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

ORDER M-1108

Appeal M-9800041

Sudbury Regional Police Services Board

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BACKGROUND:

The Sudbury Regional Police Services Board (the Police) conducted a joint study with the Addiction Research Foundation (the ARF) concerning impaired drivers in Sudbury. In carrying out the study, the Police collected data from impaired drivers who were stopped by them. This data was provided to the ARF. The data was then analysed by a team of four ARF staff members, including two senior scientists, a senior program consultant and a research associate. The rationale for analysing the data and writing the report was to assist in the development of impaired driving countermeasures in Sudbury. One of the issues considered in the study was the contributory role of the person/establishment providing the alcohol. As a result of the analysis conducted by the ARF, the Police were provided with the names of the 10 licensed establishments found in the study to account for half of all impaired drivers who indicated they had their last drink in a licensed establishment.

It should be noted at this time that the ARF ceased to exist in January, 1998, when it was amalgamated with several other institutions to form the Addiction and Mental Health Services Corporation. This corporation is a public hospital and is not designated as an institution under the Freedom of Information and Protection of Privacy Act. For ease of reference, however, I will continue to refer to this organization as the ARF.

NATURE OF THE APPEAL:

The appellant, representing a newspaper, made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Police for information relating to this joint study. Specifically requested were the names of the 10 licenced establishments which were found in the study to account for half of all impaired drivers who indicated they had their last drink in a licenced establishment. The Police located the record responsive to the request and denied access in full based on the exemption in section 10(1)(b) of the Act. The appellant appealed the denial of access.

The Police have only claimed section 10(1)(b). However, as section 10 is a mandatory exemption under the Act pertaining to third party information, the entire section is at issue in this appeal.

This office provided a Notice of Inquiry to the appellant, the Police and 11 affected parties, including the ARF and the 10 establishments listed on the record. Representations were received from the Police, the ARF and four other affected parties. All of the affected parties object to disclosure of the record. Although the appellant did not submit representations in response to the Notice of Inquiry, he has made comments in the nature of representations in his letter of appeal, and I will consider this information.

RECORD:

The record at issue is a one-page document entitled “Sudbury Drinking Driving Report”, “Names of ‘Top 10' licenced premises”.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1) of the Act reads, in part:

> 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, if 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 10(1) of the Act, the Police and/or the parties who are 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 Police 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 section 10(1) will occur.

Type of Information

The ARF submits that the record contains scientific information in that it is the end product of the analysis of raw data provided by the Police. In Order P-454, former Assistant Commissioner Irwin Glasberg had occasion to define the term "scientific information" for the purposes of sections 17(1) of the provincial Act (which is identical to section 10(1) of the Act). There, he stated that:

> Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be

> characterized as scientific, it must relate to the observation and testing of specific hypotheses or conclusions and be undertaken by an expert in the field.

Based on this definition, I am satisfied that the information resulting from the compilation and analysis of raw data by the ARF, which is an organization that actively carries on research in health related matters, qualifies as "scientific" information.

The Police submit that the information also qualifies as commercial as it relates to the buying, selling or exchange of merchandise or services. In this regard, the Police indicate that the record at issue is a list of establishments which sell liquor. The Police argue that inclusion of the names alone is sufficient to indicate to the public that these establishments are in the business of selling a product.

On its face it is clear that the record is intended to identify those establishments which are in the business of selling liquor. As such, I am satisfied that the information is sufficiently connected to the buying and selling of merchandise and services to qualify as commercial information.

Accordingly, the first part of the test has been met.

Supplied in confidence

In order to meet this element of the exemption, the affected parties and/or the Police must demonstrate that the information contained in the record was **supplied** to the Police, either explicitly or implicitly, **in confidence**.

The ARF indicates that the raw data was collected by the Police in confidential interviews, and then provided to it in confidence. The ARF adds that the survey participants were advised that any information of a specific nature would not be publicly revealed. The Police continue that the results of the analysis conducted by the ARF were then provided to them in confidence. The Police advise that the list of top 10 drinking establishments had no bearing on the study prepared by the ARF as far as the role of the Police was concerned. The Police indicate that a condition of receiving this information from the ARF was that the list be kept in strictest confidence and be used only for the purpose of identifying target areas for law enforcement.

In considering the representations of the parties, I am satisfied that, although the final analysis of the data was the result of joint efforts by the ARF and the Police, the actual content of the record at issue was prepared by the ARF and supplied to the Police. I am also satisfied that, in the circumstances, assurances of confidentiality were given and made throughout the research process and, that the ARF had a reasonably held expectation that the Police would treat the information provided to them as a result of its analysis of the data in confidence. Finally, I am satisfied that this expectation was expressly communicated to the Police.

Accordingly, I find that the second part of the test has been met.

Harms

In order to meet part three of the section 10(1) test, the Police and/or the affected parties must demonstrate that one of the harms enumerated in sections 10(1)(a), (b) or (c) could reasonably be expected to result from disclosure of the information. The onus or burden of proof lies on the parties resisting disclosure of the record, in this case, the Police and the affected parties.

The Police submit that disclosure of the record would restrict the ARF or any other similar organization from ever disclosing future studies to it, which would limit the ability of the Police to effectively protect the community it serves. The ARF expands on this argument and adds that it believes that future research efforts could be compromised by the disclosure of this information. In particular, if the precedent is set whereby confidential information, such as the names of organizations, can be revealed, it is much less likely that these organizations would co-operate with them in the future, which would hinder future research efforts.

The appellant takes the position that this argument is insufficient to establish the harms in section 10(1)(b). He states:

> We do not agree that the release of the names of licenced establishments will, at some undetermined point in the future when a subsequent study is conducted, convince impaired motorists not to disclose where they had been drinking on that particular night. Nor is the privacy of these motorists affected in any way by our request.

In my view, the arguments made by the ARF and the Police are not so concerned with the responses of motorists in future research, but rather, concern the involvement of the drinking establishments in any future studies involving alcohol use.

After considering the representations, I am not convinced that this type of information would no longer be supplied to the Police by the ARF, particularly given the stated purpose of the joint study which, in the parties' words, was to "assist in the development of impaired driving countermeasures in Sudbury" "in order to direct the Ride Program". With respect to future research, I find that the consequences of disclosure of this record, in the circumstances, is too remote. While it may be that the results of future research conducted solely by the ARF and then communicated to the Police may attract the protection of this provision, in the circumstances, the joint interest in the research by the Police and the ARF makes this result unlikely. Accordingly, I find that the harm described in section 10(1)(b) could not reasonably be expected to occur should the record be disclosed.

The remaining affected parties are vehemently opposed to disclosure of this record. They object on a variety of bases. They argue that the collection methods employed have resulted in the compilation of inaccurate information, that the information contained in it is outdated (in that the study was conducted between January 1995 and May 1996), and that its disclosure would harm their business interests if the public knew that they had been identified in such a way. Further, some of the affected parties indicate that since the study, they have changed their serving habits and employees have attended the "Smart Server

Course". The Police confirm that steps have been taken to build a positive rapport with the owners of the establishments identified on the list and their employees to reduce liquor violations.

Based on the concerns identified by the affected parties, I am satisfied that disclosure of the record could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of these establishments (section 10(1)(a)). Accordingly, I find that the third part of the test has been met.

COMPELLING PUBLIC INTEREST

The appellant did not specifically raise this issue, however, in his letter of appeal he states:

> Certainly, licenced establishments whose serving practices have come under scrutiny as a result of a publicly-funded study do not deserve absolute secrecy from being identified as part of an objective media investigation and public debate over impaired driving. Drinking and driving remains an issue of considerable concern in our community, one which demands a full accounting of the facts and a reasoned debate, which is at the heart of the [appellant's] request...

Section 16 of the Act states:

> An exemption from disclosure of a record under sections 7, 9, **10**, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

It has been established in a number of orders of the Commissioner's office that in order for section 16, "the public interest override", to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the third party exemption.

In Order P-984, Inquiry Officer Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

> In order to find that there is a compelling public interest in disclosure, **the information contained in a record must serve the purpose of informing the citizenry about the activities of their government**, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices. [emphasis added]

Inquiry Officer Big Canoe went on to address the second component of the "public interest override" as follows:

> Once a compelling public interest is established, it must be balanced against the purpose of the exemption which has been found to apply. Section 23 (the equivalent provision to section 16 in the provincial Act) recognizes that each of the exemptions listed therein, while serving to protect valid interests, must yield on occasion to the public interest in access to government information. Important considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.

I adopt the approach to the interpretation of the "public interest override" articulated by Inquiry Officer Big Canoe for the purposes of this appeal.

In my view, the appellant's arguments have considerable merit, however, in the circumstances of this appeal, the purpose of the study was to assist the Police in enforcing the law and targeting problem areas. In responding to the results of the study the Police have actively worked with the establishments identified in the study and these establishments have taken steps to reduce their involvement in drinking infractions. Further, it is not the actions of the Police that are at issue in this appeal, but the actions of private organizations. In my view, the public interest has been met in the manner in which the Police and the establishments themselves have responded to the study. To advertise their identities at a later date would not, in my view, advance any further public interest. Accordingly, I find that section 16 has no application in this appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: June 3, 1998
Laurel Cropley
Adjudicator
(formerly Inquiry Officer)