosed
4.6	[A named company's] unconsolidated financial statements for the year ended 31 December 1991	17(1)(a), (b) and (c)	Not Disclosed
4.7	[A named company's] unaudited financial statements for the quarter ended 31 March 1992	17(1)(a), (b) and (c)	Not Disclosed
4.8	Certificate of [a named company's] Secretary on insurance dated 11 May 1992	17(1)(a), (b) and (c)	Not Disclosed
4.9	Internal memorandum dated 14 May 1992	13, 17(1)(a), (b) and (c)	Not Disclosed