



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 91

Appeal 880291

Ministry of Community and Social Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

September 13, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 91
Appeal Number 880291
Ministry of Community and Social Services

This letter constitutes my Order in your appeal of the decision by the Ministry of Community and Social Services (the "institution"), to grant access to records requested under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

On May 29, 1988 a requester wrote to the institution seeking access to the following information:

... all the contracts and budget transcripts from 1985 through 1988 inclusive for both HOPE MANOR and ANCHOR HOUSE.

The institution identified the Ray of Hope Inc. (the "third party") as an organization potentially affected by the release of this information, and, on August 3, 1988, issued a notice under subsection 28(1)(a) of the Act, affording you the opportunity to make representations regarding disclosure. Following a review of your representations, the institution

decided to grant access to the requester, and notified you accordingly.

On September 14, 1988, you wrote to me appealing the institution's decision, and I gave notice of your appeal to the requester and the institution on September 16, 1988. The basis for your appeal was that disclosure of the records could reasonably be expected to prejudice your competitive position, thereby satisfying the requirements for exemption under subsection 17(1) of the Act.

As you know, as soon as your appeal was received in my office, an Appeals Officer was assigned to investigate the circumstances of the appeal, and attempt to mediate a settlement.

The Appeals Officer obtained and reviewed the records at issue in this appeal. They consist of contracts between the third party and the institution for the purchase of open custody, secure custody and detention services and programs used in the administration of the Young Offenders Act, R.S.C., 1985, c. Y_1, and the Provincial Offences Act, R.S.O., 1980, c. 400. The contracts include attachments which outline general service and program requirements and approved budgets.

Settlement was not effected because both you and the institution retained your original positions with respect to the interpretation of subsection 17(1) of the Act.

Accordingly, an Appeals Officer's Report was prepared and sent to you, the institution and the requester on March 10, 1989, together with a Notice of Inquiry. All parties were asked to make representations to me concerning the subject matter of the appeal.

I have received and considered representations from all parties in making my decision.

Section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions of this Act lies upon the head. However, as stated at page 9 in my Order 49 dated April 10, 1989 (Appeal Numbers 880017 and 880048):

...where a third party appeals the head's decision to release any such record, the onus of proving that the record should be withheld from disclosure falls to the third party.

The sole issue in this appeal is whether the requested records qualify for exemption under subsection 17(1) of the Act.

Subsection 17(1) reads 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 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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to qualify for exemption under subsection 17 the records must satisfy all three parts of the following test:

1. the records must contain 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 records must give rise to the reasonable expectation that one of the types of injuries 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) exemption claim invalid.

In your submissions you argue that the contracts contain "financial information" which "...in total might be considered as providing commercial information of value". I have reviewed the contracts and, in my view, when considered together, they

qualify as financial and/or commercial information within the meaning of subsection 17(1).

Turning to the second part of the test, it is necessary for me to determine whether the information contained in the records was "supplied to the institution in confidence implicitly or explicitly". In your submissions you make no reference to the issue of confidentiality, and I understand you advised the Appeals Officer that the information contained in these contracts was not supplied to the institution in confidence. No evidence was offered by the institution to support any claim of confidentiality and, in my view, the requirements of the second part of the test for exemption under subsection 17(1) have not been satisfied.

Because all three parts of the test must be met in order for the record to qualify for exemption under subsection 17(1), it is not necessary for me to consider part three of the test.

I find, therefore, that you have failed to establish that the records at issue in this appeal meet the requirements for exemption under subsection 17, and I order the institution to disclose the records to the requester in their entirety. I also order that the institution not release these records until 30 days following the date of the issuance of this Order. This time delay is necessary in order to give you sufficient opportunity to apply for judicial review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on the

institution within this 30_day period, I order that the records be released within 35 days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made.

Yours truly,

Sidney B. Linden
Commissioner

cc: The Honourable Charles Beer
Minister of Community and Social Services

Ms Elizabeth Flavelle, FOI Co_ordinator

Requester