



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

ORDER P-1061

Appeals P-9500370, P-9500371 and P-9500372

Ministry of Agriculture, Food and Rural Affairs



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BACKGROUND:

This order deals with three requests under the Freedom of Information and Protection of Privacy Act (the Act). The requester, a journalist, submitted the requests to the Ministry of Agriculture, Food and Rural Affairs (the Ministry).

All of the requests sought access to information provided to Ontario's Livestock Commissioner, now referred to as the Director of the Ministry's Meat Industry Inspection Branch (the Director). In particular, the requester asked for information about the financial security provided to the Director by three meat-packing operations (which I will refer to in this order as the "meat packers"). All of the meat packers mentioned in the requests are (or were) operated by members of one particular family. A separate request was submitted for access to security information provided by each of the three meat packers.

The requested information was provided to the Director pursuant to Ontario's annual licensing arrangements for livestock dealers, as set out in the Livestock and Livestock Products Act (the LLPA) and the applicable regulation. Under the scheme, dealers are required to "furnish to the Director proof of financial responsibility", or to "deposit with the Director security in a form satisfactory to the Director and in an amount prescribed by the Director" before their licences are granted or renewed. These arrangements are part of the Ministry's Livestock Financial Protection Program, which is designed to protect farmers who supply livestock to wholesalers and meat packers.

NATURE OF THE APPEALS:

The Ministry denied access to the requested information in its entirety, on the basis of the following exemptions in the Act:

- third party information - section 17(1)
- invasion of privacy - section 21(1).

The requester (now the appellant) filed an appeal of this denial of access with the Commissioner's office regarding each of his three requests. As a result, the three appeal files being dealt with in this order were opened.

The Commissioner's office sent a Notice of Inquiry to the Ministry and the appellant. This Notice was also sent to each of the three meat packers as well as several other individuals and corporations mentioned in the records (all of whom are sometimes collectively referred to in this order as "the affected parties"). The Notice of Inquiry invited the recipients to comment on the issues in the appeals.

Representations were received from the appellant and the Ministry. Three of the affected parties (one meat packer and two individuals named in the records) submitted representations indicating their opposition to disclosure.

The records at issue consist of various financial security documents, including guarantees, shareholder loan postponement agreements, a dealer bond, a corporate indemnification and several records pertaining to a mortgage of land.

DISCUSSION:

THIRD PARTY INFORMATION

This exemption appears in section 17(1) of the Act. The parts of section 17 which have been raised in connection with this appeal are sections 17(1)(a), (b) and (c). These provisions state:

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 section 17(1)(a), (b) or (c) the Ministry and/or the affected parties 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.

Part One

I have reviewed the records. As previously noted, they consist of various financial security documents. All of them pertain either to security given by the issuing party, or to changes in the issuing party's priority as a creditor. I am satisfied that all of the records consist of financial information, and part one of the test has been met.

Part Two

The Ministry has provided a copy of the set of forms used to apply for registration as a livestock dealer. The forms on which financial information is given bear the notation "Confidential". The Ministry has also provided detailed information to substantiate that it **does** treat this information as confidential. The Ministry submits that both its own staff and the dealers who participate in the licensing scheme are aware that the information is to be treated as confidential. Based on these representations, I am satisfied that the information was submitted in confidence, and that the expectation of confidentiality had a reasonable basis. Therefore, part two of the test has been met.

Part Three

Sections 17(1)(a) and (c)

I will begin my analysis of part three of the test with sections 17(1)(a) and (c). Only one of the three meat packers has made representations with respect to the harms in these sections. However, these are generic in nature, stating:

Disclosure of the information will significantly prejudice the competitive position of [the meat packer] in that disclosure will permit creditors to draw inferences (which may not be correct) respecting the nature and extent of [the meat packer]'s business.

Disclosure of the information will significantly interfere with the contractual or other negotiations of [the meat packer] with lenders and others. In particular, disclosure will permit lenders and others to draw inferences (which may not be correct) respecting the nature and extent of [the meat packer]'s business.

The meat packer who made these submissions did not provide any further details or information in support of these assertions.

The appellant submits that two of the three meat packers are no longer in business, and the third faces criminal charges. On this basis, he argues that disclosure could not harm their competitive position, or cause undue loss. However, he has not provided any documentary evidence to support the factual basis of these submissions.

The Ministry has also made representations on the application of sections 17(1)(a) and (c). These relate to the concerns of the industry generally about disclosure of this type of information. However, in this particular case, two of the three meat packers made no representations at all, despite being notified, and the third made generic representations which are entirely lacking in supporting detail. For these reasons, on the balance of probabilities, I find that a reasonable expectation of the harms referred to in sections 17(1)(a) and (c) has not been established in the particular circumstances of this appeal.

Section 17(1)(b)

I will now turn to section 17(1)(b). In order to substantiate the harm mentioned in this section, two requirements must be met. First, it must be established that disclosure could reasonably be expected to “result in similar information no longer being supplied to the Ministry”. In addition, it must be in the public interest that such information continue to be supplied to the Ministry.

Only the Ministry has made submissions in this regard. With its representations, the Ministry provided an affidavit sworn by the Director.

As noted at the outset of this order, the type of information which is at issue in this appeal must be provided to the Director to secure a licence under the Ministry’s Livestock Financial Protection Program. This requirement is set out in the regulation to the LLPA. At first glance, therefore, it might appear that similar information will simply continue to be provided, and that a claim under section 17(1)(b) would have little chance of success. However, the Ministry has made extensive representations to support its claim under section 17(1)(b). In order to explain the Ministry’s position, it will be necessary to refer to its representations in some detail.

The Ministry submits that:

The industry places a great deal of faith in the Ministry and dealers do not expect that their financial information will be shared with their competitors. If the Ministry were to disclose financial information, including security information, then that trust is destroyed - the industry would no longer trust the Ministry to keep the statements confidential and they would not submit financial records and security, since they would not want the information shared publicly.

In a similar vein, the Director’s affidavit states:

In my experience as Director, one of the most frequent and serious concerns about the licensing program that is still expressed by dealers of all types and sizes, relates to the confidentiality of the financial information and security that they supply. My staff and I are routinely required to give assurances regarding confidentiality in order to elicit the co-operation of dealers in providing such security.

While these representations indicate that there is considerable concern in the industry about the confidentiality of financial and security information, they do not, in themselves, satisfy me that these concerns could reasonably be expected to result in similar information no longer being supplied. However, the Ministry has provided detailed information about a parallel scheme dealing with potatoes, called the “Ontario Processing Potato Financial Protection Plan”. This plan had similar requirements for financial disclosure and security from potato processors. One processor developed concerns about the confidentiality of the information it was obliged to provide to the Ministry under this program. As a

result of press coverage relating to these concerns, widespread opposition to the program developed among processors with the result that it had to be terminated.

In this regard, the Ministry states:

As shown from the 1991 situation with the Processing Potato Financial Protection Program, individuals and private businesses in the food industry are quick to react to rumours and allegations that financial and security information is not confidential. ... The potato program did not survive.

On this same subject, the Director's affidavit states:

Any disclosure of security instruments or information, or other financial information relating to licensed dealers is ... likely to result in such serious concern on the part of the industry organizations, that the government will be asked to terminate the current licensing program, despite its acknowledged benefits to the health of the Ontario livestock industry.

In my view, the Ministry has successfully demonstrated the concerns of dealers in agricultural products about the disclosure of this type of information. It has also given an example of a program that collapsed because of such concerns. In my view, it is also reasonable to expect that the termination of the Livestock Financial Protection Plan would mean that information similar to the records at issue would no longer be supplied to the Ministry.

On this basis, I am satisfied that the first requirement under section 17(1)(b) (disclosure could reasonably be expected to result in similar information no longer being supplied to the Ministry) has been met.

I must now determine whether the second requirement under section 17(1)(b) has been met. This requires me to decide whether the continued supply of such information to the Ministry is in the public interest. In this regard, the Ministry states:

There are 68,000 census farms in Ontario and 35,600 of those farms reported cattle and calves on the farm. As well, 16,855 farms report cattle as the major source of income. ... In 1994, the total value of cattle and calves on farms in Ontario was \$1.87 billion. Cash receipts from the sale of cattle and calves in 1994 was \$952 million. There are 375 licensed livestock dealers in Ontario.

The Livestock Financial Protection Program was started in 1982 because of major defaults by large meat packing companies. ... It is designed to safeguard the sales of livestock.

Licensed dealers are responsible for collecting from the producer/seller 54 for each head of cattle sold. The money is remitted to the Fund for Livestock Producers. ... It is a cost effective program that protects a segment of the beef industry using a fund that

does not require public funds. The program is in the public interest because it is not a drain on public funds and it helps keep the beef industry viable. ...

The successful operation of the program relies on detailed financial information supplied by licence applicants.

In view of these submissions, and the magnitude of economic activity which is protected and encouraged by the Livestock Financial Protection Program, I find that the continued supply of this type of information to the Ministry is in the public interest.

Since both of the required elements under section 17(1)(b) have been established, I find that this exemption applies to the records at issue.

Because I have found that section 17(1)(b) applies, it is not necessary for me to consider the possible application of the "invasion of privacy" exemption in section 21(1).

ORDER:

I uphold the Ministry's decision.

Original signed by: _____

John Higgins
Inquiry Officer

_____ November 24, 1995